

Thomas Jefferson to James Madison, October 15, 1810, from The Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

TO JAMES MADISON J. MSS.

Monticello Oct. 15, 10.

Dear Sir, —Tho' late, I congratulate you on the revocation of the French decrees, & Congress still more, for without something new from the belligerents, I know not what ground they could have taken for their next move. Britain will revoke her orders of council, but continue their effect by new paper blockades, doing in detail what the orders did in the lump. The exclusive right to the sea by conquest is the principle she has acted on *in petto*, tho' she dares not yet avow it. This was to depend on the events of the war. I rejoice however that one power has got out of our way, & left us a clear field with the other.

Another circumstance of congratulation is the death of Cushing. The nation ten years ago declared it's will for a change in the principles of the administration of their affairs. They then changed the two branches depending on their will, and have steadily maintained the reformation in those branches. The third, not depending on them, has so long bid defiance to their will, erecting themselves into a political body, to correct what they deem the errors of the nation. The death of Cushing gives an opportunity of closing the reformation by a successor of unquestionable republican principles. Our friend Lincoln has of course presented himself to your recollection. I know you think lightly of him as a lawyer; and I do not consider him as a correct common lawyer, yet as much so as any one which ever came, or ever can come from one of the Eastern states. Their system of Jurisprudence

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made up from the Jewish law, a little dash of common law, & a great mass of original notions of their own, is a thing *sui generis*, and one educated

in that system can never so far eradicate early impressions as to imbibe thoroughly the principles of another system. It is so in the case of other systems of which Ld. Mansfield is a splendid example. Lincoln's firm republicanism, and known integrity, will give complete confidence to the public in the long desired reformation of their judiciary. Were he out of the way, I should think Granger prominent for the place. His abilities are great, I have entire confidence in his integrity, tho' I am sensible that J. R. has been able to lessen the confidence of many in him. But that I believe he would soon reconcile to him, if placed in a situation to shew himself to the public, as he is, and not as an enemy has represented him. As the choice must be of a New Englander, to exercise his functions for New England men, I confess I know of none but these two characters. Morton is really a republican, but inferior to both the others in every point of view. Blake calls himself republican, but never was one at heart. His treachery to us under the embargo should put him by forever. Story & Bacon are exactly the men who deserted us on that measure & carried off the majority. The former unquestionably a tory, & both are too young. I say nothing of professing federalists. Granger & Morton have both been interested in Yazooism. The former however has long been clear of it. I have said thus much because I know you must wish to learn the sentiments of others, to hear all, and then do what on the whole you perceive to be best.¹

¹ On the question of this vacancy in its bearing on the Batture case, Jefferson had already written to Albert Gallatin:

“ Monticello, September 27, 1810

“ Dear Sir,—Yours of the 10th came safely to hand and laid me under new obligations for the valuable observations it contained. The error of 12 feet instead of 7 for the rise of the Batture really *sautoit aux yeux*, and how I could have committed it at first or passed it over

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afterwards without discovery, and having copied Pelletier's plan myself, is unaccountable. I have adopted also most of your other corrections. You observe that the arguments proving the Batture public, yet prove it of such a character that it could not be within the scope of the law of March 4 against squatters. I should so adjudge myself; yet I observe many opinions otherwise, and in defence against a spadassin it is lawful to use all weapons. Besides, I have no pretensions to be exclusively the judge of what arguments are sound and what not. I give them, therefore, that they may have weight and have a right to decide for themselves. That Act of Congress, moreover, was evidently respected, particularly in the order under which the removal was made.

“With respect to the arrangement of materials in my statement, I know it is not such as counsel would employ in pleading such a cause; it is not such as I would have made myself in that character. It was determined by other considerations. I thought it possible the case might be dismissed out of court by a plea to the jurisdiction. I determined, on this event, to lay it before the public, either directly or through Congress. Respect for my associates, for myself, for our nation, would not permit me to come forward, as a criminal under accusation, to plead and argue a cause. This was not my situation. I had only to state to my constituents a common transaction. This would naturally be by way of narrative or statements of the facts in their order of time, establishing these facts as they occur, and bringing forward the law arising on them and pointing to the Executive the course he was to pursue. I suppose it was self-respectful to present it as a history and explanation of what had taken place. It does not, indeed, in that form display the subject in one great whole; but it brings forward successively a number of questions, solving themselves as they arise, and leaving no one unexamined. And the mind, after travelling over the whole case, and finding, as it goes along, that all has been considered, and all is right, rests in that state of satisfaction which it is our object to produce. In truth, I have never known a case which presented so many distinct questions, having no dependence on one another, nor belonging even to the same branches of jurisprudence. After all, I offer this as explanation, not justification, of the order I adopted.

