

**PRESIDENTS, POLITICS, AND PARDONS:
WASHINGTON’S ORIGINAL (MIS?) USE OF THE
PARDON POWER**

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*“The President . . . shall have Power to grant Reprieves and Pardons
for Offences against the United States, except in Cases of Impeachment.”*
—U.S. Constitution, Article II, Section 2.¹

Current presidential politics raise an important legal question: How much control does the President have over criminal investigations and prosecutions? The legal answer to this question determines the difference between when the President obstructs justice and when the president properly exercises executive control over criminal matters. Commentators and political observers have asserted that if the President speaks with the Director of the Federal Bureau of Investigation and asks the Director if it is possible for the Director to stop an investigation that could harm those close to the President, then the President has obstructed justice.² Responding to these assertions, well-known law professor and defense attorney Alan Dershowitz argued that the President’s pardon power could accomplish the objective and

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1. U.S. CONST. art. II, § 2.

2. A whole host of articles exist. For a primer, see Charlie Savage, *Here’s What You Need to Know About a Murky Law*, N.Y. TIMES, June 9, 2017, at A19. A Washington Post political commentator asserted that President Trump was almost begging to be accused of obstruction of justice. Aaron Blake, *Trump Is Practically Begging to Be Accused of Obstruction of Justice Right Now*, WASH. POST (May 19, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/05/19/trump-is-practically-begging-to-be-accused-of-obstruction-of-justice/?utm_term=.23574f76c6ae. *But see* Andrew C. McCarthy, *‘Pressure’ Is Not Obstruction*, NAT’L REV. (June 2, 2017, 8:00 AM), <https://www.nationalreview.com/2017/06/james-comey-president-trump-obstruction-justice-didnt-happen>.

there would be no constitutional, let alone criminal, problem.³ More recently, President Trump has raised the issue of pardons for conduct associated with the special counsel investigation of the Trump campaign's connection with Russia during the 2016 presidential election, further fueling the obstruction debate.⁴ Yet the Constitution clearly grants the President pardon power for all offenses short of impeachment.⁵

Rarely does the President's pardon power receive significant public attention.⁶ There have been some recent notable exceptions, especially at the end of a presidential administration.⁷ People questioned the pardon power in 1974 when President Ford pardoned Richard Nixon for Nixon's alleged obstruction of justice in the Watergate investigation.⁸ The pardon

3. Alan Dershowitz, *Alan Dershowitz: Trump Did Not Obstruct Justice in Firing James Comey*, WASH. EXAMINER (May 11, 2017, 6:17 PM), <http://www.washingtonexaminer.com/alan-dershowitz-trump-did-not-obstruct-justice-in-firing-james-comey/article/2622875>; see also Daniel Hemel & Eric Posner, Opinion, *If Trump Pardons, It Could Be a Crime*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/opinion/if-trump-pardons-crime-russia.html?_r=0. But see John Bowden, *Laurence Tribe: 'High Crimes' in Trump's Firing of Comey*, THE HILL (May 12, 2017, 8:26 AM), <http://thehill.com/homenews/news/333080-lawrence-tribe-high-crimes-in-trumps-firing-of-comey>; Richard H. Pildes, *In the View of the Supreme Court, Alan Dershowitz Is Wrong About the Powers of the President*, LAWFARE (June 9, 2017, 12:52 PM), <https://www.lawfareblog.com/view-supreme-court-alan-dershowitz-wrong-about-powers-president>. Hemel and Posner go one step further than Tribe and Pildes. Hemel and Posner argue that exercising the pardon power for Trump's family would, indeed, constitute obstruction of justice. Hemel & Posner, *supra*. While this is certainly true by simply applying the facts to the elements of obstructions of justice, it fails to account for the unconstitutionality of the statute as applied to the pardon power. As the President's pardon power flows from the Constitution, one could argue the supremacy clause requires the exercise of the pardon power to take precedence over an obstruction of justice statute. U.S. CONST. art. II, § 2; *id.* art. VI, § 2. It also creates a line-drawing problem. When, under Hemel and Posner's reasoning, would a President *not* obstruct justice when issuing a pardon prior to conviction or indictment?

4. Peter Baker, *Trump Says He Has 'Complete Power' to Pardon*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/2017/07/22/us/politics/donald-trump-jeff-sessions.html?action=click&contentCollection=Book%20Review&module=Trending&version=Full®ion=Marginalia&pgtype=article>.

5. U.S. CONST. art. II, § 2.

6. Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. TOL. L. REV. 89, 102 (2015).

7. See generally Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13 (2002). Barack Obama pardoned or commuted the sentences of more than 270 people in the waning days of his Administration. See Sarah Maslin Nir, *On Obama's Pardon List: A Hotel Magnate Who Owned Studio 54*, N.Y. TIMES (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/nyregion/obama-pardons-ian-schragger.html?_r=0.

8. BARRY WERTH, 31 DAYS: GERALD FORD, THE NIXON PARDON, AND A GOVERNMENT IN CRISIS 331-32 (2006).

power was questioned again following President George H.W. Bush's pardons of those involved in the Iran-Contra Affair.⁹ When Bill Clinton pardoned several controversial figures on the last day of his administration, pardons became widely discussed again.¹⁰ The controversy surrounding pardons resurfaced when George W. Bush commuted "Scooter" Libby's sentence.¹¹ Despite the public scrutiny, only a handful of scholars address the pardon power.¹² More recently, the pardon power filled the spotlight when President Trump pardoned former Maricopa County (Ariz.) Sheriff Joe Arpaio from a sentence for contempt due to be imposed by the court when Arpaio defied a judge's order that the sheriff's deputies stop detaining immigrants without legal status.¹³ Despite these high-profile pardons, the general consensus is that

9. Robert L. Jackson & Ronald J. Ostrow, *Bush Pardons Weinberger, 5 Others in Iran-Contra*, L.A. TIMES (Dec. 25, 1992), http://articles.latimes.com/1992-12-25/news/mn-2472_1_iran-contra-affair. Bush pardoned former Defense Secretary Caspar Weinberger and others prior to their criminal trials. *Id.* When making the pardons, the President asserted that it was for the good of the country and that the investigation had gone on long enough. *Id.* The price they paid, Bush said, was "grossly disproportionate to any misdeeds or errors of judgment they may have committed." *Id.*

10. Jessica Reaves, *Pardongate Play-by-Play*, TIME (Feb. 27, 2001), <http://content.time.com/time/nation/article/0,8599,100795,00.html> (stating that the most controversial aspect of Clinton's pardons was the pardoning of Marc Rich, a significant Democratic fundraiser and contributor to Clinton's Presidential Library).

11. Amy Goldstein, *Bush Commutes Libby's Prison Sentence*, WASH. POST (July 3, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070200825.html>. "Scooter" Libby was the first White House employee indicted in more than a century when he was charged with perjury and obstruction of justice. Following trial, Libby received a thirty-month prison sentence. *Id.* Bush commuted the sentence but did not pardon Libby. *Id.* Most recently, President Trump pardoned Libby at a time when the President found his closest advisors under scrutiny in an ongoing criminal investigation. Peter Baker, *Trump Pardon Scooter Libby in a Case That Mirrors His Own*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/us/politics/trump-pardon-scooter-libby.html>.

12. The leading scholar in the area is Margaret Colgate Love. She served as the Pardon Attorney for the Justice Department during the George H.W. Bush and Bill Clinton Administrations. Margaret Colgate Love, *Biography*, PARDON LAW, <http://pardonlaw.com/biography> (last visited Mar. 8, 2018). A collection of her writings in the field is available from her website. Margaret Colgate Love, *Articles & Publications*, PARDON L., <http://pardonlaw.com/articles-publications> (last visited Mar. 8, 2018).

13. Amita Kelly, *President Trump Pardons Former Sheriff Joe Arpaio*, NAT'L PUB. RADIO (Aug. 25, 2017), <http://www.npr.org/2017/08/25/545282459/president-trump-pardons-former-sheriff-joe-arpaio>; *President Trump Pardons Sheriff Joe Arpaio*, WHITE HOUSE (Aug. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/25/president-trump-pardons-sheriff-joe-arpaio>.

the pardon power has atrophied.¹⁴ Rather than using it at the end of an administration as a symbolic gesture or to liberate political allies, scholars argue that Presidents should use the pardon power to show mercy or to mitigate the harsh effects of federal sentencing.¹⁵

The debate presupposes a proper use for the pardon power. Propriety questions are normative. Whether it is proper for a President to pardon someone changes from time to time and place to place.¹⁶ To establish whether exercising the pardon power is appropriate, scholars often resort to historical precedent.¹⁷ Much of the history is similarly reviewed. Scholars cite Hamilton's writings in the Federalist Papers to argue that the pardon power is necessary to restore tranquility in times of rebellion and that, to use it effectively, the President must have unfettered ability to pardon offenders.¹⁸ They point to the Constitution's opponents who feared unchecked pardon power might allow a President to pardon those who commit treason at the President's behest.¹⁹ Then, scholars turn to the "first" use of the pardon power, George Washington's pardoning of those who engaged in the Whiskey Rebellion.²⁰ They argue that this pardon demonstrates both

14. See, e.g., Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 594 (2012).

15. *Id.*; Jeffrey Crouch, *The Law: President Misuse of the Pardon Power*, 38 PRESIDENTIAL STUD. Q. 722, 722 (2008); see also Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power From the King*, 69 TEX. L. REV. 569, 622 (1990) (arguing that to preserve the original intent and philosophical principles of the pardon power, the pardon power should be shared).

16. On the importance of norms and the perils of challenging them, see Paul Rosenzweig, *Defend Norms, Don't Violate Them*, LAWFARE (May 17, 2017), <https://www.lawfareblog.com/defend-norms-dont-violate-them> (listing several acts of normative deviance and the perils of deviating from norms in response); Bob Bauer, *When Questions of Norms Become Questions of Law: Trump's Conversations with Comey*, LAWFARE (May 11, 2017), <https://www.lawfareblog.com/when-questions-norms-become-questions-law-trumps-conversations-comey> (stating the consequences of violating the norm that Presidents do not talk individually to Directors of the Federal Bureau of Investigation).

17. Crouch, *supra* note 15, at 723–24.

18. *Id.*; Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1172–73 (2010); see also Bob Bauer, *The Problem of Donald Trump's Constitution, Part II: The Prospect of an Arpaio Pardon*, LAWFARE (Aug. 24, 2017), <https://www.lawfareblog.com/problem-donald-trumps-constitution-part-ii-prospect-arpaio-pardon>.

19. Crouch, *supra* note 15, at 723.

20. *Id.* at 724; Love, *supra* note 18, at 1173. But see P.S. Ruckman, Jr., *Policy As an Indicator of 'Original Understanding': Executive Clemency in the Early Republic (1789-1817)* 1, 6 n.12 (1994), <http://rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper7.pdf> (identifying

Hamilton's belief that pardons can restore tranquility and that the pardon is merciful, tempering the harshness of the criminal law.²¹

Two scholars, however, expand this common narrative. The first, William Duker, described the pardon power's constitutional history from its origins in early English history through the Watergate era.²² Duker, after explaining the pardon power's early English development, explores its colonial practice.²³ The King delegated the pardon power to royal governors and their councils.²⁴ As time passed, some colonies relocated the power to executive councils.²⁵ Following the Revolution, the states, averse to strong executive power, restricted the pardon power.²⁶ Some states permitted the governor to pardon people with the legislature's consent.²⁷ Some made pardons strictly a legislative function.²⁸ Still others left the pardon power with the governor but prohibited pardons in murder and treason cases.²⁹ Duker then turns to the Constitutional Convention and Hamilton's role in formulating the pardon power.³⁰ Hamilton and his supporters turned back efforts for legislative consent.³¹ Future Supreme Court Justice James Wilson³² argued that the pardon power might

David Blair of Georgia as the first pardon recipient in April 1794). None of these is correct, as will be demonstrated *infra* Section II.A..

21. Crouch, *supra* note 15, at 723.

22. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 475 (1977).

23. *Id.* at 497–501.

24. *Id.*

25. *Id.* at 500–01.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 501.

31. *Id.* at 501–06.

32. James Wilson was born in Scotland and came to America following his schooling in England. See JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 15 (2007). He studied law and was granted admission to the bar in Pennsylvania. *Id.* at 24. In that role, he soon began representing people on the western frontier of the colony. *Id.* Eventually he was elected to Pennsylvania's legislature and the Continental Congress. *Id.* at 16. As a member of the Continental Congress, he voted for and signed the Declaration of Independence. *Id.* Following that, he began representing those accused of treason against the new United States as Wilson was a strong believer in popular sovereignty. *Id.* During the Constitutional Convention, Wilson served as a delegate from Pennsylvania and became one of only six people to sign both the Declaration of Independence and the Constitution. *Id.* With his distinguished reputation

be necessary to obtain accomplice testimony in criminal cases.³³ Future Attorney General Edmund Randolph³⁴ wanted to limit the pardon power to exclude treason cases, arguing that the President could pardon those whom he solicited to engage in treasonable activities.³⁵ Hamilton and another future Supreme Court Justice, James Iredell, defeated this effort.³⁶ Following his description of the Constitutional Convention, Duker shifts to the pardon power in practice but focuses most of his attention on the Civil War years and beyond.³⁷ Therefore, Duker only provides a high-level view of the pardon power's early use.

The second study provides a closer look. P.S. Ruckman conducted a systematic study of pardon usage between 1789 and 1817, utilizing the pardon warrants housed in the National Archives.³⁸ When the President issued a pardon, a "warrant" was drafted with the original sent to the court and copies maintained with the Secretary of State.³⁹ Ruckman analyzed these warrants; he identified the president issuing the warrant, the date it was issued, the person pardoned, the state of origin for the case, the form of clemency, offense details, and reason for the clemency.⁴⁰ His analysis focused on the frequency of clemency activity, equating

as a legal scholar, Wilson was among Washington's first nominees to the Supreme Court of the United States. *Id.*

33. Duker, *supra* note 22, at 501–02.

34. Edmund Randolph was born in Williamsburg, Virginia as part of a prominent family. *See generally* JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY (1974). His father was a loyalist, however, and this created questions about Edmund's loyalties. *Id.* To demonstrate his support for the revolution, Randolph enlisted as Washington's aide-de-camp. *Id.* He remained for a year until family matters required his presence home. *Id.* From there, Randolph became immersed in Virginia politics, becoming a member of the House of Burgesses and the state's governor. *Id.* This brought him into contact with George Washington, Thomas Jefferson, and James Madison, among others. *Id.* Randolph was selected as a Virginia delegate to the Constitutional Convention. Madison worked with Randolph so that Randolph presented Virginia's Plan for the national government during the Convention's first days. *Id.* Ultimately, however, Randolph would not sign the finished product but did support it during Virginia's heated ratification debates. *Id.* Based on his relationship with both Madison and Washington, Randolph became the nation's first Attorney General in 1789. *Id.* Upon Jefferson's retirement in 1794, Washington named Randolph as Secretary of State. *Id.*

35. Duker, *supra* note 22, at 502.

36. *Id.* at 502–03.

37. *Id.* at 506–09.

38. Ruckman, *supra* note 20, at 3. Ruckman also edits a blog called Pardon Power. PARDON POWER, <http://www.pardonpower.com> (last visited Apr. 4, 2018).

39. Ruckman, *supra* note 20, at 5.

40. *Id.*

this with an “original understanding” of the pardon power.⁴¹ Following his analysis, Ruckman concluded that the first four presidents viewed the pardon power as British monarchs did, meaning that their attention focused on the individual’s conduct and moral blameworthiness.⁴² Yet Ruckman’s analysis only scratches the surface. To better understand how the nation’s founders understood the pardon power, we must look deeper.

This study utilizes more data than Ruckman’s study and focuses only on George Washington’s Administration, thus providing context for the president’s pardon power. Not only does it draw on the pardon warrants but includes correspondence between President Washington and his advisors and surviving court records on the cases. This enhances our perspective in two ways. First, it provides a richer environment. Rather than merely seeing the outcome, we see the thinking and perspectives that went into the exercise of the pardon power. Second, we see more pardons than those recorded in the extant National Archives pardon records. Not only did Washington grant more pardons than these records indicate, but he refused to pardon some individuals who requested one.⁴³ This provides a more complete analysis about the reasons for granting pardons. Stephen L. Carter’s analysis of President George H. W. Bush’s pardons for those involved in the Iran-Contra affair demonstrates the importance of looking at both pardons and denials.⁴⁴ Carter dissected the reasons provided for the pardon and found similarly situated people who met those criteria but did not receive pardons.⁴⁵ Similarly, by looking at whom Washington did not pardon and why, we can better determine the reasons for granting pardons.

