nated the kingdom of Italy, it lays open to the direct trade of neutrals the ports of the north of Europe. Under the Order of the 26th April, therefore, while there are on the one hand fewer points of difference to stand in the way of a satisfactory arrangement between Great Britain and the United States, it is possible that their may be less temptation to the latter, to enter into such an arrangement, as the extent of their commerce may be if they please, nearly as great under the Order in Council of the 26th, April, as it would be under any arrangement which should effect the indispensible objects, to which that order applies, or as it would be even without any such order as long as France and the powers subservient to France continue to enforce their decrees. It is, in the same proportion, matter of indifference to Great Britain, whether the orders in council be continued or an arrangement by mutual consent substituted in its room.

Such, Sir, are the grounds on which it has appeared to his majesty to be unnecessary to command me to propose to the government of the United States any formal agreement to be substituted for that which his majesty has been under the necessity of disavowing; but I am directed to receive and discuss with you any proposal which you may be authorised to make to me on this head.

As no disposition has hitherto been shewn on your part to make any such proposal, it has been impossible for me to state by anticipation, (nor was I instructed so to do) what might be the answer that I should eventually think it my duty to return to you; consequently I could not have made with that view the statement contained in the 4th section of your letter, and the three subdivisions of it. Such a statement would have been obviously inconsistent with the former part of my overture, which you very correctly record in the 3d section, viz. that I was not instructed to make to you any proposal whatever upon this subject. I must necessarily reserve, until I hear from you, what proposals it may be deemed proper to make on behalf of the United States, to state in how far they do or do not accord with the instructions, which it has pleased his majesty to give me for my guidance in this negociation.

I will only add, sir, in conclusion of this letter, that his majesty is very sincerely desirous of maintaining a perfect and cordial understanding with the United States, and of bringing to a complete and satisfactory adjustment, all the points of difference that have arisen between the two governments; and that, agreeing as I do with you, most heartily, as to the interest which both nations have in fostering a mutual and solid friendship and cordiality, no zeal or exertions shall be wanting on my part to carry into effect his majesty's commands for this most salutary purpose.

I have the honor to be, with great respect, Sir, your most obedient humble servant,

F. J. JACKSON.

The Hon. Robert Smith, &c. &c. &c.

MR. SMITH TO MR. JACKSON.

Department of State, October 19, 1809.

SIR,

I have had the honor of receiving your letter of the 11th inst.

Before I proceed to the more material topics, which it embraces, it is proper that I should take some notice of your construction, which has unhappily converted an intimation of the expediency of conducting in a written form our further discussions, on this particular occasion, into a general prohibition of all verbal communications whatever, and into an unprecedented violation of the most essential rights of a public minister, requiring a formal protest and a resort to the commands of your sovereign.

A recurrence to that intimation cannot fail to shew that its sole object was to avoid, in the *further* discussions of a case of unusual delicacy and importance, the misconceptions well known to be incident to oral proceedings, and of which the diplomatic intercourse between the two governments had furnished so many and such serious proofs,—nay, of which your letter itself is an additional illustration. That a change in diplomatic discussions from an oral to a written form is not without precedent, I cannot refer to one which will be more satisfactory to you than the intimation recently given by Mr Canning, in the case of the proposal by Mr. Pinkney on the subject of the Orders in Council and the Embargo, that the discussions which had been previously verbal must thenceforth take a written form. And with this view I take the liberty of recalling your attention to the subjoined extracts. (See A & B.) of letters that passed on that occasion.

On the present, as on that occasion, the change from verbal to written communications was requested after two conferences, and when the subject appeared to one of the parties to have, by those verbal discussions, been brought to a point, which required a precise understanding of the views and propositions of the other.

You will, sir, hence perceive, that in maintaining the right, which every government has as to the rules of intercourse with foreign functionaries near it, no encroachment has been made or intended, on any right or customary privilege belonging to you in that character, nor any thing done to impede the proper and usual course of negociation.

You have been sufficiently apprised, by my letter of the 9th, of the light in which the President views the arrangement lately made by your predecessor with this government, and of the grounds on which he has expected a formal and satisfactory explanation of the reasons for the refusal of his Britannic Majesty to carry it into effect. He persists in that expectation, and in the opinion, that there has been given no explanation that is adequate, either as to the matter, or as to the mode.

When one government has been solemnly pledged to another in a mutual engagement by its acknowledged and competent agent and refuses to fulfil the pledge, it is perfectly clear, that it owes it, both to itself and to the other party, to accompany its refusal with a formal and frank disclosure of sufficient reasons for a step, which, without such reasons must deeply injure its own character, as well as the rights of the party confiding in its good faith.

