Marcus III
Norfolk and Portsmouth Journal, 5 March 1788 (excerpt)

Answers to Mr. Mason's *Objections* to the New Constitution, Recommended by the late Convention at Philadelphia.

VIth. Objection.

"The President of the United States, has the unrestrained power of granting pardons for treason, which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt."

Answer.

Nobody can contend upon any rational principles, that a power of pardoning should not exist somewhere in every government, because it will often happen in every country, that men are obnoxious to a legal conviction, who yet are entitled, from some favorable circumstances in their case, to a merciful interposition in their favor. The advocates of monarchy have accordingly boasted of this, as one of the advantages of that form of government, in preference to a Republican; nevertheless this authority is vested in the Stadtholder in Holland, and I believe is vested in every Executive power in America. It seems to have been wisely the aim of the late Convention in forming a general government for America, to combine the acknowledged advantages of the British Constitution with proper Republican checks, to guard as much as possible against abuses; and it would have been very strange if they had omitted this which has the sanction of such great antiquity in that country, and if I am not mistaken, an universal adoption in America.[(a)] Those gentlemen who object to other parts of the Constitution, as introducing innovations, contrary to long experience, with a very ill grace attempt to reject an experience so unexceptionable as this, to introduce an innovation (perhaps the first ever suggested) of their own. When a power is acknowledged to be necessary, it is a very dangerous thing to prescribe limits to it; for men must have a greater confidence in their own wisdom than I think any men are entitled to, who imagine they can form such exact ideas of all possible contingencies as to be sure that the restriction they propose will not do more harm than good. The probability of the President of the United States committing an act of treason against his country is very slight; he is so well guarded by the other powers of government, and the natural strength of the people at large must be so weighty, that in my opinion it is the most chimerical apprehension that can be entertained. Such a thing is however possible, and accordingly he is not exempt from a trial, if he should be guilty, or supposed guilty, of that or any other offence.

I entirely lay out of the consideration, the improbability of a man honored in such a manner by his country, risquing, like General Arnold, the damnation of his fame to all future ages, though it is a circumstance of some weight in considering, whether, for the sake of such a remote and improbable danger as this, it would be prudent to abridge this power of pardoning in a manner altogether unexampled, and which might produce mischiefs, the extent of which, it is not perhaps easy at present to foresee. In estimating the value of any power it is possible to bestow, we have to chuse between inconveniences of some sort or other, since no institution of man can be entirely free from all. Let us now therefore consider some of the actual inconveniencies which would attend an abridgement of the power of the President in this respect. One of the great advantages attending a single Executive power is, the degree of secrecy and dispatch with which, on critical occasions, such a power can act. In war this advantage will often counterballance the want of many others. Now suppose, in the very midst of a war of extreme consequence to our safety or prosperity, the President could prevail upon a gentleman of abilities to go into the enemy's country, to serve in the useful, but dishonorable character of a spy: Such are certainly maintained by all vigilant governments, and in proportion to the ignominy of the character, and the danger sustained in the enemy's country, ought to be his protection and security in his own. This man renders very useful services; perhaps, by timely information prevents the destruction of his country. Nobody knows of these secret services but the President himself; his adherence however to the enemy is notorious: He is afterwards intercepted in endeavouring to return to his own country, and having been perhaps a man of distinction before, he is proportionably obnoxious to his country at large for his supposed treason. Would it not be monstrous, that the President should not have it in his power to pardon this man? or that it should depend upon mere solicitation and favor, and perhaps, though the President should state the fact as it really was, some zealous partizan, with his jealousy constantly fixed upon the President, might insinuate that in fact the President and he were secret traitors together, and thus obtain a rejection of the President's application. It is a consideration also of some moment, that there is scarcely any accusation more apt to excite popular prejudice than the charge of treason. There is perhaps no country in the world where justice is in general more impartially administered than in England; yet let any man read some of the trials for treason in that country even since the Revolution, he will see sometimes a fury influencing the Judges, as well as the Jury, that is extremely disgraceful. There may happen a case in our country, where a man in reality innocent, but with strong plausible circumstances against him, would be so obnoxious to popular resentment, that he might be convicted upon very slight and insufficient proof. In such a case it would certainly be very proper for a cool, temperate man of high authority, and who might be supposed uninfluenced by private motives, to interfere, and prevent the popular current proving an innocent man's ruin. I know men who write with a view to flatter the people, and not to give them honest information, may misrepresent this account, as an invidious imputation on the usual impartiality of Juries. God knows, no man more highly reverences that blessed institution than I do: I consider them the natural safeguard of the personal liberties of a free people, and I believe they would much seldomer err in the administration of justice, than any other tribunal whatever. But no man of experience and candor will deny the probability of such a case as I have supposed, sometimes, tho' rarely

happening; and whenever it did happen, surely so safe a remedy as a prerogative of mercy in the chief magistrate of a great country, ought to be at hand. There is little danger of an abuse of such a power, when we know how apt most men are in a Republican government, to court popularity at too great an expence, rather than to do a just and beneficent action, in opposition to strong prevailing prejudices, among the people. But, says Mr. Mason, "The President may sometimes exercise this power to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt." This is possible, but the probability of it is surely too slight to endanger the consequences of abridging a power which seems so generally to have been deemed necessary in every well regulated government. It may also be questioned, whether, supposing such a participation of guilt, the President would not expose himself to greater danger by pardoning, than by suffering the law to have its course. Was it not supposed, by a great number of intelligent men, that Admiral Byng's execution was urged on to satisfy a discontented populace, when the Administration, by the weakness of the force he was entrusted with, were, perhaps the real cause of the miscarriage before Minorca? Had he been acquitted, or pardoned he could perhaps have exposed the real fault: As a prisoner under so heavy a charge, his recrimination would have been discredited as merely the effort of a man in despair to save himself from an ignominious punishment. If a President should pardon an accomplice, that accomplice then would be an unexceptionable witness. Before, he would be a witness with a rope about his own neck, struggling to get clear of it at all events. Would any men of understanding, or at least ought they to credit an accusation from a person under such circumstances?[(b)] . . .

(a) *I have since found, that in the Constitutions of some of the States, there are much stronger restrictions on the Executive authority, in this particular, than I was aware of. In others the restriction only extends to prosecutions carried on by the General Assembly, or the most numerous branch of Legislature; or a contrary provision by law: Virginia is in the latter class.*[1] *But when we consider how necessary it is in many cases to make use of accomplices to convict their associates, and what little regard ought in general to be paid to a guilty man swearing to save his own life, we shall probably think that the jealousies which (by prohibiting pardons before conviction) ever disabled the Executive authority from procuring unexceptionable testimony of this sort, may more fairly be ascribed to the natural irritation of the public mind at the time when the Constitutions were formed, than to an enlarged and full consideration of the whole subject. Indeed, it could scarcely be avoided, that when arms were first taken up in the cause of liberty, to save us from the immediate crush of arbitrary power, we should lean too much rather to the extreme, of weakening than of strengthening the Executive power in our own government. In England, the only restriction upon this power in the King, in case of Crown prosecutions (one or two slight cases excepted) is, that his pardon is not pleadable in bar of an impeachment; but he may pardon after conviction, even on an impeachment; which is an authority not given to our President, who in cases of impeachment has no power either of pardoning or reprieving.*

(b) *The evidence of a man confessing himself guilty of the same crime, is undoubtedly admissible; but it is generally, and ought to be always viewed with great suspicion, and other circumstances should be required to corroborate it.*

1. Every state constitution except South Carolina's provided for pardons.

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