This article argues that politics, often in the form of policy, played the guiding force when Washington exercised the pardon

41. *Id.* at 6.

42. *Id.* at 15.

43. *To George Washington from Charles Lee, 18 April 1796*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/99-01-02-00453> (last modified Feb. 1, 2018); *From George Washington to Daniel Leet, 24 April 1796*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/99-01-02-00468> (last modified Feb. 1, 2018).

44. See Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883, 885–86 (1992).

45. *Id.*

power. Washington rejected the first pardon petition he received because it lacked legal justification.⁴⁶ The second pardon petition was similarly rejected.⁴⁷ When government interests necessitated pardoning people, Washington did not hesitate to do so.⁴⁸ After these initial pardon petitions, Washington mostly used the pardon power for commercial benefit.⁴⁹ When tax protestors violently resisted tax collection, Washington used the pardon power to reward compliance and reconcile the nation.⁵⁰ Finally, Washington used the pardon power to promote his foreign policy.⁵¹

I. FEDERAL COURTS IN THE EARLY REPUBLIC

Today's criminal justice environment differs significantly in size and complexity from the system in which Washington knew. Like the federal government itself, the number of layers between those who carry out day-to-day criminal justice functions and the President has increased dramatically.⁵² Similarly, the number of federal crimes today dwarfs the number of crimes in the federal government's earliest years.⁵³ Yet, as the first President of the United States, Washington confronted something that today's presidential administrations do not: no precedents. Today's criminal justice bureaucracy relies upon numerous well-trodden precedents that have formed norms of behavior.⁵⁴ Washington did

46. *To George Washington from Thomas Bird, 5 June 1790*, FOUNDERS ONLINE, n.1, <http://founders.archives.gov/documents/Washington/05-05-02-0299> (last modified Feb. 1, 2018).

47. *To George Washington From Shubael Swain, 3 September 1790*, FOUNDERS ONLINE, n.5, <http://founders.archives.gov/documents/Washington/05-06-02-0187> (last modified Feb. 1, 2018).

48. *See From George Washington to Edmund Randolph, 10 October 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-09-02-0035> (last modified Feb. 1, 2018); *see infra* notes 250–90 and accompanying text.

49. *See infra* Section II.B, notes 312–15 and accompanying text; *see Ruckman, supra* note 20, at 18.

50. *See infra* Section III.C, notes 420–24 and accompanying text.

51. *See infra* Section III.D, notes 470–533 and accompanying text.

52. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 71–72 (1993).

53. *See id.*

54. Nancy Baker, in her study of the historical relationship between the President and Attorney General, identified three norms of behavior emanating from the relationship: (1) independence from executive control; (2) nonpartisanship; and (3) loyalty to the President. NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN

not have this luxury. He knew every action he took established a precedent for future presidents.

One area where Washington set significant precedents was the use of federal judicial power. During the Constitutional Convention and subsequent Ratification Conventions, federal judicial power was one of the most contentious topics, serving as a focal point for concerns about national authority and liberty safeguards.⁵⁵ The Constitutional Convention vested the judicial power in a Supreme Court.⁵⁶ Judicial power extended to cases arising under the Constitution, the laws of the United States, and treaties made by the United States.⁵⁷ Yet, the Constitution did not assume the Supreme Court would handle every federal case. First, it only gave the Supreme Court original jurisdiction over certain matters.⁵⁸ Second, it granted Congress the power to create inferior federal courts.⁵⁹ The lack of detail became the cause for great debate.⁶⁰ Ratification opponents feared that the federal government would arrest people and carry them away to the nation's capital for trial before the Supreme Court.⁶¹ While the Constitution granted defendants the right to a jury trial, ratification opponents feared that the jury might be drawn from some distant place so that defendants were not judged by members of their own community.⁶² They also feared that trial in

THE ATTORNEY GENERAL'S OFFICE, 1789-1990, at 32-33 (1992). Of particular importance for Baker's book are the norms relating to relations between the White House and the Justice Department. On these norms, see Jane Chong, *White House Interference with Justice Department Investigations? That 2009 Holder Memo*, LAWFARE (Feb. 22, 2017, 4:12 PM), <https://www.lawfareblog.com/white-house-interference-justice-department-investigations-2009-holder-memo#>. Recently, the focus on the independence norm results from President Donald Trump's flagrant violation of it. See *Does Trump Have a Case Against Mueller?*, POLITICO MAG. (July 21, 2017), <http://www.politico.com/magazine/story/2017/07/21/robert-mueller-trump-roundtable-215404> (including a passage by Carrie Cordero discussing how "Trump doesn't respect the Justice Department's independence").

55. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 10-22* (1995).

56. U.S. CONST. art. III, § 1.

57. U.S. CONST. art. III, § 2.

58. *Id.*

59. U.S. CONST. art. III, § 1.

60. WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 15 (Wythe Holt & L.H. LaRue eds., 1990).

61. Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 13, 21 (Maeva Marcus ed., 1992).

62. *Id.*

some distant location would prevent defense witnesses from making the journey for trial.⁶³ Concurrent with these fears, the Constitution's opponents believed giving Congress power to create federal courts with such extensive jurisdiction effectively eliminated state courts.⁶⁴ The Constitution's proponents insisted that inferior federal courts were necessary to protect federal interests.⁶⁵ They feared state courts would favor state interests over federal interests, thus impairing the federal government's effectiveness.⁶⁶ Ultimately, the Constitution prevailed and the First Congress was left to resolve the problem.⁶⁷

When the First Congress met in March of 1789, it legislated the details so the new federal government could function.⁶⁸ One such detail was a Judiciary Act, which established inferior federal courts and federal judicial positions.⁶⁹ The First Congress attempted to strike a balance between protecting federal interests and alleviating concerns about outsiders interfering with local customs.⁷⁰ It created two sets of inferior federal courts.⁷¹ One was the district court.⁷² Of the two, this was the most local court.⁷³ Each state had at least one district court.⁷⁴ A single judge, a resident of the district, presided over this court.⁷⁵ The court had limited jurisdiction, meaning it could only hear certain, relatively minor, matters.⁷⁶ Most of the district court's cases involved

63. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 417-18 (2010).

64. Marcus & Wexler, *supra* note 61, at 21-22; CASTO, *supra* note 55, at 11-12, 29.

65. CASTO, *supra* note 55, at 11-12; Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, *supra* note 61, at 281, 286-87; DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 3 (1971).

66. CASTO, *supra* note 55, at 49.

67. RITZ, *supra* note 60, at 3-5.

68. *The First Federal Congress*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/tr easures_of_congress/text/page2_text.html (last visited Mar. 11, 2018).

69. RITZ, *supra* note 60, at 14-15.

70. *Id.* at 7.

71. Judiciary Act of 1789, 1 Stat. 73 §§ 3-4.

72. *Id.* § 3.

73. *Id.*

74. *Id.* Massachusetts and Virginia each had two district courts. *Id.* The present-day state of Maine was, at that time, part of Massachusetts, so the Maine territory was its own district. *Id.* Kentucky was a Virginia territory and was its own district court. *Id.*

75. *Id.*

76. *Id.* § 9.

customs violations, debtor-creditor matters, and admiralty.⁷⁷ District courts exercised some criminal power: they could issue warrants and determine guilt in criminal customs violations.⁷⁸ The second court created was the circuit court.⁷⁹ Congress created three primary circuit courts, each covering multiple states.⁸⁰ The Eastern Circuit covered the New England states plus New York.⁸¹ The Middle Circuit covered the mid-Atlantic states to Virginia.⁸² The Southern Circuit covered South Carolina and Georgia, with North Carolina added when it ratified the Constitution.⁸³ The circuit court held sessions in each state twice per year.⁸⁴ Initially, each circuit had three judges with two necessary for a quorum.⁸⁵ Two Supreme Court Justices and the district court judge from the state where the circuit court met comprised the bench.⁸⁶ At the end of each Supreme Court session, the Justices divided the circuits and traveled from place to place.⁸⁷ The circuit courts had general jurisdiction, and were able to hear any matter within federal authority.⁸⁸ This meant that most federal crimes were heard in these courts.⁸⁹ These courts, and the people who staffed them, would handle the cases Washington considered for pardon and, in many instances, refer the cases to the President.⁹⁰

The Judiciary Act gave Washington the responsibility to appoint judges, district attorneys, and marshals, whom he hired

77. *Id.*; see also CASTO, *supra* note 55, at 38–41.

78. Judiciary Act of 1789, 1 Stat. 73 § 9.

79. *Id.* § 4.

80. *Id.* There were two other circuit courts. *Id.* The Maine and Kentucky District Courts also possessed the jurisdiction of circuit courts. *Id.* Congress did this so that the Supreme Court justices who comprised two thirds of the circuit court would not have to travel to the outer territories of Maine and Kentucky. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* § 5.

85. *Id.* § 4.

86. *Id.*

87. *Id.*

88. *Id.* § 11.

89. *Jurisdiction: Criminal*, FED. JURISDICTION CTR., <https://www.fjc.gov/history/courts/jurisdiction-criminal>.

90. *From George Washington to the United States Senate, 24 September 1789*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-04-02-0053> (last modified Feb. 1, 2018).

within two days of signing the law.⁹¹ The Act created two distinct attorney positions.⁹² The first was the Attorney General.⁹³ This person represented the United States before the Supreme Court and provided legal advice to the various department heads.⁹⁴ Washington selected Edmund Randolph, a fellow Virginian who introduced the Virginia Plan to the Constitutional Convention, as the first Attorney General.⁹⁵ The second attorney position was the United States District Attorney.⁹⁶ Each district court had an attorney who represented the United States government in both the district and circuit courts.⁹⁷ Most cases involved collecting customs debts in conjunction with local federal revenue officials and prosecuting criminal cases.⁹⁸ When performing these tasks, the district attorneys had relative autonomy.⁹⁹ The administration only became involved in a handful of cases.¹⁰⁰

Federal criminal jurisdiction encompassed a variety of crimes but jurisdictional limits were uncertain.¹⁰¹ The federal courts clearly had jurisdiction over two crime categories.¹⁰² The first encompassed violations of federal law.¹⁰³ In 1790, Congress

91. *Id.*; *From George Washington to the United States Senate, 25 September 1789*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-04-02-0053> (last modified Feb. 1, 2018); *see also* Judiciary Act of 1789, 1 Stat. 73 §§ 3, 27, 35. *See generally* Kate Brown, *Asserting the “Chief Magistrate’s” Prerogatives: Washington, Hamilton, and the Development of the President’s Discretionary Powers*, WASHINGTON PAPERS: WASHINGTON’S QUILL (Jan. 19, 2015), <http://gwpapers.virginia.edu/asserting-the-chief-magistrates-prerogatives-washington-hamilton-and-the-development-of-the-presidents-discretionary-powers>.

92. Judiciary Act of 1789, 1 Stat. 73 § 35.

93. *Id.*

94. *Id.*

95. *From George Washington to the United States Senate, 24 September 1789*, *supra* note 90; *From George Washington to Edmund Randolph, 28 September 1789*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-04-02-0073> (last modified Feb. 1, 2018). On Randolph’s background, *see* REARDON, *supra* note 34, at 98–100, 178–80.

96. Judiciary Act of 1789, 1 Stat. 73 § 35.

97. *Id.*

98. Scott Ingram, *Representing the United States Government: Reconceiving the Federal Prosecutor’s Role Through a Historical Lens*, 31 NOTRE DAME J.L. PUB. POL’Y & ETHICS 293, 315 (2017).

99. *Id.*

100. *Id.*

101. *See* Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 L. & HIST. REV. 223, 229–31 (1986); Robert C. Palmer, *The Federal Common Law of Crime*, 4 L. & HIST. REV. 267, 292–99 (1986). There has been scholarly debate about the application of common law to federal criminal courts. *Id.*

102. Crimes Act of Apr. 30, 1790, Stat. II, ch. IX, §§ 1–8.

103. *Id.* §§ 1–2.

passed the first Crimes Act.¹⁰⁴ It prohibited certain acts against the government, such as counterfeiting United States securities.¹⁰⁵ Congress also made criminal penalties an aspect of its customs laws.¹⁰⁶ Willfully evading customs duties was prosecutable.¹⁰⁷ The second category consisted of common law crimes occurring in federal territories or on the high seas.¹⁰⁸ These included crimes such as murder, manslaughter, assault, and theft.¹⁰⁹ A third category of crimes was more ambiguous.¹¹⁰ Lawyers then and scholars now debate whether the federal government had common law criminal jurisdiction.¹¹¹ Could common law criminal violations be prosecuted in federal court, and, if so, which ones? Ultimately, the Supreme Court decided in 1812 that federal courts did not possess federal common law criminal jurisdiction.¹¹² Yet, when Washington served as president, the question remained unanswered.¹¹³ During his time as president, Washington received pardon petitions from each category of federal crimes.

With the structure in place, federal courts began operating almost immediately. The first district court sessions occurred in 1789.¹¹⁴ In February 1790, the United States Supreme Court convened for the first time.¹¹⁵ Following that session, the Justices set out on their circuits, holding the first sessions of the circuit courts.¹¹⁶ It would only be four months later when Washington received his first pardon petition.¹¹⁷

104. *See generally id.*

105. *Id.* § 14.

106. *See infra* notes 183–93 and accompanying text.

107. An Act to Regulate the Collection of Duties, Stat. 1, ch. V, § 36 (1789).

108. U.S. CONST., art. III, § 2.

109. Crimes Act of Apr. 30, 1790, Stat. II, ch. IX, § 8.

110. *See* Judiciary Act of 1789, 1 Stat. 73 § 9; *see also* CASTO, *supra* note 55, at 48.

111. *See id.*

112. *United States v. Hudson*, 11 U.S. 32, 34 (1812).

113. Palmer, *supra* note 101, at 268.

114. Judiciary Act of 1789, 1 Stat. 73 §§ 2–3.

115. 2 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 7 (Maeva Marcus ed., 1988).

116. *Id.*

117. *To George Washington from Thomas Bird, 5 June 1790*, *supra* note 46.

II. WASHINGTON'S (MIS?) USE OF PARDONS

As the first president under the nation's new Constitution, Washington understood his role as unifier and precedent-setter.¹¹⁸ Even before his official inauguration, Washington took great care in his public appearance.¹¹⁹ He knew he had to balance the national interest and the need for national power with the public's fear of monarchy and executive power.¹²⁰ He considered the optics of every position he took.¹²¹ Over time, however, as factions in his administration emerged, Washington's political preferences assumed primacy.¹²² This appeared in military decisions, economic decisions, and pardon decisions.¹²³ Washington understood that his first use of the pardon power would send a message to the nation and set a precedent for future Presidents.¹²⁴ Over time, Washington used his pardon power to protect mercantile interests and internal and external national security interests. Washington sought to show mercy, but who deserved mercy? In many instances, Washington did not show mercy, although circumstances seemed to warrant it. Instead, political interests determined who received mercy.

A. *The First Pardons and Their Precursors*

Washington took office in April 1789.¹²⁵ He needed to unify thirteen different states which had reluctantly surrendered some of their sovereignty to an overarching federal government.¹²⁶ To best unify the states, Washington hoped to create a respectable

118. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 75-76 (2009).

119. *See also* DON HIGGINBOTHAM, *GEORGE WASHINGTON: UNITING A NATION* 53-54 (2002). *See generally* DAVID S. HEIDLER & JEANNE T. HEIDLER, *WASHINGTON'S CIRCLE: THE CREATION OF THE PRESIDENT* (2015).

120. *See* JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 18-27 (1993).

121. WOOD, *supra* note 118, at 75-76.

122. JOHN FERLING, *JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION* 230-32 (2013); RON CHERNOW, *WASHINGTON: A LIFE* 648-50 (2010).

123. *See generally* Glenn A. Phelps, *George Washington and the Paradox of Party*, 19 *PRESIDENTIAL STUD. Q.* 733, 742 (1989).

