

James Madison to Thomas Jefferson, August 16, 1809. Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York: G.P. Putnam's Sons, 1900-1910.

TO THOMAS JEFFERSON. MAD. MSS.

Montpellier, Aug. 16, 1809.

Dear Sir, —I got home from my trip to Washington on Saturday last, having remained there three days only.¹ You will have seen in the Procln issued the result of our consultation on the effect of what has passed on our commercial relation with G. B. The enforcement of the non-intercourse act agst her will probably be criticized by some friends, and generally assailed by our adversaries, on the ground that the power given to the Ex., being special, was exhausted by the first exercise of it; and that the power having put out of force the laws to which it related, could, under no possible construction, restore their operation. In opposition to this reasoning, it was considered that the act of the last session continuing the non-intercourse no otherwise excepted G. B. than by a proviso that it should not affect any trade which had been or might be permitted, in conformity with the section of the original act authorising a

proclamation in favor of the nation revoking its Edicts; and that the proclamation in favor of G. B. was not conformable to that section.

¹ While there he issued his proclamation of Aug. 9, withdrawing the proclamation of April 19:

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“Whereas it is now officially made known to me that the said orders in council have not been withdrawn agreeably to the communication and declaration aforesaid,

“I do hereby proclaim the same, and, consequently, that the trade renewable on the event of the said orders, being withdrawn, is to be considered as under the operation of the several acts by which such trade was suspended.”

It was not so in substance, because the indispensable pre-requisite, a repeal of the Orders in Council, did not take place. It was not so even in form; the law requiring a past and not a future fact to be proclaimed, and the proclamation, on its face, pointing to a future, not to a past fact. This difficulty was felt at the time of issuing the first proclamation; but it yielded to the impossibility of otherwise obtaining, without great delay, the coveted trade with G. B, and an example that might be followed by France; to the idea that the mode in which the repeal, though future, of the orders and of the law, was coupled by the proclamation, might, on the occurrence of the former, give a constructive validity to the latter; and to the opportunity afforded by an intervening session of Congress for curing any defect in the proceeding. In one respect, it would have been clearly proper for Congress to have interposed its authority, as was frequently intimated to members; that is, to provide for the contingency, not so much of a disavowal by G. B, which was never suspected, as of her not receiving the act of her Minister till after the 10th of June. Congress, however, never could be brought to attend to the subject, although it was pressed by several members, I believe, certainly by Gardenier,¹ on the general ground, that the Procln, however acceptable, was not in a form, nor under the circumstances, contemplated by law. In some of the instructions given by Mr. Gallatin's circular, a liberty has been

¹ Berent Gardenier, of New York, a federalist of the extreme type.

taken having no plea but manifest necessity, and as such will be before Congress.

Erskine is in a ticklish situation with his Govt. I suspect he will not be able to defend himself against the charge of exceeding his instructions, notwithstanding the appeal he

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makes to sundry others not published. But he will make out a strong case agst Canning, and be able to avail himself much of the absurdity and evident inadmissibility of the articles disregarded by him. He can plead, also, that the difference between his arrangemt and the spontaneous orders of Apl 26 is too slight to justify the disavowal of him. This difference seems, indeed, to limit its importance to the case of Holland, and to consist in the direct trade admitted by the arrangement, and an indirect one

through the adjoining ports required by the orders. To give importance to this distinction, the Ministry must avow, what, if they were not shameless, they never wd avow, that their object is not to retaliate injury to an enemy; but to prevent the legitimate trade of the U. S. from interfering with the London smugglers of sugar and coffee.

We are looking out for Mr. and Mrs. Gallatin every day. Untill they arrive, and we learn also the periods of your being at and absent from Home, we do not venture to fix a time for our proposed visit to Monticello.

Accept my most affectionate respects.

Capt: Coles has been with us since Sunday. I refer to him for the state of our foreign affairs, with which he is especially acquainted, to say more than I cou'd well put on paper.