"To refuse with honor (says a high authority on public law) to ratify what has been concluded on by virtue of a full power, it is necessary that the government should have *strong and solid reasons*, and that he shew in particular that his Minister has violated his instructions."

Although it is particularly incumbent on the Soveriegn in such case to shew that his instructions have been violated, yet it is not a mere violation of them on immaterial points that will be sufficient.—It is indispensably requisite, moreover, that the reasons be *strong and solid*, that they manifestly outweigh not only the general obligation to abide by what has been so done, but also the disappointment and injury accruing to the other party. And it is worthy of notice that the case under discussion is of a higher character, and appeals with greater solemnity to the honor and justice of the refusing party, than the case stated in Vattel, inasmuch as the transaction, now disavowed, was not a treaty or convention to be ratified by both parties, previous to an execution by either. It had according to the terms of it (and this peculiarity appears to have been contemplated by your government) been actually and immediately carried into execution on the part of the United States. The refusal of his Britannic Majesty is, therefore, not simply to ratify what had been ratified by the other party, but to carry into effect on his part an arrangement which had been carried into full effect, with good faith on the part of the United States. Nay, the case is strengthened by the further peculiarity, that some of the circumstances attending the execution of the arrangement on the part of United States render it unsusceptible of a full equivalent for the refusal to execute it on the other side.

It has not escaped observation, that the obligation of your government to tender explanations on this occasion is admitted by your attempt to shew that it has been sufficiently done in what passed in conversation between Mr. Canning and Mr. Pinkney, and by the instructions given to Mr. Erskine to communicate such explanations.

With every disposition to view in the most favorable light whatever may affect the relations between the two countries, it is impossible to mistake the conversations of those ministers for a discharge of such a debt to the good faith and reasonable expectations of the United States. Besides that they were mere conversations in a case requiring the precision and respect of a formal communication, it is certain, that it was neither understood by Mr. Pinkney, nor intended by Mr. Canning, that those conversations were, so to be regarded, Mr. Pinkney is explicit on this point. And Mr. Canning himself, after declining to recapitulate in writing what he had verbally remarked, signified to Mr. Pinkney in a letter dated May 27th, that his observations on the subject would be more properly made through the successor of Mr. Erskine, who was about to proceed to the United States.

With respect to the instructions on this point, given to Mr. Erskine, it might be sufficient to remark that they were never carried into execution; but it may be asked, whether it was a mark of friendly respect to the United States to employ for such a purpose, a minister from whom his government had thought proper publicly to withdraw its confidence, and to the peculiar delicay and embarrassment of whose situation you have yourself referred, as accounting for his act having executed the task imposed upon him.

I must here repeat, what was suggested in my former letter, that the successor of Mr. Erskine is the proper functionary for a proper explanation. Nor can I perceive the force of your remark, that the delay incident to your arrival in the United States rendered it more consistent with the friendly sentiments of his majesty to prefer the other channels for communicating the motives for his disavowal. To your own reconsideration I appeal, whether the course most consonant to those friendly sentiments was not the obvious one of employing the new organ, guarding at the same time against any misconstruction of the delay by apprizing the American government thro' its minister of the cause of it. The supposition, that the delay incident to your mission gave rise to the conversation of Mr. Canning and Mr. Pinkney, is not reconcileable to the correspondence of the latter, which contains no such indication. On the contrary it distinctly shews that he was apprised of the intention to replace Mr. Erskine by a successor whom he regarded as the proper channel for the explanatory communications, that he understood Mr. Canning to be under the same impression, and that he learned from yourself, not more than two days after his conversation with Mr. Canning, that you were to sail for the United States within three weeks.

Although it may not have been your intention to have given to this subject a posture which it would not have naturally assumed, yet such has been the tendency of some of your remarks; and particularly of the conclusion you have drawn from the circumstances, 1st.—That no trace of complaint from this government against the disavowal appears in the records of the British mission, or was distinctly announced by me in our conferences, and 2d, that from the official correspondence of Mr. Erskine with his government, it appears, that although he did not communicate in extenso his original instructions, he submitted to me the three conditions therein specified and received my observations on each.

If there be no trace of complaint against the disavowal in the archives of the mission, it is because this government could not have entered such complaint before the reasons for the disavowal had been explained, and especially as the explanations were justly and confidently expected through the new functionary. And as to the supposed reserve on my part on this subject in our several conferences, I did imagine, that my repeated intimations to you of the necessity of satisfactory explanations, as to the disavowal, were sufficient indications of the dissatisfaction of this government with respect to the disavowal itself.