124. *See* Crouch, *supra* note 15, at 724-25.

125. CHERNOW, *supra* note 122, at 567-68.

126. MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 397 (2016); GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 126-27 (1993).

government.¹²⁷ He hoped that by hiring respected subordinates, he would create respect for the government.¹²⁸ Washington hoped to accomplish this through his subordinates.¹²⁹ He selected people with strong, local reputations.¹³⁰ His selections understood local customs and culture.¹³¹ For national positions, such as the Cabinet and Supreme Court, Washington sought geographic diversity.¹³² He selected people who had demonstrated loyalty to the nation.¹³³ Washington also sought to balance national needs and local concerns.¹³⁴ To him, this meant giving local authorities some measure of discretion when enforcing federal laws.¹³⁵ Unless the matter implicated a larger national concern, Washington did not interfere in local decisions.¹³⁶ He also initially resisted using national power unless there was an absolute necessity.¹³⁷

This made Washington's first use of the pardon power symbolic and precedent-setting. With power centralized in the presidency, Washington believed his first pardon should be for someone who merited mercy—someone who exemplified proper usage.¹³⁸ Washington denied the first two pardon petitions he received.¹³⁹ The third petition met his standards.¹⁴⁰

The first pardon petition resulted from one of the first federal criminal cases.¹⁴¹ Thomas Bird, a British citizen, served on the sloop *Mary*, beginning in September 1787 when it departed

127. PHELPS, *supra* note 126, at 126.

128. See WOOD, *supra* note 118, at 104–09.

129. *Id.* at 107–08.

130. GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE 69, 71–72 (2016) (discussing the characteristics of those hired for customs collection).

131. *Id.* at 71–72.

132. HIGGINBOTHAM, *supra* note 119, at 68.

133. Ingram, *supra* note 98, at 316–17.

134. *Id.* at 312.

135. See *id.* at 323–24.

136. *Id.* at 322.

137. See *id.* at 312.

138. Crouch, *supra* note 15, at 724–25.

139. See *To George Washington from Thomas Bird, 5 June 1790*, *supra* note 46, at n.1; *To George Washington From Shubael Swain, 3 September 1790*, *supra* note 47, at n.5.

140. *From George Washington to Edmund Randolph, 1 March 1791*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-07-02-0273> (last modified Feb. 1, 2018).

141. *To George Washington from Thomas Bird, 5 June 1790*, *supra* note 46.

Plymouth, England.¹⁴² It arrived along the western coast of Africa approximately nine weeks later and engaged in trade, including slaves.¹⁴³ Along the way it encountered a Dutch vessel.¹⁴⁴ According to Bird, he made a mistake for which the *Mary's* Captain, John Connor, punished him severely.¹⁴⁵ Near the same time, Josiah Jackson entered on board as a mate.¹⁴⁶ While who approached whom was disputed, the fact that Jackson and Bird began talking about killing Connor was not.¹⁴⁷ Nor did anyone dispute that Bird acquired a gun and shot Connor in the chest, killing him.¹⁴⁸ Jackson assumed captaincy and sailed for Boston around May 2, 1788.¹⁴⁹ The *Mary* appeared off the coast of Portland, Maine in July 1789.¹⁵⁰ Initially Bird, Jackson, and a third mariner, Hans Hanson, appeared before the Massachusetts court presiding in Portland, and provided statements about the vessel's activities and the captain's murder.¹⁵¹ The Massachusetts court, based on the statements, determined it lacked jurisdiction and held the trio for the federal district court, presided over by Judge David Sewall.¹⁵² When the grand jury met, it indicted Bird and Hanson for piracy by murder on the high seas.¹⁵³ Both stood trial during the same term.¹⁵⁴ The jury convicted Bird and acquitted

142. *Id.*

143. JERRY GENESIO, PORTLAND NECK: THE HANGING OF THOMAS BIRD 11 (2010).

144. *Id.* at 15.

145. *Id.* at 17.

146. *Id.* at 18.

147. *Id.* at 29.

148. *See id.* at 21.

149. *See id.* at 25.

150. *Id.* at 26.

151. *Id.* at 28. At this time, Maine was not an independent state but part of Massachusetts. *Id.*

152. *Id.* at 42. David Sewall was a well-respected attorney and judge in Maine beginning in 1767 when he was named a justice of the peace. *Sewall, David*, FED. JUD. CTR., <https://www.fjc.gov/node/1387626> (last visited Feb. 24, 2018). In 1777, he was named as a Justice for Maine's highest court. *Id.* In 1789, Maine's representative to the United States House of Representatives recommended Sewall for the District Court post. *Id.* Washington followed this recommendation and the Senate confirmed Sewall. *Id.* Sewall remained on the bench until his resignation in 1818. *Id.*; *To George Washington from George Thacher, 14 September 1789*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-04-02-0021> (last modified Feb. 1, 2018).

153. GENESIO, *supra* note 143, at 47.

154. *Id.*

Hanson on June 5.¹⁵⁵ Sewell sentenced Bird to death with the execution date set for June 25.¹⁵⁶

On the day Sewell pronounced the court's sentence, Bird dictated a letter to President Washington seeking a pardon.¹⁵⁷ "Permit me then to beg that the Commencement of your administration may be marked, by Extending mercy to the first Condemned under it, or at least by granting a Reprieve for a few months longer"¹⁵⁸ This petition reveals two interesting pieces of knowledge. First, it demonstrates Bird knew his was the first federal death penalty case.¹⁵⁹ Perhaps this gave him hope for a pardon. Second, Bird begs for mercy, be it a reprieve or a pardon.¹⁶⁰ His presentation appears more desperate than reasoned. Bird's letter and copies of the court record reached Washington eight days later, on June 13.¹⁶¹

When Washington received Bird's request, he sent the matter to Supreme Court Chief Justice John Jay.¹⁶² On the surface, this sets an interesting precedent. Why would the President consult the Chief Justice about a pardon? Pardons are an executive, not judicial, function.¹⁶³ While this could potentially raise separation of powers questions, the reason Washington consulted Jay was that Attorney General Edmund Randolph had left New York for Virginia in March, after the Supreme Court's

155. *Id.* at 48–49.

156. *Id.* at 52.

157. *Id.*

158. *To George Washington from Thomas Bird, 5 June 1790, supra* note 46.

159. *Id.*

160. *Id.*

161. *Id.*

162. *From George Washington to John Jay, 13 June 1790*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-05-02-0325> (last modified Feb. 1, 2018). John Jay was born into a wealthy New York family and attended Columbia University. RICHARD B. MORRIS, JOHN JAY, THE NATION AND THE COURT 4–5 (1967). Soon after graduating, Jay was admitted to the bar of New York. *Id.* at 4. Jay served in the Continental Congress during the Revolution. *Id.* at 7. Following independence, Jay served as Secretary of Foreign Affairs under the Articles of Confederation, making him one of the few qualified people to be Secretary of State under the new Constitution. *Id.* at 42. Jay was then offered the choice of retaining his position as head of a major department, or becoming the first Chief Justice of the United States Supreme Court. *Id.* Jay chose the latter. *Id.* Though a lawyer, Jay had little legal experience. *Id.* He remained Chief Justice until appointed by Washington to negotiate a commercial treaty with Great Britain which became known as Jay's Treaty. *John Jay's Treaty, 1794-1795*, OFF. HISTORIAN, <https://history.state.gov/milestones/1784-1800/jay-treaty> (last visited Feb. 28, 2018).

163. U.S. CONST. art. 2, § 2.

first session.¹⁶⁴ Randolph would not return until July and Bird's June 25 execution date required an immediate response.¹⁶⁵ Therefore, Washington turned to Jay, an attorney who held an official judicial position in the new government.¹⁶⁶

Jay responded to Washington's letter the same day, recognizing the urgency.¹⁶⁷ In Washington's letter to Jay, Washington asked, "[w]ould there be prudence, justice or policy in extending mercy to the Convict mentioned in the enclosed Papers?"¹⁶⁸ This reveals that mercy, in and of itself, was not sufficient. Washington required a practical, just, or policy reason to show mercy.¹⁶⁹ Jay clearly understood this. He wrote Washington that "[t]here does not appear to be a single Circumstance in the Case of the murderer in question, to recommend a Pardon—His own Petition contains no averment of Innocence, no Palliative for Guilt, no complaint of Court Jury or witnesses, nor of the want of witnesses."¹⁷⁰ Jay's response provided his own criteria for a pardon. To Jay, pardons went to the innocent, the justified, or those who suffered some procedural problem.¹⁷¹ Jay saw none of these in Bird's case.¹⁷² In fact, not until his dying declaration did Bird assert innocence.¹⁷³

Despite Jay's immediate response, Washington did not send Judge Sewall a response until June 28, three days after Bird's execution.¹⁷⁴ Washington adopted only one of Jay's reasons and added his own consideration. Washington wrote:

No palliating circumstance appeared in the case of this unhappy man to recommend him to mercy for which he applied: I could not therefore have justified it to the laws of my Country, had I, in this

164. REARDON, *supra* note 34, at 192–93.

165. *Id.*

166. *See supra* note 162 and accompanying text.

167. *To George Washington from John Jay, 13 June 1790*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-05-02-0326> (last modified Feb. 1, 2018).

168. *From George Washington to John Jay, 13 June 1790, supra* note 162.

169. *Id.*

170. *To George Washington from John Jay, 13 June 1790, supra* note 167.

171. *Id.*

172. *Id.*

173. GENESIO, *supra* note 143, at 62.

174. *To George Washington from Thomas Bird, 5 June 1790, supra* note 46, at n.1.

instance, exercised that pardoning power which the Constitution vests in the President of the United States.¹⁷⁵

Like Jay, Washington recognized the need to justify Bird's pardon and, like Jay, Washington could not identify one. Yet, for Washington, the symbolic nature of a pardon also factored into the decision.¹⁷⁶ He believed that he must justify pardoning Bird in a legal sense.¹⁷⁷ By this, Washington meant the common law, a law founded on what people did.¹⁷⁸ A pardon, therefore, required a rational basis, derived from practice.

Several months later, a second pardon request arrived.¹⁷⁹ This time a mariner had been ensnared in the nation's new revenue laws.¹⁸⁰ These laws generated the most pardon petitions during Washington's presidency. On September 3, 1790, Shubael Swain wrote President Washington from the "Debtors apartment" in Philadelphia.¹⁸¹ According to Swain, he commanded a vessel that sailed from Nantucket to Philadelphia that contained a mix of cargo and people.¹⁸² Swain only commanded the vessel and had no pecuniary interest in the vessel or the cargo.¹⁸³ In fact, according to Swain, the person who owned both the vessel and the cargo sailed as a passenger.¹⁸⁴ According to Swain, the owner loaded the cargo prior to hiring Swain and Swain had no knowledge of the cargo weight he transported.¹⁸⁵ This, in turn, caused Swain to falsely state the cargo's weight, the basis for taxation.¹⁸⁶ In his petition, he noted the quantity carried was insubstantial.¹⁸⁷ Whether Swain had informed the revenue

175. *Id.*

176. *Id.*

177. *Id.*

178. CASTO, *supra* note 55, at 34–35; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW, at xiii–xiv (3d ed. 2005).

179. *To George Washington From Shubael Swain, 3 September 1790, supra* note 47.

180. *Id.*

181. *To George Washington From Shubael Swain, 3 September 1790, supra* note 47. *See generally* BRUCE H. MANN, REPUBLIC OF DEBTORS (2002).

182. *To George Washington From Shubael Swain, 3 September 1790, supra* note 47.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

collector for Philadelphia about this information or not is uncertain, but Swain was brought before the Federal District Court for Pennsylvania, convicted of making a false statement, and sentenced to pay \$400.¹⁸⁸ As he was only paid \$16 for his services, Swain could not pay the fine, resulting in his incarceration.¹⁸⁹ Nine months later, Swain remained in the “Debtors apartment,” creating significant hardship for his family.¹⁹⁰ Their survival depended upon his work, which he could not do while confined.¹⁹¹

Swain’s pardon petition differed considerably from Bird’s. Where Bird failed to provide any “palliative circumstances,”¹⁹² Swain provided ample basis for excusing and abating his conduct. First, it appears he lacked the requisite fraudulent intent. While revenue laws were strict liability, his violation proved an ignorance of fact rather than criminal evasion.¹⁹³ Justice required the owner, not the commander, face the penalty for not accurately completing the requisite customs forms.¹⁹⁴ Second, his family situation begged for mercy. While Bird made no reference to family, Swain referenced the dire circumstances his incarceration caused his family.¹⁹⁵ Next, Swain does not appear to be a “professional” in the sense that he did not regularly conduct business of this nature. In his petition to Washington, Swain notes his youthfulness and inexperience.¹⁹⁶ Born in 1764, it is unlikely he had commanded many vessels.¹⁹⁷ Finally, Swain had respectable people support his pardon including the judge and jury.¹⁹⁸

These supporters devised his multi-pronged efforts to obtain relief. Likely due to uncertainty about how to obtain relief from the one-year-old federal government, Swain sought relief

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *To George Washington from Thomas Bird, 5 June 1790, supra note 46.*

193. *See To George Washington From Shubael Swain, 3 September 1790, supra note 47.*

194. *See generally id.*

195. *Id.*; *To George Washington from Thomas Bird, 5 June 1790, supra note 46.*

196. *To George Washington From Shubael Swain, 3 September 1790, supra note 47.*

197. *Id.*; see MATTHEW TAYLOR RAFFERTY, *THE REPUBLIC AFLOAT: LAW, HONOR AND CITIZENSHIP IN MARITIME AMERICA* 14–17 (2013) (describing distinctions within the mariner community).

198. *To George Washington From Shubael Swain, 3 September 1790, supra note 47.*

from both Congress and the President.¹⁹⁹ Swain and his advisors began by petitioning Congress.²⁰⁰ Congress did nothing.²⁰¹ With that prong stalled, they petitioned the President.²⁰²

When Washington received the pardon petition, he repeated the process utilized with Bird's pardon petition.²⁰³ Randolph was back in New York, so Washington referred the matter to Randolph rather than the Chief Justice.²⁰⁴ Washington instructed Randolph to determine whether "any thing so favorable as to justify an interference in his behalf by the Secretary of Treasury."²⁰⁵ The revenue laws permitted the Treasury Secretary, Alexander Hamilton, to remediate forfeitures.²⁰⁶ Randolph undoubtedly examined the matter and responded that there was no forfeiture for Hamilton to set aside.²⁰⁷ Therefore, nothing could be done.

By the end of November, Swain tried again, and this time received assistance from Pennsylvania's United States Marshal.²⁰⁸ The Marshal wrote:

Swain made application to Judge Hopkinson who recommended him to the Secretary of the Treasury, who I am informed considers his Case as not within his power to decide upon—The facts set forth in the petition are nearly conformable to what appeared in the Trial, or have since come to my knowledge and from the long Imprisonment which Swain has suffered I presume to forward the petition to you and to add that his behaviour in prison induces me to recommend him for mercy.²⁰⁹

199. *Id.*

200. *Id.*

201. *See id.*

202. *Id.*

203. *See generally id.*; *To George Washington from Thomas Bird, 5 June 1790, supra note 46.*

204. *See generally To George Washington From Shubael Swain, 3 September 1790, supra note 47, at n.5.*

205. *Id.*

206. *See id.*

207. *Id.*

208. *Id.*

209. *Id.*

Washington again did not act, leading to the conclusion that no one in the executive branch had authority to act as Swain requested.²¹⁰ Federal District Court Judge Francis Hopkinson,²¹¹ in Swain's second petition to Congress in December, 1790, wrote, "As there seems to have been no Provision made for pardoning Offences against the Laws of Trade, other than the Mercy of the Legislature, and as the Case of Sheubel Swain appears to be a hard one, I beg leave to recommend his Petition to their favourable Notice."²¹² This is curious at least because the Constitution made clear that the President had the power to pardon all offenses except impeachment.²¹³ Randolph participated in the pardon debates at the Convention and through the ratification process, so he knew there were no other Constitutional limits on the pardon power.²¹⁴

With the Swain private legislation pending before Congress, Washington received a third pardon petition,²¹⁵ this one similar to Swain's but with one significant difference. This time the pardon petition came from Samuel Dodge, a New York customs inspector.²¹⁶ Dodge, who had served as a Lieutenant in the Revolutionary War, entered on board a cargo vessel that was unloading at the port of New York.²¹⁷ According to law, cargo could not be unloaded after seven o'clock at night.²¹⁸ Apparently, several barrels of molasses were unloaded after that time.²¹⁹ Dodge claimed that this was a new law and he was not aware of it.²²⁰

210. *See generally id.*

211. Francis Hopkinson was born in Philadelphia and studied at the College of Philadelphia (later the University of Pennsylvania). *Hopkinson, Francis*, FED. JUD. CTR., <https://www.fjc.gov/node/1382396> (last visited Feb. 27, 2018). He was admitted to the bar in 1761 and served as a delegate to the Continental Congress from New Jersey in 1776 when he signed the Declaration of Independence. *Id.* Three years later he became an admiralty judge in Philadelphia. *Id.* The federal district courts, under the Constitution, were vested with admiralty jurisdiction. *Id.* This made him the natural choice to assume this position under the new federal government. *Id.* He remained as judge until May 1791, when he died. *Id.*

212. *To George Washington From Shubael Swain, 3 September 1790, supra note 47, at n.5.*

213. U.S. CONST. art. II, § 2, cl.1.

214. Duker, *supra* note 22, at 502, 504.

215. *Compare To George Washington From Shubael Swain, 3 September 1790, supra note 47, with From George Washington to Edmund Randolph, 1 March 1791, supra note 140.*

216. *From George Washington to Edmund Randolph, 1 March 1791, supra note 140, at n.1.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

Nonetheless, due to the offense imposing strict liability, a grand jury indicted Dodge.²²¹ Yet, even though the grand jury indicted, it did not think Dodge's conduct fraudulent.²²² Following the indictment, Dodge discussed the matter with the court and, most likely, an attorney.²²³ This resulted in something akin to a plea agreement.²²⁴ Dodge pleaded guilty with the expectation that a pardon awaited. According to his petition, he was:

induced to plead guilty to his indictment trusting that the purity of his intentions Would With the honorable the Executive effect A remission of the penalties to which he is exposed—He also begs leave to State that the honorable the Judges of the Circuit Court have suspended giving Judgment against him until the next Court in order that he might in the meantime apply for relief. As Your Petitioner therefore is conscious of having violated the Act first above mentioned unintentionally and without any fraudulent design, and as no injury could possibly arise to the publick, or any advantage accrue to himself or to any person interested in the Said cargo by reason of the unlading a part thereof as above Stated he hopes the Executive will consider his conduct as the mere effect of ignorance. And be pleased to remit all the penalties disabilities and forfeitures to Which he is exposed under the Act above mentioned—or afford him such other relief as may be proper.²²⁵

To support his petition, his supervisor, the collector of revenue for New York, John Lamb, attested to Dodge's upstanding character.²²⁶ Dodge also included an affidavit from the ship owners who indicated there was sufficient light to see the offloaded cargo.²²⁷

221. *Id.*

222. *Id.*

223. *See generally id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

Once again, the Administration faced a pardon problem regarding the revenue laws. In March, Hamilton wrote to Richard Harison,²²⁸ the United States District Attorney for New York, asking Harison to suspend proceedings in the case while Washington re-evaluated the pardon issue.²²⁹ As part of this process, Hamilton sought Harison's opinion, writing:

A question arises concerning the extent of the power to pardon. There is a general rule that a power to pardon cannot be exercised so as to divest Individuals of a right of action for their sole benefit, or of a *vested* right which they have in conjunction with the sovereign; as where there is a penalty part to the use of the Public and part to the use of an informer. The inquiry consequently is how far the penalties within the 26 Section are liable to the distribution contemplated by the 68 section of the same Act and what difference the mode of proceeding by Indictment instead of a popular action may make.²³⁰

The issue arose because the government rewarded informers in revenue cases. Those who reported violations committed by others shared the forfeiture proceeds, called moieties.²³¹ There is no direct evidence in either Swain's case or

228. Richard Harison was born in New York and attended Columbia University. *See Richard Harison Papers, 1734-[ca. 1900]*, COLUM. U. LIBR. ARCHIVAL COLLECTIONS, http://www.columbia.edu/cu/lweb/archival/collections/ldpd_4078865/index.html (last visited Feb. 27, 2018). He became a lawyer prior to the Revolution and remained loyal to the British throughout the war, thus costing him his law license. *Id.* He was re-admitted to the bar following the end of hostilities and resumed his practice in New York. *Id.* In a time when lawyers did not specialize, Harison handled significant commercial litigation matters and worked with Alexander Hamilton during the Confederation period. *Id.* This connection earned Harison the United States District Attorney nomination, a post he held throughout the 1790s. *Id.*

229. *From Alexander Hamilton to Richard Harison, 18 March 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Hamilton/01-08-02-0127> (last modified Feb. 1, 2018).

230. *From Alexander Hamilton to Richard Harison, 26 April 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Hamilton/01-08-02-0263> (last modified Feb. 1, 2018).

231. NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 221–22 (2013).

Dodge's case that someone had reported the violations to the government.²³² Hamilton's statement of the problem also references the mode of case origination.²³³ Legally, an indictment originated with a grand jury, as opposed to an information, which originated with the government, or a "popular action" which a private individual brought.²³⁴

After a month of research, Harison responded that the pardon power could not be used to affect a private individual's interests.²³⁵ Notably, Harison based his conclusion on English common law, a questionable proposition at the time as many believed the English common law no longer applied in the United States.²³⁶ Harison carefully worded his rationale for adopting English common law principles. He wrote, "The principles of the Common Law of England upon this Subject appear to be founded in good sense and I think must govern where-ever they will apply."²³⁷ The English law applied because it made sense, not because of a legal requirement. Harison believed that the individual benefit infringed upon by a pardon, namely the share of forfeiture proceeds due to the informant, unfairly placed the interests of one citizen over another. He wrote, "if a part of the fine or penalty is expressly given to any Individual, his right is to be respected, and I think cannot be disposed of without his own consent or a legislative provision."²³⁸ Harison left room for exceptions but concluded, "I am very doubtful whether in the Case of Mr. Dodge, any relief can be given under the act for remission of penalties as besides the forfeiture a disability is incurred which the Secretary of the Treasury has no power to remit."²³⁹ Rather than leave the matter there, Harison provided a potential solution:

232. See *To George Washington From Shubael Swain, 3 September 1790*, *supra* note 47; see also *From George Washington to Edmund Randolph, 1 March 1791*, *supra* note 140.

233. *From Alexander Hamilton to Richard Harison, 26 April 1791*, *supra* note 230.

234. *Id.* at n.4.

235. *To Alexander Hamilton from Richard Harison, 24 May 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Hamilton/01-08-02-0326> (last modified Feb. 1, 2018).

236. FRIEDMAN, *supra* note 52, at 65.

237. *To Alexander Hamilton from Richard Harison, 24 May 1791*, *supra* note 235.

238. *Id.*

239. *Id.*

I should suppose however that the pardon would be considered as a mere nullity, with respect to a moiety of the fine, and I do not see why execution might not go for the residue stating that part was satisfied or remitted. Neither do I see any objection to making the pardon conditional, “provided the offender satisfy the officers &c. for the one half of the fine or penalty & pay the expences of prosecution.”²⁴⁰

Essentially, Harison recommended that Washington make Dodge’s pardon conditional upon Dodge’s payment of the informant’s share of the proceeds.

Harison’s recommendation sat throughout the summer of 1791 and Dodge’s case was continued until October.²⁴¹ In early September, Washington, through his secretary Tobias Lear, wrote to Randolph requesting that Randolph prepare pardon papers.²⁴² Randolph did this and forwarded them to Washington and Harison in time for the October circuit court session.²⁴³ Thus, Samuel Dodge became the first convicted person pardoned by the new federal government, because, according to Washington, Dodge’s conduct appeared “unintentional.”²⁴⁴

While the Administration considered Dodge’s case, Washington received information about a matter necessitating an urgent use of his pardon power. William Lewis,²⁴⁵ the United States District Attorney for Pennsylvania, wrote to Washington about Henry Smith:²⁴⁶

On Saturday last, I received Information that several Persons were on some account or other,

240. *Id.*

241. *Id.*

242. *To George Washington from Tobias Lear, 2 October 1791*, FOUNDERS ONLINE, n.1, <http://founders.archives.gov/documents/Washington/05-09-02-0021> (last modified Feb. 2, 2018).

243. *From George Washington to Edmund Randolph, 10 October 1791*, *supra* note 48.

244. *Id.*

245. *See generally* ESTHER ANN MCFARLAND & MICKEY HERR, WILLIAM LEWIS, ESQUIRE: ENLIGHTENED STATESMAN, PROFOUND LAWYER, AND USEFUL CITIZEN 1–85 (2012).

246. *To George Washington from William Lewis, 7 March 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-07-02-0294> (last modified Feb. 1, 2018).

confined in the Jail of this City, and that one of them, of the name of Henry Smith, had informed the Attorney General of this State, that he, with two or three of his Fellow Prisoners, and several other persons who are now at large in the different States, had been employed for a considerable time past in counterfeiting the Certificates of the United States, and in passing them as genuine.²⁴⁷

Lewis went to the Philadelphia jail and met with Smith:²⁴⁸

I found him very willing to disclose the whole Business, on the above Terms, and indeed he went so far as to offer to shew me several of their original Papers, which he said would establish the whole of his account He says, that two or three of the Offenders are now in Jail with him; that another is at large in this City, that some have gone off since he was apprehended, and that others are dispersed through the different States.²⁴⁹

Lewis believed that the only way to pursue this case was for Washington to pardon Smith and to do so quickly.²⁵⁰ If Lewis could obtain a pardon, then he could take Smith before a judge so that Smith could provide his evidence under oath.²⁵¹ It is unclear what Washington did with Lewis' letter.²⁵²

Four days later, Chief Justice Jay wrote Washington about the same matter, but Jay identified a different offender.²⁵³ On the

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Correspondence between William Lewis and George Washington*, FOUNDERS ONLINE, <https://founders.archives.gov/search/Correspondent%3A%22Lewis%2C%20William%22%20Correspondent%3A%22Washington%2C%20George%22> (last visited Mar. 11, 2018) (indicating that George Washington never responded to William Lewis' letter).

253. *To George Washington from John Jay, 11 March 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-07-02-0312> (last modified Feb. 1, 2018).

same day that Lewis met with Smith, Abraham Ogden,²⁵⁴ the United States District Attorney for New Jersey, spoke with Dr. Clarkson Freeman, another one of the forgery conspirators.²⁵⁵ Like Smith, Freeman wanted to speak with the local United States attorney to provide information in exchange for a pardon.²⁵⁶ Ogden, like Lewis had with Smith, informed Freeman that Ogden could not promise a pardon, but that Ogden would listen to Freeman's evidence on the condition that what Freeman said would not be used against him should he be indicted.²⁵⁷ Freeman's story matched Smith's. Like Lewis, Ogden also understood that to make a case against any of the conspirators, the government would need the testimony of some conspirators.²⁵⁸ Ogden wrote:

From their Mode of practising upon the unwary and unsuspecting, it was extremely difficult to point such positive Testimony against any One Individual; as would be sufficient to convict, upon a charge, affecting life—After the most full Investigation of the Facts, I was clearly of Opinion, that it would be necessary to make Use of some One of the Felons against his accomplices.²⁵⁹

Also, like Lewis, Ogden recommended pardoning Freeman so his evidence could be used against others in the counterfeiting organization.²⁶⁰

With reports from two conspirators, both identifying the same people, Washington sought an opinion from Attorney

254. Abraham Ogden was born into a prominent New Jersey family. See THE OGDEN FAMILY IN AMERICA: ELIZABETHTOWN BRANCH AND THEIR ENGLISH ANCESTRY 103–04 (1907). At the time of the revolution, his family remained loyal, but Abraham adopted the revolution. *Id.* When Washington marched his army toward New York following the Battle of Princeton, Ogden housed a portion of the army. *Id.* Following the war, Ogden became a prominent attorney, teaching law to New Jersey's first United States District Attorney, Richard Stockton, Jr. *Id.* Ogden also maintained close ties to Richard Harison and Alexander Hamilton. *Id.* This combination of relations made him the obvious choice to become United States District Attorney for New Jersey when Stockton resigned. *Id.*

255. *To George Washington from John Jay, 11 March 1791, supra* note 253.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at n.1.

260. *Id.*

General Edmund Randolph.²⁶¹ A day after Washington sent the information to Randolph, Randolph responded.²⁶² Washington forwarded the report to Jay.²⁶³ While the report has been lost,²⁶⁴ subsequent activities indicate its content. Randolph prepared blank pardons.²⁶⁵ One went to Ogden and another to Lewis.²⁶⁶ Lewis used his blank pardon for Henry Smith.²⁶⁷ Though not connected to a specific case, Smith became the first pardon, of any sort, granted by the new federal government. Lewis conveyed Smith's examination to Richard Harison.²⁶⁸ Ogden, however, waited.²⁶⁹ The pardon was intended for Clarkson Freeman but Ogden wondered if it was necessary and may have opposed it outright.²⁷⁰ Ogden wrote to Harison at the end of March about the matter.²⁷¹ While this letter is lost, Harison responded that he spoke with Chief Justice Jay.²⁷² Jay, according to Harison, opined:

Freeman will be a competent witness without receiving a Pardon, but . . . it would be best not to have him indicted and [Jay] is further of opinion that altho a Pardon ought to be given in consideration of the Discoveries that have been made yet it should be upon Condition of his leaving the United States.²⁷³

261. *Id.* at n.4.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *To George Washington from William Lewis, 7 March 1791, supra* note 246, at n.2.

268. Letter from Richard Harison to William Lewis, March 31, 1791, Richard Harison Letterbooks, 1790-1802, Richard Harison Papers (on file with New York Historical Society) ("in consequence of Smith's examination contained in the same cover with your letter of the fourteenth instant....").

269. *To Thomas Jefferson from Robert Morris, 8 December 1793*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-27-02-0466> (last modified Feb. 1, 2018).

270. Letter from Richard Harison to Abraham Ogden, March 29, 1791, Richard Harison Letterbooks, 1790-1802, Richard Harison Papers, (on file with New York Historical Society).

271. *Id.*

272. *Id.*

273. *Id.* As this was occurring at the same time as Dodge's case, it is likely that Jay's conditions for Freeman's pardon inspired Harison to consider conditions for Dodge's pardon. *Id.*

Freeman, himself, complicated the matter by not signing his examination.²⁷⁴ This caused the government to miss its opportunity for indictments during the spring circuit.²⁷⁵ By August, Freeman finally signed his examination but then promptly escaped confinement.²⁷⁶ By the spring of 1793, he still had not been located but his father petitioned the Administration for a pardon.²⁷⁷ Once again a debate ensued about the propriety of pardoning Freeman.²⁷⁸ Freeman was not located, however, and no pardon was ever submitted.²⁷⁹

From this extensive correspondence, only one unsuccessful prosecution resulted. Amasa (also known as “Amos”) Parker was indicted in New Jersey for his role in the counterfeiting scheme.²⁸⁰ Lewis Freeman was also indicted but never apprehended.²⁸¹ Despite the debate and considerations paid to ensuring sufficient evidence, a jury acquitted Parker.²⁸²

These four cases—Bird, Swain, Dodge, and Smith/Freeman—reveal the uncertainty about the President’s pardon power both regarding its extent and application. When the first pardon request arrived, Jay and Washington believed that there must be some justification for granting a pardon. As Bird alleged none, he was not pardoned. When Swain’s pardon petition arrived, it provided strong justification, including recommendations from the judge and jury who heard the case. Yet, a pardon was not forthcoming because of a question concerning the President’s power to pardon when another’s interest in the outcome could be affected. It was not until someone with connections to the federal government and who had served the Continental Army required a pardon that

274. *To Thomas Jefferson from Robert Morris, 25 November 1793*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-27-02-0411> (last modified Feb. 1, 2018).

275. *To Alexander Hamilton from Richard Harison, 8 April 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Hamilton/01-08-02-0195> (last modified Feb. 1, 2018).

276. *Argus*, September 6, 1791.

277. *To Thomas Jefferson from Robert Morris, 25 November 1793*, *supra* note 274.

278. *See id.*

279. *To Thomas Jefferson from Robert Morris, 8 December 1793*, *supra* note 269.