The stress you have laid on what you have been pleased to state as the substitution of the terms finally agreed on, for the terms first proposed, has excited no small degree of surprize. Certain it is, that your predecessor did present for my consideration the three conditions which now appear in the printed document—that he was disposed to urge them more than the nature of two of them (both palpably inadmissible and one more than merely inadmissible) could permit, and that on finding his first proposals unsuccessful, the more reasonable terms comprized in the arrangement respecting the orders in council were adopted. And what, sir, is there in this to countenance the conclusion you have drawn in favor of the right of his Britannic Majesty to disavow the proceeding? Is any thing more common in public negociations than to begin with a higher demand, and, that failing, to descend to a lower? To have, if not two sets of instructions, two, or more than two grades of propositions in the same set of instructions, to begin with what is the most desirable & to end with what is found to be inadmissible in case the more desirable should not be attainable. This must be obvious to every understanding, and it is confirmed by universal experience.

What were the real and entire instructions given to your predecessor is a question essentially between him and his government. That he had, or at least that he believed he had sufficient authority to conclude the arrangement, his formal assurances, during our discussions, were such as to leave no room for doubt. His subsequent letter of the 15th June renewing his assurance to me "that the "terms of the agreement so happily con-"cluded by the recent negociation will "be strictly fulfilled on the part of his "majesty," is an evident indication of what his pursuasion then was to his instructions. And with a view to shew what his impressions have been even since the disavowal, I must take the liberty of referring you to the annexed extracts (See C.) from his official letters of the 31st July and of the 14th of August.

The declaration "that the despatch from Mr. Canning to Mr. Erskine of the 23d January is the only despatch by which the conditions were prescribed to Mr. Erskine for the conclusion of an arrangement on the matter to which it relates" is now for the first time made to this government. And I need hardly add, that if that despatch had been communicated at the time of the arrangement, or if it had been known that the propositions contained in it and which were at first presented by Mr. Erskine, were the only ones, on which he was authorized to make an arrangement, the arrangement would not have been made.

As you have disclaimed any authority to offer explanations for the disavowal, as you have been willing to ascribe the want of such authority to the consideration that other channels had been preferred, and as you have even considered the circumstances which the arrangement took place to be such as could only lead to a disavowal, and therefore as superseding the necessity of any explanation whatever, it is to be regretted, that you had not deemed it proper to render precise and explicit, that part of your letter which seems to imply that you had in our conversations, in relation to the affair of the Chesapeake, following the words of your instructions held out not only the manner in which the reparation had been accepted, but even the form in which it had been tendered, as warranting his majesty in even retracting the offer of reparation, and that you had elucidated the observation by a reference to the particular expressions which, at all events, put it totally out of his power to confirm any act containing them.

Whatever may have been your intention in this part of our conversation, or whatever may be the import of the passage to which I have just alluded, I have now the honor of signifying to you, that I am authorised to receive in a proper form whatever explicit explanations you may chuse to make, with respect to the grounds of this part of the disavowal; & without enquiring whether your authority be derived from instructions that have been addressed to yourself, or that have devolved on you as the successor of the minister who had declined to execute them.

As you have, at the same time, been pleased to say that his Britannic majesty had authorised you to renew the offer of satisfaction which Mr. Erskine was instructed to make, it was also naturally expected that you would in your letter have stated with precision in what that offered differed from the reparation solemnly tendered by Mr. Erskine and accepted by the U. States, & that you would have shewn in what the reparation thus tendered differed from his instructions. And when I had the honor to intimate that, in order to avoid the misconceptions incident to oral proceedings, it was thought expedient that our further discussions on the present occasion should be in the written form, there was no part of the subject to which that intimation supplied with more force than the case of the Chesapeake; none on which it was more desirable to avoid misconceptions and to obtain a precise knowledge of the propositions which you were authorised to make, not only because I did not really understand the particulars of the offer as distinctly as you seem to have supposed, but also because, on that point, and on that alone, you had expresly stated that you had propositions to make, and that you were authorised to carry them into immediate execution.

On the subject of the orders in council, the President perceives with sentiments of deep regret, that your instructions contemplate, neither an explanation of the refusal of your government to fulfill the arrangement of that branch of the existing differences, nor the substitution of any other plan of adjustment, nor any authority to *conclude* any agreement on that subject; but merely to receive and discuss proposals, that might be made to you on the part of the United States; and these, it appears, must include a stipulation on the part of the United States to relinquish the trade with the enemies' colonies, even in branches not hitherto interrupted by British orders for capture, and also a sanction to enforcing of an act of Congress by the British navy

Were the way properly opened for formal propositions from this government, a known determination on the part of his Britannic Majesty to adhere to such extraordinary pretensions would preclude the hope of success in such advances, whether regard be had to the conditions themselves, or to the disposition they indicate, in return for the conciliatory temper which has been evinced by the U. States.