280. *To George Washington from John Jay, 11 March 1791*, *supra* note 253, at n.1.

281. *Id.*

282. *Id.* at n.4.

Washington's Administration found means to grant a pardon. Hamilton sought Harison's guidance and, after much consideration, Harison suggested a conditional pardon; a solution that Attorney General Randolph could not discover in his initial hasty response. Ultimately, Dodge received his pardon but the records do not indicate if Swain ever received his. While Harison constructed his solution, his and the Administration's attention turned to a matter of expediency. James Wilson had foreseen the situation.²⁸³ Had Senate approval been required for pardons, the government may have lost its chance to prosecute the counterfeiting ring because the First Congress had adjourned and the Second Congress would not meet until October.²⁸⁴ One thing does unite Washington's first pardons: a government benefit. In the Dodge case, a loyal government worker received a conditional pardon, enabling the government to fulfill its obligations to its informants and not discourage future informants. In the Smith/Freeman case, the government needed to pardon those involved to better its chance of convicting conspiracy members.

B. Pardons for the Merchant Class

Word of Dodge's pardon spread through the northern and mid-Atlantic merchant class.²⁸⁵ As a result, more merchants applied for pardons than any other group.²⁸⁶ Every year, merchants subjected to criminal prosecution and subsequent forfeiture submitted pardon applications.²⁸⁷ Although many were granted, some were not.²⁸⁸ Behind each pardon, however, stood one important government policy: promoting commerce.

The Constitution's preamble made promoting the general welfare a founding principle.²⁸⁹ Interstate commerce was one of

283. See Duker, *supra* note 22, at 501–02.

284. See *1st to 9th Congresses (1789–1807)*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Session-Dates/1-9> (last visited Feb. 27, 2018). The First Congress held its third session from December 6, 1790 until March 3, 1791. *Id.* The Second Congress convened on October 24, 1791. *Id.*

285. See ARTHUR MEIER SCHLESINGER, *THE COLONIAL MERCHANTS AND THE AMERICAN REVOLUTION, 1763-1776*, at 586–87 (1918).

286. *Id.*

287. *Id.*

288. *Id.*

289. U.S. CONST. pmb.

the main motivating factors for the Constitutional Convention.²⁹⁰ Many at the Convention, including those who would later serve in Congress and the administration, saw commerce as the means to grow the country, to gain acceptance into the wider Atlantic world, and to secure itself from external threats.²⁹¹ The separate states had differing and inconsistent trade policies that disadvantaged those who sought to trade their goods on a larger and wider scale.²⁹² To remedy this problem, the delegates granted the federal government the power to regulate interstate and foreign commerce.²⁹³

Once the new federal government began functioning, newly-minted Treasury Secretary, Alexander Hamilton, established an ambitious program to assert the federal government's power.²⁹⁴ It began with a comprehensive program of customs and duties.²⁹⁵ Income derived from commerce became the federal government's primary revenue source.²⁹⁶ For this plan to work, however, Hamilton had to rely upon customs houses to collect the revenue.²⁹⁷ Therein lay the problem. Throughout the revolutionary era, the commercial culture had been to evade customs collection.²⁹⁸ Yet, Hamilton had a solution. As Treasury Secretary, he selected loyal soldiers with customs experience to enforce the revenue laws.²⁹⁹ Like the United States District Attorneys, those Hamilton selected were loyal to the United States yet understood local culture.³⁰⁰ Hamilton trusted them to negotiate the terrain and collect sufficient revenue.³⁰¹ The collectors accomplished this by overlooking violations in certain instances.³⁰² By employing discretion, they could mitigate harm

290. *Constitutional Convention*, THE COLUMBIA ENCYCLOPEDIA (7th ed. 2017).

291. KLARMAN, *supra* note 126, at 21.

292. *Id.* at 130.

293. *Id.*

294. *Id.*

295. 1 Stat. 38–45 (1845).

296. RAO, *supra* note 130, at 6.

297. *Id.*

298. *See generally* PETER ANDREAS, SMUGGLER NATION: HOW ILLICIT TRADE MADE AMERICA (2013).

299. RAO, *supra* note 130, at 69–71.

300. *Id.* at 72–73.

301. *Id.*

302. *See id.* at 85–88.

caused by unjust application of strict liability laws.³⁰³ Even when the collectors exercised their enforcement authority, Hamilton served as a check.³⁰⁴ In many cases, those caught violating could appeal to Hamilton who reviewed the case and exercised power to remit forfeitures.³⁰⁵

With mechanisms in place to prevent injustices, pardons seem unnecessary. Yet, Washington received more pardon petitions from merchants than any other group. Washington received at least nineteen pardon petitions related to mercantile activity. Of those, sixteen were pardoned. Those seeking pardons fell into three categories. Most common was the vessel's master or owner who had violated the revenue laws. Next were those who committed some crime while on the high seas. The final category, a category of one case, was a merchant asking for a "pardon" prior to violating the law.³⁰⁶

Thirteen of the nineteen pardon petitions involved masters or owners who violated a revenue law. Most often the violation involved landing cargo without notifying customs inspectors. Many landed their goods at night, like Dodge had done. The others involved violations of an embargo on foreign commerce enacted by Congress in 1794.³⁰⁷ The overwhelming majority of cases came from Pennsylvania and states farther north, only three petitions from two cases came from the South. Only one petition was denied. Reasons for granting the pardon varied from the need for evidence against others, inexperience, ignorance, and for no apparent reason. In one case, the owner and master of a schooner were convicted for importing material of foreign growth or manufacture, thus violating the embargo.³⁰⁸ When Washington

303. *See id.*

304. *See id.* at 95–97.

305. *See id.* It is important to note that "appeal" in this case does not mean a legal appeal, but instead refers to merchants' tendency to ask Hamilton to intervene on their behalf.

306. *See infra* text accompanying notes 361–68.

307. *Cabinet Opinion on Enforcing the Embargo, 26 March 1794*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-15-02-0347> (last visited Feb. 1, 2018); *Treasury Department Circular to the Collectors of the Customs, 26 March 1794*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Hamilton/01-16-02-0152> (last visited Feb. 1, 2018).

308. *To George Washington from Alexander Hamilton, 9 June 1794*, FOUNDERS ONLINE, n.1, <https://founders.archives.gov/documents/Washington/05-16-02-0167> (last modified Feb. 1, 2018).

issued the pardons he wrote, “it is made manifest to me that the said cause of the forfeiture arose from ignorance and misinformation and not from fraud or intention to violate the laws.”³⁰⁹ In another petition, co-owners of a vessel who received government permission to travel to a foreign port were prosecuted when the vessel exceeded the terms of their permission.³¹⁰ According to the co-owners, the violations occurred “in consequence of certain acts of benevolence and humanity by them done.”³¹¹ Washington granted these requests as well.³¹² In several instances, the merchants only asked for penalty remission.³¹³ The one instance when a pardon was not granted occurred in April 1791, just after Washington began touring the southern United States.³¹⁴ The case originated in New York.³¹⁵ The defendant had testified against the principal involved, was acting under orders from the captain, had been imprisoned for six months, was in grave health, and seeking only remission of his penalty.³¹⁶ United States District Attorney Harison sent materials to Hamilton for the Treasury Secretary’s review.³¹⁷ Hamilton refused to send the matter to Washington, instead telling Harison that he had permission to grant a remission of penalties through statutory means.³¹⁸

The second category involved three cases against mariners who had committed crimes on the high seas.³¹⁹ Two out of the

309. *James Green and William Martin Pardon, June 11, 1794*, PRESIDENTIAL PARDONS AND REMISSIONS, VOL. 1-4, microformed on Roll T967, RG 59 (National Archives – College Park, MD).

310. *To George Washington from Charles Peter Carpentier, c.19–21 December 1794*, FOUNDERS ONLINE, n.2, <https://founders.archives.gov/documents/Washington/05-17-02-0203> (last modified Feb. 1, 2018).

311. *Id.* at n.4.

312. *Id.*

313. *Id.*

314. *From Alexander Hamilton to Richard Harison, 18 April 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Hamilton/01-08-02-0240> (last modified Feb. 1, 2018); Washington began his southern tour in March and concluded in July. *See March 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/01-06-02-0002-0002> (last modified Feb. 1, 2018).

315. *To Alexander Hamilton from Richard Harison, 8 April 1791*, *supra* note 275.

316. *Id.*

317. *Id.*

318. *Id.*

319. *See Enclosure: Memorial from Oliver Hartshorn, 8 June 1795*, FOUNDERS ONLINE, n.2, <http://founders.archives.gov/documents/Washington/05-18-02-0174-0002> (last modified Feb. 1, 2018); *To George Washington from Edmund Randolph, 6 September 1794*, FOUNDERS

three cases received pardons.³²⁰ The case not receiving a pardon arose in December 1791.³²¹ William Jones assaulted his commander.³²² William Lewis, now the District Court Judge for Pennsylvania, wrote to Washington seeking a pardon for Jones.³²³ Lewis clearly struggled with the case when he heard it:

His former good Conduct for a considerable length of time, his low Circumstances in life, and the helpless situation of his Wife, with one or two children, induced the Court to impose on him as mild a Punishment as a Sence of propriety would admit of, and yet the aggravating Circumstances attending his Conduct on that Occasion, to which he appeared to have been led by intoxication, were such, as to call for exemplary Punishment.³²⁴

At first, Lewis believed he needed to make an example of Jones, but then his “low circumstances” persuaded Lewis to limit the penalty to a \$30 fine.³²⁵ Perhaps Lewis believed Jones could pay the fine but, ultimately, Jones could not and this resulted in him having “suffered more than a months imprisonment without [paying].”³²⁶ Lewis, therefore, recommended clemency.³²⁷ There is no record of any response or action by Washington or the Administration. The inaction may have hastened Lewis’ departure from the bench, as he resigned three weeks later.³²⁸

ONLINE, <http://founders.archives.gov/documents/Washington/05-16-02-0444> (last modified Feb. 1, 2018); *To George Washington from William Lewis, 12 December 1791*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-09-02-0165> (last modified Feb. 1, 2018).

320. See *Enclosure: Memorial from Oliver Hartshorn, 8 June 1995*, *supra* note 319 (pardoning Joseph Hood for manslaughter on the high seas); *To George Washington from Edmund Randolph, 6 September 1794*, *supra* note 319 (pardoning Thomas Norton for larceny committed on the high seas).

321. *To George Washington from William Lewis, 12 December 1791*, *supra* note 319.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. Lewis resigned on January 4, 1792. *To Thomas Jefferson from Benjamin Rush, 4 January 1792*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Jefferson/01-23-02-0013> (last modified Feb. 1, 2018). He had reluctantly taken the position, having first

The other two cases, where pardons were granted, involved larceny and manslaughter.³²⁹ In the first case, Thomas Norton stole silk stockings and had been imprisoned for slightly more than a year.³³⁰ According to Norton, the ship on which he served had been attacked by a privateer.³³¹ He took Francis Moreau's silk stockings and hid them from the invaders.³³² Norton claimed those who lost their property accused Norton of stealing Moreau's.³³³ Following his conviction, District Judge Richard Peters³³⁴ and United States District Attorney William Rawle³³⁵ recommended a pardon.³³⁶ Randolph, who became Secretary of State earlier in the year, concurred.³³⁷ The second case involved a Massachusetts case that came to Washington's attention when the jailer in Boston sought compensation for confining Joseph Hood.³³⁸ Hood was convicted of manslaughter and received an

refused it when offered. *To George Washington from Edmund Randolph, 13 July 1791*, FOUNDERS ONLINE, n.1, <https://founders.archives.gov/documents/Washington/05-08-02-0233#GEWN-05-08-02-0233-fn-0001> (last modified Feb. 1, 2018).

329. See *Enclosure: Memorial from Oliver Hartshorn, 8 June 1795*, *supra* note 319; *To George Washington from Edmund Randolph, 6 September 1794*, *supra* note 319.

330. *To George Washington From Edmund Randolph, 6 September 1794*, *supra* note 319.

331. *Id.* at n.1.

332. *Id.*

333. *Id.*

334. Richard Peters was born in the Philadelphia area and studied law. *Richard Peters II*, PA. ST. SEN., <http://www.legis.state.pa.us/cfdocs/legis/BiosHistory/MemBio.cfm?ID=4714&body=S> (last visited Mar. 11, 2018). Prior to the Revolution, he favored independence from Britain. *Id.* During the War he served as the register for admiralty. *Id.* Following the war, he became involved in Pennsylvania politics, serving in both houses of the Pennsylvania legislature. *Id.* He remained there until 1792 when he replaced William Lewis as the District Judge for Pennsylvania. *Id.* Peters would remain on the bench until his death in 1828. *Id.*

335. William Rawle was born into a Philadelphia Quaker family. See *Rawle Family Papers*, HIST. SOC'Y PA., http://www2.hsp.org/collections/manuscripts/r/rawle536.htm#b_oxfolder1 (last visited Mar. 11, 2018). His father died when Rawle was young and his mother married Samuel Shoemaker, a prominent Loyalist and Quaker. *Id.* When the war commenced, Rawle and Shoemaker fled to New York. *Id.* There Rawle studied law under a former New York Attorney General. *Id.* Following his course of study, Rawle left for more legal study at the Inns of Court, Middle Temple, in London. *Id.* He returned to Philadelphia in 1783 and earned admission to the bar. *Id.* He became active in the Pennsylvania Abolition Society where he met William Lewis. *Id.* The two formed a close working relationship. *Id.* Most likely, when Lewis received his judicial appointment, Lewis recommended Rawle for the United States District Attorney post. *Id.* Rawle received his appointment in July 1791 and served until May 1800. *Id.*

336. *To George Washington from Edmund Randolph, 6 September 1794*, *supra* note 319.

337. *Id.*

338. *Enclosure: Memorial from Oliver Hartshorn, 8 June 1795*, *supra* note 319.

eighteen-month sentence.³³⁹ The pardon application arrived in June 1795.³⁴⁰ When Washington finally issued the pardon, in January 1796 he wrote, “[Hood] has already sustained an imprisonment of many months before his trial an hath an aged mother to maintain.”³⁴¹ Between these three cases, there does not seem to be any connecting idea. Jones’s petition seems equally meritorious as the other two. The only difference is that Jones had served the least amount of imprisonment and suffered the most hardship. Norton’s palliative circumstances do not seem to be a factor as Hood’s case presented none and both were pardoned.

The final category presents a unique case. Prominent Philadelphia merchant John Leamy sought a pardon in advance of committing a crime.³⁴² Leamy sent a memorial to Washington on April 30, 1794, soon after the trade embargo took effect.³⁴³ He claimed to have “Property to the Amount of Sixty thousand Dollars now lying at the Havana, ariseing from shipments made from this Port, & only waiting proper conveyances to bring it hither, but that no Vessells are expected from that Port by which his said Property may be remitted to him.”³⁴⁴ Leamy feared that should war begin, he would be unable to retrieve this property and be ruined financially.³⁴⁵ To retrieve the property, Leamy contracted with a Henry Stephens to sail to Havana and return the property.³⁴⁶ Leamy conducted a substantial Spanish trade and was instrumental in the appointment of the consul to Spain.³⁴⁷ Washington sent the request to Randolph who forwarded it to Hamilton and Secretary of War Henry Knox asking what could be

339. *Id.* at n.2.

340. *Id.*

341. *Id.*

342. *To George Washington from John Leamy, 30 April 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-15-02-0545> (last modified Feb. 1, 2018).

343. *Id.* at n.1.

344. *Id.*

345. *Id.*

346. *Id.*

347. JOHN H. CAMPBELL, HISTORY OF THE FRIENDLY SONS OF ST. PATRICK AND OF THE HIBERNIAN SOCIETY FOR THE RELIEF OF EMIGRANTS FROM IRELAND 120 (1892); *To James Madison from John Leamy, 24 December 1802*, FOUNDERS ONLINE, n.1, <https://founders.archives.gov/?q=leamy&s=1111311111&sa=&r=14&sr=>.

done.³⁴⁸ There is no extant response from either one and the matter does not appear in subsequent correspondence.³⁴⁹ Most likely, someone decided that exceptions could be made as the case of Baltimore merchants Munnikhuisen and Sadler makes clear. However, Leamy's request raises an interesting issue about the pardon power: could Washington have legally pardoned Leamy prior to the journey? This was a strict liability offense.³⁵⁰ Would that make a difference? From a purely policy standpoint, the President pardoning someone prior to violating the law raises concerns. Essentially, granting an advance pardon allows the individual to engage in conduct for which the effects are unknown.³⁵¹ In a typical case, once the offense has occurred, mitigating factors meriting a pardon, appear.³⁵² There is no guarantee of mitigating factors should an advance pardon occur.

Overall, the commercial pardons reveal, once again, the connection between government interest and pardons. The government's economic future rested upon robust interstate and foreign commerce.³⁵³ While most citizens followed the law, some cut corners.³⁵⁴ The customs houses had to balance the needs of commerce with the need for strict enforcement.³⁵⁵ Pardons served as a means to mitigate overly strict enforcement. There were no guiding principles. There was no unifying factor other than the connection to commerce. Further, with one exception, all of the pardons were for those in Maryland and other northern states. This permits an inference that the merchants pardoned likely had

348. *Edmund Randolph to Alexander Hamilton and Henry Knox, 2 May 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-16-02-0308> (last modified Feb. 1, 2018).

349. *See generally id.*; *Edmund Randolph to Alexander Hamilton and Henry Knox, 20 May 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-16-02-0367> (last modified Feb. 1, 2018); *From Alexander Hamilton to Edmund Randolph, 14 May 1791*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-16-02-0350> (last modified Feb. 1, 2018); *To Alexander Hamilton from Edmund Randolph, 7 May 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-16-02-0328> (last modified Feb. 1, 2018).

350. *See From George Washington to Edmund Randolph, 1 March 1791*, *supra* note 220, at n.1.

351. *Memorandum for the Pardon Attorney*, 19 OP. OFF. LEGAL COUNSEL 161-65 (1995) (citing *Ex parte Garland*, 71 U.S. 333, 380-81 (1866)).

352. *Id.*

353. RAO, *supra* note 130, at 75.

354. *Id.* at 83-85; SCHLESINGER, *supra* note 285, at 586-87.

355. RAO, *supra* note 130, at 82-85.

some government connections. Somehow, word reached the northern ports that pardons were available, but it never reached the southern states.³⁵⁶ Ultimately, by using the pardon power to remit penalties for merchants, the government promoted commerce.

C. *The Whiskey Rebellion*

Another piece of Hamilton's economic program was an excise tax on whiskey.³⁵⁷ This tax targeted whiskey distillers.³⁵⁸ All whiskey production was taxed, regardless of the amount produced.³⁵⁹ While the tax had little effect on large distillers, the small farmers on the western edge of the nation felt the effect strongly.³⁶⁰ They wasted little time resisting the collection.³⁶¹ Opposition was so strong in Kentucky that no one would accept the United States district attorney position because that person had responsibility for prosecuting violations.³⁶² In North Carolina and Virginia, people protested strongly.³⁶³ Western Pennsylvania, however, took resistance several steps further: they violently resisted tax collection, in one instance burning the house where the collector resided.³⁶⁴ Several counties organized their resistance and threatened to kill anyone who even assisted with tax collection.³⁶⁵ By August 1794, Hamilton advocated for using the

356. See SCHLESINGER, *supra* note 285, at 586–87.

357. See Andrew Glass, *Excise Tax Imposed on Whiskey, Starts Whiskey Rebellion, Jan. 27, 1791*, POLITICO (Jan. 27, 2009, 4:50 AM), <https://www.politico.com/story/2009/01/excise-tax-imposed-on-whiskey-starts-whiskey-rebellion-jan-27-1791-017976>.

358. See WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY* 62 (2006).

359. *Id.* at 69.

360. *Id.*

361. See *id.* at 70.

362. MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816*, at 101 (2015).

363. See Jeffery J. Crow, *The Whiskey Rebellion in North Carolina*, 66 N.C. HIST. REV. 1, 1 (1989).

364. *From Alexander Hamilton to George Washington, 5 August 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-17-02-0017> (last modified Feb. 1, 2018).

365. Michael Hoover, *The Whiskey Rebellion*, ALCOHOL & TOBACCO TAX & TRADE BUREAU (Aug. 21, 2014), https://www.ttb.gov/public_info/whisky_rebellion.shtml.

militia to suppress resistance.³⁶⁶ Using the militia required a certification from a Supreme Court Justice and meant that the civil judiciary could not control the situation.³⁶⁷ Justice Wilson issued the certification in early August 1794.³⁶⁸ Prior to using the militia, however, Washington sent commissioners to western Pennsylvania hoping to resolve the situation peacefully.³⁶⁹ Attorney General William Bradford,³⁷⁰ one of the commissioners, received authority to pardon any offender who subsequently complied with the law:

That [Washington] is willing to grant an amnesty and perpetual oblivion for every thing which has past—and cannot doubt, that any penalty to which the late transactions may have given birth, under the laws and within the jurisdiction of Pennsylvania may be also wiped away—but upon the following conditions. That satisfactory assurances be given that the laws be no longer obstructed in their execution by any combinations directly or indirectly³⁷¹

Washington hoped the pardons would secure peace.³⁷²

366. *From Alexander Hamilton to George Washington, 5 August 1794, supra* note 364, at n.23.

367. *Proclamation 7 August 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-16-02-0365> (last modified Feb. 1, 2018).

368. *See Conference Concerning the Insurrection in Western Pennsylvania, [2 August 1794]*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-17-02-0009> (last modified Feb. 1, 2018).

369. *See Alexander Hamilton and Henry Knox to George Washington, 5 August 1794*, FOUNDERS ONLINE, n.2, <https://founders.archives.gov/documents/Hamilton/01-17-02-0016> (last modified Feb. 1, 2018).

370. William Bradford was born in Philadelphia and attended Princeton University. *Attorney General: William Bradford*, U.S. DEP'T JUST. (July 7, 2017), <https://www.justice.gov/ag/bio/bradford-william>. He then went to study law under prominent Philadelphia attorney Edward Shippen. *Id.* Bradford enlisted in the Continental Army. *Id.* After the war, he served eleven years as the state's Attorney General. *Id.* When the federal capital moved to Philadelphia, Bradford frequently interacted with those in the federal government. *Id.* When Edmund Randolph moved to Secretary of State, Washington considered many people for Attorney General and eventually decided on Bradford. *Id.* In August 1795, Bradford died while in office. *Id.*

371. *See Alexander Hamilton and Henry Knox to George Washington, 5 August 1794, supra* note 369, at n.3.

372. *Id.*

The Commission's efforts to restore peace failed. Despite meeting with a delegation from those opposed and agreeing to end the resistance in exchange for a pardon, "the proposals of the Commissioners were unfavourably received; that rebellion and hostile resistance against the United States were publicly recommended by some of the members; and that so excessive a spirit prevailed, that it was not thought prudent or safe to urge a compliance with the terms and preliminaries. . . ." ³⁷³ This forced Washington and Hamilton to lead a small militia into western Pennsylvania. ³⁷⁴ In a matter of weeks, the militia restored a semblance of order sufficient for Judge Peters and United States District Attorney Rawle to travel west to prepare criminal prosecutions. ³⁷⁵ People whom the militia arrested went before Rawle and Peters and provided their statements. ³⁷⁶ These statements formed the basis of dozens of prosecutions. ³⁷⁷ They ranged from misdemeanors, such as erecting a liberty pole, to treason. ³⁷⁸ However, the large quantity of cases overwhelmed the small, fledgling federal court system. ³⁷⁹

Pardons became an essential part of the criminal justice process so that the courts could continue functioning. ³⁸⁰ The pardons did not come all at once, however. ³⁸¹ In these cases, pardons not only served the functional aim of administering justice efficiently but the symbolic aim of deterring future resistance to tax collection. ³⁸² The government had to make an

373. *From the Commissioners Sent to Western Pennsylvania, 24 September 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-16-02-0488> (last modified Feb. 1, 2018).

374. *See Hoover, supra* note 365.

375. *From Alexander Hamilton to Henry Lee, 20 October 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-17-02-0317> (last modified Feb. 1, 2018).

376. *See, e.g.*, Deposition of Thomas Hamilton, October 18, 1794, Rawle Family Papers, Pennsylvania Historical Society, Philadelphia, PA.

377. Criminal Case Filed of the US Circuit Court for the Eastern District of Pennsylvania, 1791-1840, *microformed on* Roll M986, RG 21 (National Archives-Philadelphia).

378. *Id.*

379. *See* Patrick Grubbs, *Whiskey Rebellion Trials*, ENCYCLOPEDIA GREATER PHILA., <http://philadelphiaencyclopedia.org/archive/whiskey-rebellion-trials/>.

380. Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 452 (2009).

381. THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 187 (1986).

382. *Id.*

example of some offenders.³⁸³ The militia's commanding officer, Henry Lee, issued the first pardon on November 29, 1794.³⁸⁴ This was a blanket pardon, the first of its kind.³⁸⁵ There is no official record of it in the Secretary of State's pardon records.³⁸⁶ Lee pardoned everyone involved in the insurrection but excepted nearly two dozen people, not counting those in custody who still had to be sorted.³⁸⁷ In advance of this blanket pardon, Washington received a pardon petition from Alexander Fulton, the only pardon petition received prior to the blanket pardon.³⁸⁸ Fulton wrote that he:

considers himself guilty of many offences, which he does not pretend to justify, and as your Petitioner only relies on the sovereign and unmerited mercy of his Country so—he hopes that the particular circumstances attending his almost hopeless case may point him out as a penitent object of that mercy.³⁸⁹

Yet Fulton also minimized his role:

After the law commonly called the Excise law, had passed the usual forms, I was one of its loudest and most zealous Advocates. This marked me as an object of resentment to the concealed, powerful and increasing faction opposed to the law . . . I went so far as to offer to General Neville (if he should be attacked in Washington) my house as an Assylum where I promised to defend him

383. *Id.*

384. *From Alexander Hamilton to William Rawle, [17–19 November 1794]*, FOUNDERS ONLINE, n.2, <https://founders.archives.gov/documents/Hamilton/01-17-02-0359> (last modified Feb. 1, 2018).

385. Menitove, *supra* note 380, at 452.

386. *Clemency Statistics*, U.S. DEP'T JUST., <https://www.justice.gov/pardon/clemency-statistics> (last visited Mar. 11, 2018).

387. *From Alexander Hamilton to William Rawle, [17–19 November 1794]*, *supra* note 384.

388. *To George Washington from Alexander Fulton, October 1794–November 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-17-02-0087> (last modified Feb. 1, 2018).

389. *Id.*

He wrote about his involvement at the burning of Neville's house.³⁹⁰ About his participation in robbing the mails, he wrote:

To attempt to stem the torrent after I was immersed in the stream I found by fatal experience would be vain and fruitless hence I account for my after conduct. Some time after this James Marshal of Washington applied to me to accompany him to David Bradfords to hear some letters read. When we were seated in Mr Bradfords he produced the letters and to my astonishment I found that they had concerted and effected the robbery of the Mail.³⁹¹

If Washington, Hamilton, Lee, or Rawle saw this prior to preparing their list of exceptions from the general pardon, then Fulton's request fell on deaf ears. His name appeared as one excepted from the pardons.³⁹²

As 1795 began, Daniel Morgan, in charge of overseeing security in western Pennsylvania, wrote to Washington about John Mitchell, who had been excepted from the first wave of pardons.³⁹³ David Bradford, one of the rebellion's leaders, had sent Mitchell and William Bradford to take the mail because David Bradford hoped to identify who supported the federal tax.³⁹⁴ Morgan described Mitchell as

a man who appears to me rather an object of pitty than of censure: He is like most others who have been led astray, weak—ignorant and unthinking—His want of proper information, together with his

390. *Id.*

391. *Id.*

392. *From Alexander Hamilton to William Rawle, [17–19 November 1794], supra note 384.*

393. *To George Washington from Daniel Morgan, 19 January 1795*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-17-02-0272> (last modified Feb. 1, 2018).

394. SLAUGHTER, *supra* note 381, at 159. Despite its foundation for criminal prosecutions, texts on the Whiskey Rebellion only briefly mention the incident. James P. McClure, 'Let Us Be Independent': *David Bradford and the Whiskey Insurrection*, 74 PITTSBURGH HIST. 72, 72 (1991); Linda Myrsiades, *A Tale of a Whiskey Rebellion Judge: William Paterson, Grand Jury Charges, and the Trials of the Whiskey Rebels*, 140 PA. MAG. HIST. & BIOGRAPHY 129, 129 (2016).

high opinion of those, who under the specious pretext of patriotism wished to plunge their Country into anarchy, easily rendered him the dupe of the designing³⁹⁵

Attorney General Bradford recognized Mitchell's limited role but did not think a pardon appropriate:

That there does not appear to the Attorney General any thing in this man's case which at this point of time calls for peculiar indulgence: and altho' it may be very consistent with the public interests finally to extend mercy to him, yet as he did not accept the general amnesty offered by the president, and as the security of the Mail is of great public importance, the Attorney General is of opinion that no pardon should be granted before Trial & that some benefit will result from the *Conviction* of a person guilty of this offence altho' he should afterwards receive the mercy he asks.³⁹⁶

Mitchell stood trial for treason in May and was convicted, one of only two treason convictions resulting from nearly 100 cases and twelve trials.³⁹⁷

The second treason conviction was Phillip Vigol (also known as "Wigle") who participated in several attacks on revenue collectors.³⁹⁸ Vigol and Mitchell both received the requisite death sentence.³⁹⁹ Almost immediately, the President received petitions for pardons, especially for Vigol, who appeared to be mentally incompetent.⁴⁰⁰ One of the more eloquent petitions came from Philadelphia's Grand Inquest. It wrote:

395. *To George Washington from Daniel Morgan, 19 January 1795, supra* note 393.

396. *To George Washington from William Bradford, 9 March 1795*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-17-02-0425> (last modified Feb. 1, 2018).

397. SLAUGHTER, *supra* note 381, at 188.

398. *Id.* at 187–88.

399. *To George Washington from "Incog.," 10 June 1795*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-18-02-0161> (last modified Feb. 1, 2018).

400. *Id.*

[I]f the principal objects of punishment are to reform the sufferer, and to warn others from the perpetration of similar offences, the Grand Inquest are persuaded, that the death of the two culprits, left by the law at this time dependent upon your mercy, cannot add to the remorse, which the detestation of the Community has awakened, nor impair that security against a repetition of such crimes, which results from an experien[ce] of the practical energy of the Government.

The Grand Inquest are neither disposed, nor able, to extenuate the offences, that have been perpetrated by the convicts, to whose cases they have referred: but in addition to the remark, which they have made on the subject, it may not be improper to observe that the Leaders in the recent outrage offered to the Laws, have escaped either by flight, or by a reliance on the faith of Government: The victims offered, therefore, to the justice of the Country, if not the most innocent, are, probably, the most ignorant; and the impunity, which has been obtain[ed] by the art and machinations of others, may not, perhaps, be unseasonably requested, in pity to their folly and delusion.⁴⁰¹

Ten days after the Grand Inquest wrote its petition, Washington granted both Mitchell and Vigol a reprieve for six months.⁴⁰² On November 2, 1795, just as the reprieve was set to expire, Washington pardoned Mitchell and Vigol.⁴⁰³ According to their pardon, “the restoration of peace, order and submission to the laws . . . renders it unnecessary to make examples of those who have been so convicted, the principal and end of human punishment being the reformation of others”⁴⁰⁴ While there

401. *To George Washington from Philadelphia Citizens, 15 June 1795*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-18-02-0177> (last modified Feb. 1, 2018).

402. Crouch, *supra* note 15, at 724.

403. *Philip Vigol Stay of Execution, 16 June 1795*, FOUNDERS ONLINE, n.1, <https://founders.archives.gov/documents/Washington/05-18-02-0181> (last modified Feb. 1, 2018).

404. *Id.*

is no reason to doubt the sincerity of this rationale, Washington had little choice but to issue the pardon. He had already extended mercy to most offenders with only those having fled remaining.⁴⁰⁵ Juries acquitted everyone else for want of sufficient evidence.⁴⁰⁶ The two convictions obtained resulted in multiple pardon petitions.⁴⁰⁷ Neither had led the insurrection.⁴⁰⁸ Had Washington not pardoned Mitchell and Vigol, a renewed insurrection in western Pennsylvania might have occurred.