As to the demand in relation to the colonial trade, it has been the less apprehended, as it is not in itself connected, nor has it ever been before brought into connection, either with the case of the orders in council, or with that of the Chesapeake. And it was reasonably to be presumed, if the idea of such a condition had in the first instance proceeded from the erroneous belief that it was not objectionable to the United States, that it would not have been persisted in after that error had been ascertained and acknowledged.

The other demand could still less have been apprehended. Besides the inevitable and incalculable abuses incident to such a license to foreign cruisers, the stipulation would touch one of those vital principles of sovereignty, which no nation ought to have been expected to impair. For where would be the difference in principle between authorising a foreign government to execute, and authorising it to make laws for us?—Nor ought it to be supposed that the sanctions and precautions of a law of the United States, in the cases of the prohibited trade in question, would prove inefficacious for its purposes.

Had none of those obstacles presented themselves to the course corresponding with the sentiments and dispositions of the President, I should have felt great pleasure in giving you formal assurances of his readiness to execute the conditional authority with which he is invested for restoring in its full extent, as far as it may depend on the United States, the commercial intercourse of the countries, and that he would moreover, be disposed to extend the experiment of a friendly negociation to every point of difference and of mutual interest between them. If, indeed, in the event of a successful termination of what relates to the case of the Chesapeake, it be tho't that a removal of the difficulties arising from the orders in council might be facilitated by comprehending them in a general negociation and the operation of the orders can in the mean time be suspended, the door might be considered as immediately open to that course of proceeding.

To such a suspension no reasonable objection can be made, if, as you have stated, the orders in council as now modified leave the trade of the United States nearly as great as it would be without the existence of such orders, so long as France and the other powers shall continue their decrees, and inasmuch as a discontinuance of their decrees by those powers confessedly requires an immediate and entire revocation of their orders in council.

That a suspension of the orders with a view to their being brought into a general negociation is more reasonable than a temporary submission to their authority, by the United States with that view, is obvious from the reflection that such a submission would necessarily involve a relinquishment of the principle which they have stedfastly asserted, whereas a discontinuance of the orders in council in the present actual state of things would not be incompatible with the principle on which they were originally founded.

This principle was, as you well know, the necessity of retaliating, through neutrals, injuries received through a violation of their rights by another belligerent. In the actual state of things, and under the actual modification of the orders in council produced by it, it is admitted by you, that the orders have no practical effect in abridging the commerce of neutrals, and can of course have no retaliating effect on the other belligerents.

Although it cannot be allowed to be true that the orders in council are no longer injurious to the commerce of the United States, it is certainly true that they produce no degree of injury to the enemies of Great Britain that can countenance the retaliating plea alledged in support of them.

What, permit me to ask, is the degree of injury actually accruing to the enemies of Great Britain from her retaliating orders? According to those orders, as now modified, and more especially taking into view along with them the prohibitory law of this country in relation to France, the essential difference between their repeal and their existence consists in this—that in the case of their repeal, as pledged by the arrangement of April, the trade of the United States might be carried on directly with the ports of Holland, whilst during their existence, as at present, it is to be carried on through the contiguous and neighboring ports. To your own calculations, sir, I submit, whether the inconsiderable effect of this circuit on the prices of Holland and in the countries supplied through her, can any longer sustain the plea of inflicting distress on an enemy, or palliate the injuries done to a friend by a proceeding so contrary to his sentiments of justice, and which subject his regular commerce not only to inconvenient channels, but to all the abuses which may result from the suspicions, real or pretended, of interested cruisers. You cannot but be sensible, that a perseverance under such circumstances in a system, which cannot longer be explained by its avowed object, would force an explanation by some object not avowed. What object might be considered as best explaining it, is an enquiry into which I do not permit myself to enter, further than to remark, that in relation to the United States it may be an illegitimate object.

It remains to make a few observations which are due to the just interest of the United States, and which are invited by yours relating to the order in council of May last.

You seem to consider that measure as comprising the utmost precaution that was in the power of his Britannic majesty to take, for preventing losses, from his disavowal of the engagement of your predecessor, to citizens of the U. States, whom had resumed their commercial pursuits on the faith of that act,

Without entering into a full view of the inadequacy of the order in that respect, I take the liberty of pointing out the following instances in which it falls essentially short of its declared intention.

1. The order does not provide for the important case of vessels returning with cargoes from the ports of Holland.

2. The exemption from interruption of vessels bound from the U. States to Holland was restricted by that order to such as should have departed prior to the 20th of July, at which date it is not certain that the order, when it was first