Washington was not done with pardons resulting from the insurrection in western Pennsylvania. The leaders had escaped and had yet to be prosecuted, let alone pardoned.⁴⁰⁹ In April 1796, several petitions arrived seeking a general pardon for those whose cases had not been otherwise disposed.⁴¹⁰ When the petitions arrived, Washington requested his new Attorney General, Charles Lee,⁴¹¹ meet with Rawle.⁴¹² Lee and Rawle conferred and agreed on their preferred course of action. “We concur in opinion that so long as any offender keeps himself out of the power of that court to which he is properly amenable, he is not to be deemed a fit object of mercy.”⁴¹³ Lee reported that Daniel Hamilton, in particular, did not merit a pardon. He concluded, “I cannot think it expedient under these circumstances to cease the prosecution

405. *George Washington—Proclamation of July 10, 1795*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/gwproc12.asp (last visited Apr. 12, 2018).

406. *Insurrection in Western Pennsylvania: The Whiskey Rebellion*, PAPERS WAR DEP'T (Apr. 27, 2011), <http://wardepartmentpapers.org/blog/?p=285>.

407. *To George Washington from “Incog.,” 10 June 1795*, *supra* note 399.

408. *Id.* at n.1.

409. Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN MAG. (Aug. 29, 2017), <https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/>.

410. *From George Washington to Daniel Leet, 24 April 1796*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/99-01-02-00468> (last modified Feb. 1, 2018).

411. Charles Lee was born in Virginia in 1758. *Charles Lee (1795-1797)*, MILLER CTR., <https://millercenter.org/president/washington/essays/lee-1795-attorney-general>. His brother was Henry Lee, the governor of Virginia and the militia leader in the Whiskey Rebellion. *Id.* Charles Lee attended Princeton University and studied law with Jared Ingersoll, a prominent Philadelphia attorney and signer of the Constitution. *Attorney General: Charles Lee*, DEP'T JUST., <https://www.justice.gov/ag/bio/lee-charles>. Lee was admitted to the bar in June 1794. *Id.* In December 1795, he became Attorney General. *Id.* Despite his inexperience, Lee served as Attorney General until Thomas Jefferson became the third President. *Id.*

412. *To George Washington from Charles Lee, 18 April 1796*, *supra* note 43.

413. *Id.*

against Daniel Hamilton, or at this time generally to pardon those who have heretofore been excepted.”⁴¹⁴ Washington concurred, sending a letter to Daniel Leet, one of those who petitioned for pardons on behalf of those who absconded.⁴¹⁵

While citizens accused of crimes or misdemeanors are endeavouring to elude a fair trial by the laws of the land, absconding or otherwise keeping themselves from the power of the court to which most properly they are amenable they seem not entitled to the clemency of government; and more especially when that clemency is not solicited by the offenders themselves. Under these circumstances they, in whose behalf you have been led by motives of compassion to intercede, are not deemed now to deserve the forgiveness of their country.⁴¹⁶

Here, Washington returned to his thinking behind his refusal to grant Bird a pardon in 1790. No palliative circumstances existed to justify pardoning those who eluded capture.

Less than a year later, Washington reversed course. On his last full day as president, Washington extended pardons to nearly all remaining insurgents, regardless of their status.⁴¹⁷ In doing so, he established a precedent for pardoning people on the last day of an Administration.⁴¹⁸ The first was for Benjamin Parkinson who had been a leading member of the Mingo Creek Democratic Society.⁴¹⁹ United States Marshal David Lenox wrote to Washington the previous June seeking a pardon for Parkinson because Parkinson had been helpful when Lenox made efforts to calm the situation.⁴²⁰ Though excepted from the first pardon,

414. *Id.*

415. *From George Washington to Daniel Leet, 24 April 1796, supra note 410.*

416. *Id.*

417. *Washington, George (1732–1799) [Presidential Pardon of the Ten Ringleaders of the Whiskey Rebellion, Who Had Been Convicted of High Treason]*, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/content/presidential-pardon-ten-ringleaders-whiskey-rebellion-who-had-been-convicted-high-treason> (last visited Apr. 20, 2018).

418. *Id.*

419. *From Alexander Hamilton to William Rawle, [17–19 November 1794], supra note 384.*

420. *To George Washington from David Lenox, 3 June 1796*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/99-01-02-00583> (last modified Feb. 1, 2018).

Parkinson's pardon was consistent with the outcome of other cases where people had resisted the tax but had attempted to prevent violence.⁴²¹ In a separate document, Washington pardoned those involved in the mail robbery.⁴²² According to the pardon, Daniel Hamilton, William Miller, Richard Holcroft, Ebenezer Gallagher, William Hannah, Peter Sisle, David Locke, Alexander Fulton, Samuel Hannah, and Thomas Spiers had afterward engaged in good behavior and Washington had a ". . . desire to temper the administration of justice with a reasonable extension of mercy in cases which appear to require it."⁴²³

While Washington no doubt desired to extend mercy as he departed the presidency, his wording left room for a sub-text. Why did these particular cases appear to require mercy, especially when, less than a year prior, they did not? The answer is two-fold. First, Washington did not want the incident to extend beyond his presidency. As John Adams assumed the role, Washington wanted him to do so with a clean-slate. Second, as a practical matter, Washington likely knew prosecutions were impossible. It had been thirty months since the insurrection.⁴²⁴ Locating the witnesses to prosecute the leaders after such a long time would be impossible.⁴²⁵ The government failed to provide sufficient evidence six months after the events;⁴²⁶ two additional years would not make prosecution any easier. Therefore, Washington had practical reasons for pardoning people as he left office.

Curiously, however, he did not pardon David Bradford.⁴²⁷ Bradford was an attorney in western Pennsylvania and an officer in the Democratic Society of the County of Washington in

421. *George Washington—Proclamation of July 10, 1795*, *supra* note 405.

422. *Presidential Pardon of the Ten Ringleaders*, *supra* note 417.

423. *Id.*

424. The insurrection ended in October of 1794. *Timeline: Whiskey Rebellion*, CLASSROOM CONTEXT, http://clic.cengage.com/uploads/efacfa7e94deb2ee0f663aa33691db7a_1_3772.pdf. George Washington's last day of his presidency was March 4, 1797. *US Presidents in the Census Records*, NAT'L ARCHIVES, <https://www.archives.gov/research/census/presidents> (last visited Apr. 20, 2018).

425. Janis Merle Caplan, Note, *Better Never Than Late: Pre-Arrest Delay As a Violation of Due Process*, 1978 DUKE L.J. 1041, 1041–42.

426. Hoover, *supra* note 365.

427. *To George Washington from Elizabeth Bradford, 10 December 1794*, FOUNDERS ONLINE, n.3, <http://founders.archives.gov/documents/Washington/05-17-02-0172> (last modified Feb. 1, 2018).

Pennsylvania.⁴²⁸ While the Society did little, the Administration quickly associated it with the Mingo Creek Association, which was behind some of the most violent attacks.⁴²⁹ Yet, Bradford, perhaps due to his high social standing, became a vocal opponent of the excise.⁴³⁰ He hosted a party for those who attacked the house where the revenue collector resided.⁴³¹ He also participated in reading the mail stolen by Fulton and others.⁴³² When the militia arrived, Bradford fled west, leaving his family.⁴³³ Throughout 1795, his wife, Elizabeth, petitioned for Bradford's pardon on many occasions.⁴³⁴ Yet, none was forthcoming. What made Bradford different? Others like Parkinson participated at an equal level and received pardons.⁴³⁵ It is possible that Washington, Lee, and Secretary of State Timothy Pickering⁴³⁶ simply overlooked him. Neither Lee nor Pickering had been involved in the government's response to the insurrection.⁴³⁷ Yet, Bradford never expressed remorse.⁴³⁸ Other than his wife, no one spoke for him.⁴³⁹ It was not

428. HOGELAND, *supra* note 358, at 137. On Democratic Societies, see Albrecht Koschnik, *The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, circa 1793-1795*, 58 WM. & MARY Q. 615, 617-18 (2001).

429. HOGELAND, *supra* note 358, at 138. Slaughter also sees Bradford as someone who was somewhat involuntarily brought into the insurrection. SLAUGHTER, *supra* note 381, at 183-85.

430. HOGELAND, *supra* note 358, at 138; SLAUGHTER, *supra* note 381, at 183-85.

431. SLAUGHTER, *supra* note 381, at 183-85.

432. *Id.* at 185.

433. *Id.*

434. *To George Washington from Elizabeth Bradford, 10 December 1794*, *supra* note 427; *To George Washington from Elizabeth Bradford, 10 September 1795*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-18-02-0435> (last modified Feb. 1, 2018).

435. *To George Washington from Alexander Fulton, October 1794-November 1794*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-17-02-00870435> (last modified Feb. 1, 2018).

436. See *Biographies of the Secretaries of State: Timothy Pickering (1745-1829)*, OFF. HISTORIAN, <https://history.state.gov/departmenthistory/people/pickering-timothy> (last visited Aug. 31, 2017). Timothy Pickering was born in Massachusetts and attended Harvard College. *Id.* He studied law and then served in the Revolutionary Army. Following the war, he moved to Pennsylvania and attended the Constitution Ratification Convention for Pennsylvania. *Id.* He then became Postmaster General in 1791, serving until his appointment as Secretary of War in 1795. *Id.* Soon after, Edmund Randolph resigned as Secretary of State and Pickering served as Secretary of State for a period of time. *Id.* He would remain as Secretary of State until 1800. *Id.*

437. The Whiskey Rebellion ended in October 1794. See *Timeline: Whiskey Rebellion*, *supra* note 424. Pickering did not ascend to the position of Secretary of War until August 1795. See *Biographies of the Secretaries of State*, *supra* note 436. But see Hoover, *supra* note 365 (discussing Lee's involvement in the government reaction to the Whiskey insurrection).

438. SLAUGHTER, *supra* note 381, at 197.

until 1798 that Bradford wrote President Adams to express contrition for his conduct.⁴⁴⁰ Adams ultimately pardoned Bradford on March 9, 1799.⁴⁴¹

While commercial pardons arose most frequently, the criminal cases involving the Whiskey Rebellion generated the largest number of pardoned individuals.⁴⁴² This stands to reason as more criminal cases emanated from this event than the rest of the decade combined.⁴⁴³ In these cases, Washington asserted that he pardoned people in a show of mercy and as a sign of reconciliation.⁴⁴⁴ Yet, like the other pardon categories, these reasons do not completely explain the conduct. If mercy was the stated goal, why did Rawle, Lee, and Washington refuse to pardon people immediately? If mercy was the stated goal, why did Washington only grant a reprieve to Mitchell and Vigol, rather than an immediate pardon? One might answer that the timing was not yet proper because Washington was not convinced there would not be a repeat of 1794 in 1795. Once the tax was collected without opposition in 1795, then he could pardon them in order to reconcile the nation. While this might be true of Mitchell and Vigol, who were facing execution, why did Washington not pardon the others? If he wanted to reconcile the nation, why leave so many unpardoned? The answer to these questions is that pardoning the others was not in the government's immediate interest. As Lee and Rawle pointed out, those who were not pardoned were fugitives from justice, not deserving pardons.⁴⁴⁵ They still hoped to apprehend the offenders.⁴⁴⁶ It was not until

439. *To George Washington from Elizabeth Bradford, 10 September 1795, supra note 434; see To George Washington from Elizabeth Bradford, 10 December 1794, supra note 427.*

440. *To John Adams from David Bradford, 20 September 1798*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/99-02-02-3003> (last modified Feb. 1, 2018); Ron Schuler, *Early Pittsburg Lawyers and the Frontiers of Argument and Dissent*, 73 U. PITT. L. REV. 657, 666 (2012).

441. *To George Washington from Elizabeth Bradford, 10 December 1794, supra note 427*, at n.3.

442. Hoover, *supra* note 365.

443. HENDERSON, *supra* note 65.

444. Robert Nida & Rebecca L. Spiro, *The President As His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 207-08 (1999).

445. *To George Washington from Charles Lee, 18 April 1796, supra note 43.*

446. *Id.*

Washington's second term expired that the Administration decided pardons were appropriate.⁴⁴⁷

D. Pardons As Foreign Policy

In addition to promoting welfare, another of the Constitution's purposes was to "provide for the common defense."⁴⁴⁸ The Constitution delegated control over foreign affairs to the President.⁴⁴⁹ In 1793, the United States faced its first foreign policy crisis under the new Constitution.⁴⁵⁰ When France declared war on Great Britain, it placed the United States in a difficult position.⁴⁵¹ It relied upon trade with Great Britain and had treaty obligations to France.⁴⁵² Washington sought a neutral course that would protect the United States and earn itself a place among Europe's respectable nations.⁴⁵³ One way Washington accomplished this was to use the criminal prosecution.⁴⁵⁴ Pardons became part of this process. Between 1793 and 1796, Washington received three pardon petitions related to foreign affairs. Two of those three emanated from the war between France and Great Britain. The third involved a consul from Genoa who attempted to extort money from the British Minister to the United States.

The Western Hemisphere theater of the war between France and Great Britain involved privateers.⁴⁵⁵ Privateers were citizens of warring powers who operated their private vessels on behalf of a warring nation to attack vessels of the opposing

447. Carrie Hagen, *The First Presidential Pardon Pitted Alexander Hamilton Against George Washington*, SMITHSONIAN MAG. (Aug. 29, 2017), <https://www.smithsonianmag.com/history/first-presidential-pardon-pitted-hamilton-against-george-washington-180964659/>; *President Washington's Second Term (1793-1797)*, MOUNT VERNON, <http://www.mountvernon.org/george-washington/the-first-president/second-term-1793-1797/> (last visited Mar. 11, 2018).

448. U.S. CONST. pmb1.

449. See U.S. CONST. art. II.

450. See Stephen Knott, *George Washington: Foreign Affairs*, MILLER CTR., <https://millercenter.org/president/washington/foreign-affairs> (last visited Mar. 11, 2018).

451. *Id.*

452. *John Jay's Treaty*, *supra* note 162.

453. Scott Ingram, *Replacing the Sword of War with the Scales of Justice: Henfield's Case and the Origins of Lawfare in the United States*, 9 J. NAT'L SECURITY L. & POL'Y (forthcoming 2018).

454. *Id.*

455. WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL* 43 (2006).

nation.⁴⁵⁶ Once the privateer captured a vessel from an opposing nation, known as a prize, the privateer had to deliver the prize to an admiralty court operated by the sponsoring nation.⁴⁵⁷ The admiralty court would determine the seizure's lawfulness and, if lawful, award the prize to the privateer.⁴⁵⁸ The privateer would sell the prize and split the proceeds with the sponsoring nation.⁴⁵⁹ The problem for France in the Western Hemisphere was that it had no ports it controlled along the east coast of the United States.⁴⁶⁰ To solve this problem, France utilized their consuls in the United States as prize courts.⁴⁶¹ While France believed this was consistent with its treaty with the United States, the United States disagreed and, as part of its neutrality, refused to allow either side to arm privateers in its ports.⁴⁶² In an April 1793 proclamation, Washington declared any American citizen who assisted or served on a privateer for either side would face criminal prosecution.⁴⁶³ Fourteen months later, Congress codified Washington's proclamation.⁴⁶⁴ The two pardon petitions Washington received resulted from violations of this law.

The first case involved Samuel Rogers who served on a French vessel, the *Concorde*.⁴⁶⁵ On September 3, Rogers piloted the *Concorde* when it fired upon the *Success*, which was sailing from Boston to Halifax, Nova Scotia.⁴⁶⁶ During the conflict, someone took clothing and money from passengers.⁴⁶⁷ Some of the clothing reached Rogers.⁴⁶⁸ Upon his arrest he admitted piloting the *Concorde*.⁴⁶⁹ In October 1794, a Massachusetts jury convicted

456. *Id.*

457. *Id.*

458. *Id.* at 44.

459. *Id.*

460. *Id.* at 38.

461. *Id.* at 39.

462. *Neutrality Proclamation, 22 April 1793*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/05-12-02-0371> (last modified Feb. 1, 2018).

463. *Id.*

464. *Neutrality Proclamation*, MOUNT VERNON, <http://www.mountvernon.org/digital-encyclopedia/article/neutrality-proclamation> (last visited Mar. 11, 2018).

465. *To George Washington from Edmund Randolph, 4 November 1794*, FOUNDERS ONLINE, n.1, <https://founders.archives.gov/documents/Washington/05-17-02-0096> (last modified Feb. 1, 2018).

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

Rogers despite his counsel's argument that the law did not apply to a mere pilot.⁴⁷⁰ Following Rogers's conviction, the court delayed sentence until the next circuit court session.⁴⁷¹ This allowed the French Minister to the United States Joseph Fauchet to petition the administration to pardon Rogers.⁴⁷² Fauchet's petition has not been located but Secretary of State Randolph forwarded the petition to Washington asking, "whether it may not be better to grant a pardon under the peculiar circumstances of the case."⁴⁷³ Washington reviewed the matter and agreed to pardon Rogers.⁴⁷⁴ However, Washington reconsidered upon receiving additional information from Christopher Gore,⁴⁷⁵ the United States Attorney for the Massachusetts District.⁴⁷⁶ Gore, a vocal Federalist who would become one of the American commissioners to Britain under the Jay Treaty, presented Washington with additional information that made Washington withhold the pardon.⁴⁷⁷ Gore's motivation was suspect as he represented the *Concorde's* owners in a civil suit to recover the vessel.⁴⁷⁸ This provided Gore with more information about the case than Randolph and, perhaps, provided Washington a more complete view of the case than Fauchet provided via Edmund Randolph. Regardless, Washington refused to pardon Rogers.⁴⁷⁹

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.*

475. *Gore, Christopher, (1758–1827)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000322> (last visited Mar. 11, 2018). Christopher Gore was born in Boston, the son of a loyalist family. *Id.* He attended Harvard and studied law. *Id.* By the late 1780s he became prominent in Massachusetts politics. *Id.* He also strongly supported the new Federal government. *Id.* This led to his appointment as the first United States District Attorney for Massachusetts. *Id.* He remained in this position until his appointment as a Commissioner to England under Jay's Treaty. *Id.*

476. *Id.*

477. HELEN REISINGER PINKNEY, CHRISTOPHER GORE, FEDERALIST OF MASSACHUSETTS, 1758-1827 (Gore Place Society, 1969).

478. *To George Washington from Edmund Randolph, 4 November 1794*, *supra* note 465.

479. *See* FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 90 (1849).

With Rogers's case completed, a similar matter arose in Philadelphia involving John Etienne Guinet.⁴⁸⁰ Philadelphia's collector of revenue initiated the investigation with a letter to Hamilton informing him that a vessel named *Les Jumeaux* had left Philadelphia after having been fitted out as a privateer.⁴⁸¹ The vessel was British-owned but sailed from Port-au-Prince to Philadelphia as a French ship.⁴⁸² When it arrived only four of its twenty port holes were open for cannons.⁴⁸³ Jean Baptiste le Maitre, the owner, negotiated with a Philadelphia craftsmen to open the remaining sixteen port holes and make other necessary repairs.⁴⁸⁴ Guinet served as le Maitre's principal negotiator and interpreter.⁴⁸⁵ Once the repairs were completed, the vessel departed Philadelphia with its purpose and destination uncertain.⁴⁸⁶ This likely triggered the revenue collector's report.⁴⁸⁷ Witnesses who saw the vessel sail along the Delaware River claimed that it only had the four cannon with which it arrived.⁴⁸⁸ Yet, Guinet, upon his arrest, had in his possession several more guns that he had recently purchased, apparently for outfitting the vessel.⁴⁸⁹ This was sufficient evidence for the jury to convict Guinet.⁴⁹⁰ For his role in the offense, Guinet received a twelve month sentence and a \$400 fine.⁴⁹¹ After serving his confinement, Guinet lacked funds to pay the fine.⁴⁹² Accordingly, Washington pardoned Guinet's fine on the condition that he was not held for any other reason.⁴⁹³

480. *To George Washington from Alexander Hamilton, 31 January 1795*, FOUNDERS ONLINE, nn.1-2, <http://founders.archives.gov/documents/Washington/05-17-02-0310> (last modified Feb. 1, 2018).

481. *Id.*

482. *Id.* at n.2.

483. *See* WHARTON, *supra* note 479, at 95.

484. *Id.* at 96.

485. *Id.* at 95.

486. *Id.*

487. *From Alexander Hamilton to William Rawle, 28 December 1794*, FOUNDERS ONLINE, n.1, <http://founders.archives.gov/documents/Hamilton/01-17-02-0479> (last modified Feb. 1, 2018).

488. *See* WHARTON, *supra* note 479, at 96.

489. *Id.* at 97.

490. *Id.* at 101.

491. *Id.* at 94.

492. *Id.*

493. Jean Etienne Guinet Pardon, *Presidential Pardons and Remissions*, vol. 1-4, *microformed on Roll T967, RG 59* (National Archives – College Park, MD).

There is little that distinguishes these two cases. Both offenders played a minor role in their respective cases. Guinet served as interpreter for the French owner. Rogers served as pilot for the French owner. Whether either knew the overall scheme is questionable. Both seemed to be people looking for work and hoping to use their skills to earn a living. Rogers and Guinet became pawns in the international diplomacy between France and the United States. Yet, Guinet received a pardon and Rogers did not.⁴⁹⁴ Perhaps the main difference was the sentence. Guinet served his sentence but could not afford the fine and, therefore, could not be released.⁴⁹⁵ This situates him similarly to the merchants who asked for penalty remission. Rogers served twenty-three weeks, so it is possible that Washington thought the sentence necessary and not unduly costly.⁴⁹⁶ It is more likely, however, that Gore's private interests or public political persuasions led to this disparity between Rogers and Guinet.

A final pardon was issued for a man named Joseph Ravara, a consul from Genoa, living in Philadelphia.⁴⁹⁷ In an isolated case, it appears that he sent letters to Washington and several British citizens, including George Hammond, the British Minister to the United States.⁴⁹⁸ Some letters threatened harm if the recipients did not pay \$200.⁴⁹⁹ Hammond complained to the government.⁵⁰⁰ Rawle dispatched Hilary Baker, a Philadelphia alderman, to investigate.⁵⁰¹ This led to Ravara's arrest.⁵⁰² At a special session of the circuit court in July 1793, a grand jury indicted Ravara.⁵⁰³ He

494. *To George Washington from Edmund Randolph, 4 November 1794, supra note 465.*

495. *Jean Etienne Guinet Pardon, supra note 493.*

496. *See Enclosure: Memorial from Oliver Hartshorn, 8 June 1795, supra note 319.*

497. *To George Washington from Joseph Ravara, 10 May 1793, FOUNDERS ONLINE, n.1, <http://founders.archives.gov/documents/Washington/05-12-02-0448> (last modified Feb. 1, 2018).*

498. *Id.*

499. *Id.*

500. John D. Gordan III, *United States v. Ravara: "Presumptuous Evidence," "Too Many Lawyers," and a Federal Common Law Crime, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, supra note 61, at 106, 116.*

501. *Id.*

502. *Id.* at 112.

503. SAMUEL T. SPEARS, *THE LAW OF THE FEDERAL JUDICIARY: A TREATISE ON THE PROVISIONS OF THE CONSTITUTION, THE LAW OF CONGRESS AND THE JUDICIAL DECISIONS RELATING TO THE JURISDICTION OF, AND PRACTICE AND PLEADING IN THE FEDERAL COURTS* 671 (Baker, Voorhis & Co., Law Publishers ed., 1883).

went to trial in April 1794 and was found guilty.⁵⁰⁴ The next day, without any formal petition, Washington pardoned Ravara.⁵⁰⁵ According to Washington, this was purely a matter of diplomacy. “I have thought proper from sentiments of respect for the said Republic of Genoa, and from other good causes and considerations.”⁵⁰⁶ Similar to Philip Vigol’s case that would arise the next year, there were questions about Ravara’s competency, hence Washington’s reference to “other good causes.” Ultimately, Ravara’s case sits as an outlier and, perhaps, the one case of pardon based on mercy.

E. Understanding Washington’s Pardons

Washington’s pardons defy simple categorization. They do not fit neatly into a single box. He issued pardons in a wide-range of cases for a wide-range of reasons. Nevertheless, certain trends emerge through the pardons issued. On the surface, Washington’s pardons reflect the conventional wisdom that pardons should be used to promote justice and mercy and to mitigate the harsh effects of sentencing. Yet, uncovering Washington’s standards for determining who was worthy of mercy is essential for understanding Washington’s motivations for pardoning some people and not others similarly situated. Instead, political factors greatly influenced Washington’s perceptions of who deserved mercy. These included the pardon’s symbolic power, the desire to promote commerce, and the government’s self-interest. Of these three, the government’s self-interest proved to be the predominate factor.

Symbolism played an important role in Washington’s pardon decisions, appearing in the first pardon petition Washington received. When Thomas Bird petitioned for a pardon, Washington understood that his decision set a precedent. He denied the pardon due to the lack of palliative circumstances. Washington concluded that pardoning Bird would set a bad precedent. Not everyone who asks for a pardon should get one.

504. GEORGE VAN SANTVOORD, SKETCHES OF THE LIVES AND JUDICIAL SERVICES OF THE CHIEF-JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 58–59 (Charles Scribner ed., 1854).

505. *Id.* at 59.

506. Joseph Ravara Pardon, Presidential Pardons and Remissions, vol. 1-4, *microformed on Roll T967, RG 59* (National Archives – College Park, MD).

Several years later, Washington exercised his pardon power in a symbolic manner by pardoning several insurgents associated with the Whiskey Rebellion. Mitchell and Vigol, the only two convicted of treason, were pardoned after an initial reprieve. In the pardon, Washington referred to the restoration of peace. Pardoning Mitchell and Vigol symbolized that.

Not all pardons were symbolic because most pardons occurred without significant attention. Washington used his pardon power primarily to benefit merchants, upon whom the financial health of the nation depended. Revenue collectors at the customs houses used their discretion and did not fully enforce the new nation's revenue laws. When they did bring cases, however, many northern merchants utilized their connections with federal judges, federal prosecutors, and Alexander Hamilton to obtain pardons from Washington. Washington's use of the pardon power presented a problem though. By completely pardoning revenue law violators, government informants lost their incentive to report revenue violations. This conflict caused the government to ignore Swain's pardon petition. His dire circumstances provided sufficient justification to show mercy. Yet, neither Washington nor Congress mitigated the harsh effects of Swain's punishment. It was not until six months later, when a government employee and Revolutionary War veteran, Samuel Dodge, was convicted of landing goods after seven at night, that the United States Attorney for New York, Richard Harison, crafted conditional pardons. Harison suggested that pardons occur after the merchant paid the informant's share. This creative solution allowed the government to have it both ways. It could pardon merchants while ensuring informants were paid.

Above all, government interests provided the primary justification for the government to show mercy to those convicted of crimes. Beyond the aforementioned commercial benefits, the government pardoned people as a form of immunity. They used it to avoid prosecuting insurgents who could not be located nor successfully prosecuted. The need for government interest emerged in the very first pardon petition when no such interest arose. Thomas Bird was part of a slave trader and British. Less than a year later, the administration pardoned one person and prepared a pardon for another to prosecute a counterfeit ring. Despite the pardon, the prosecution failed and the ringleaders escaped. The scenario repeated itself three years later when the

Whiskey Rebellion arose. The government issued a general pardon hoping to calm the situation. Using Harison's idea from the Dodge case, the government conditioned the pardon on law adherence. Many people came forward and gave sworn statements incriminating others. In a second general pardon, the government excepted those who were incriminated. Many of those, however, escaped, never to be located. Then, over time, to save itself from losing cases due to insufficient evidence, the government pardoned the others. Finally, in foreign affairs, when the government needed to demonstrate strict law enforcement in neutrality matters, the government did not pardon one person and only pardoned another because his prison sentence expired. Certainly, the government displayed mercy through its pardons but only when the government benefitted.

III. CONCLUSION

With President Washington using politics as his criteria for mercy, what does this mean for today? First, we must not view pardons with rose-colored glasses. Second, we must understand that pardons are not granted for one reason alone. Third, when the pardon power is used for policy purposes, a long line of precedent justifies it. Finally, there are unwritten limits to the pardon power that must be understood.

Scholars and commentators on the pardon power begin with the premise that pardons should only be used to show mercy and to mitigate the harm caused by a rigid criminal justice system.⁵⁰⁷ Pardons are judged by this standard. Rarely, if ever, are considerations about why one person deserved mercy and another did not analyzed. Only when the specter of politics rises, will commentators question the wisdom of the pardon power and argue for limitations. What Washington's pardon practice tells us is that pardons have always been tinged with political considerations. Criminal prosecution is an inherently political act. It utilizes the state's power to coerce compliance with its laws. Similarly, the pardon power is an inherently political act. Politics and pardons are not only mixed but intertwined.

507. Bennett L. Gershman & Joel Cohen, *Pardoning Criminals—Appropriate Mercy or Perverting Justice?*, HUFFINGTON POST (Jan. 18, 2012, 1:00 PM), https://www.huffingtonpost.com/bennett-l-gershman/pardoning-criminals-appro_b_1211239.html.

Second, we also tend to see pardons as singularly motivated. Supposedly, if the President pardons a political ally, then that relationship must be the reason. That is not necessarily the case. While the relationship might be a factor, pardons can serve multiple purposes at once. We need to scrutinize pardons more thoroughly to understand their motivations. Rather than focusing on the identities, we need to understand the issues. This requires thinking more broadly about the pardon power. Washington's stated reasons provide one layer, but the reasons must be viewed in context. What other events were happening? Who was *not* pardoned? Examining these issues provides a clearer guide for when exercising the pardon power is justified.

Whether we like it or not, policy considerations play a significant role when exercising the pardon power. This is evidenced by President Trump's pardon of Joe Arpaio. Putting aside the pardon's merits, the pardon was consistent with Trump's political position on illegal immigration.⁵⁰⁸ President Obama used the pardon power to mitigate the harm caused by what he perceived to be excessive federal sentences for drug abusers.⁵⁰⁹ Similarly, President Washington used his pardon power to promote commercial interests. Scholars and commentators can find fault with both instances. Rather than critique these individual uses, however, we should focus on the presence of a policy. It is better to have a pardon policy than to randomly award pardons for no reason. As Washington's pardons demonstrate, he had a clear focus when granting pardons. Pardons advanced his goals of promoting the general welfare through expanding commerce and ensuring the nation's security by enforcing its laws and the symbolically healing the divisions enforcement created.

The final lesson emerging from Washington's pardons is that there are unwritten limits to the power. The Constitution only prevents the President from pardoning impeachable offenses.

508. Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Ex-Sheriff Seen As Migrant Foe*, N.Y. TIMES, Aug. 26, 2017, at A1; see Eliana Johnson & Josh Dawsey, *Trump Crafting Plan to Slash Legal Immigration*, POLITICO (July 12, 2017, 7:07 PM), <http://www.politico.com/story/2017/07/12/trump-legal-immigration-cuts-240478> (referencing Trump's broader immigration policy).

509. Sari Horwitz, *Obama to Commute Hundreds of Federal Drug Sentences in Final Grants of Clemency*, WASH. POST (Jan. 16, 2017), https://www.washingtonpost.com/world/national-security/obama-to-commute-hundreds-of-federal-drug-sentences-in-final-grants-of-clemency/2017/01/16/c99b4ba6-da5e-11e6-b8b2-cb5164beba6b_story.html?utm_term=.8586425470e3.

However, Washington's practice reveals other limits. If the pardon adversely affects another person's financial interests, the President cannot grant the pardon without at least compensating the person detrimentally affected. If palliative circumstances are not present, then the President should not exercise the pardon power as those pardons cannot be justified under the nation's laws. Ultimately, these limits are political. If the President chooses to disregard them, there are only political consequences.

Like prosecutorial discretion, there are few limits on the pardon power. The President has near complete discretion to pardon whomever whenever the President chooses.⁵¹⁰ To restrain this power requires reliance on the political process. If the political costs of pardoning are substantial enough, the President will not grant the pardon. This is why Presidents wait until their final days to announce substantial pardons. Of course, when Presidents pardon people on their last day in office, they follow the precedent set by the nation's first President.

510. U.S. CONST. art. II, § 2.