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“What the issue of the case ought to be, no unbiased man can doubt. What it will be, no one can tell. The judge's inveteracy is profound, and his mind of that gloomy malignity which will never let him forego the opportunity of satiating it on a victim. His decisions, his instructions to a jury, his allowances and disallowances and garblings of evidence, must all be subjects of appeal. I consider that as my only chance of saving my fortune from entire wreck. And to whom is my appeal? From the judge in Burr's case to himself and his associate judges in the case of Marbury v. Madison. Not exactly, however. I observe old Cushing is dead. At length, then, we have a chance of getting a Republican majority in the Supreme judiciary. For ten years has that branch braved the spirit and will of the nation, after the nation has manifested its will by a complete reform in every branch depending on them. The event is a fortunate one, and so timed as to be a Godsend to me. I am sure its importance to the nation will be felt, and the occasion employed to complete the great operation they have so long been executing, by the appointment of a decided Republican, with nothing equivocal about him. But who will it be? The misfortune of Bidwell removes an able man from the competition. Can any other bring equal qualifications to those of Lincoln? I know he was not deemed a profound common lawyer; but was there ever a profound common lawyer known in one of the Eastern States? There never was, nor never can be, one from those States. The basis of their law is neither common nor civil; it is an original, if any compound can be so called. Its foundation seems to have been laid in the spirit and principles of Jewish law, incorporated with some words and phrases of common law, and an abundance of notions of their own. This makes an amalgam *sui generis*; and it is well known that a man first and thoroughly initiated into the principles of one system of law can never become pure and sound in any other. Lord Mansfield was a splendid proof of this. Therefore I say there never was, nor never can be a profound common lawyer from those States. Sullivan had the reputation of pre-eminence there as a common lawyer, but we have his *History of Land Titles*, which gives us his measure. Mr. Lincoln is, I believe, considered as learned in their laws as any one they have. Federalists say that Parsons is better; but the criticalness of the present nomination puts him out of the question. As the great mass of the functions of the new judge are to be performed

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in his own district, Lincoln will be most unexceptionable and acceptable there, and on the Supreme bench equal to any one who can be brought from thence. Add to this his integrity, political firmness, and unimpeachable character, and I believe no one can be found to whom there will not be more serious objections.

“You seem to think it would be best to ascertain the probable result before making a proposition to Congress to defend Livingston's suit. On mature consideration I think it better that no such proposition should be made. The debates there would fix the case as a party one, and we are the minority in the judiciary department, and especially in the Federal branch of it here. Till Congress can be thoroughly put in possession of all the points in the case, it is best they should let it lie. Livingston, by removing it into the judiciary, has fairly relinquished all claims on their interference. I am confident that Congress will act soundly whenever we can give them a knowledge of the whole case. But I tire you with this business, and end, therefore, with repeating assurances of my constant attachment and respect.”

He also wrote to Gideon Granger:

“ Monticello Oct. 22. 10.

“ Dear Sir,—Your two favors of Sep. 27. and Oct. 4. have been duly received. The substance of the latter I immediately communicated to my friend at Lynchburg, where the information will be received with joy. The former was a week before it got here. About the 25th of Sep. writing to two members of the cabinet on other business, and having just heard of Cushing's death, I reminded them of our friend Lincoln in those terms which his worth & standing dictated. After the receipt of yours of the 4th writing again on other business, and taking a review of supposed candidates, I expressed with respect to yourself those sentiments of esteem & approbation which are sincerely mine; and with as much earnestness as the laws I lay down for myself in these cases would permit. And with the more in contemplation of an expression in your letter, to wit ‘had our friend

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Lincoln remained capable my lips would have remained sealed' for altho' I have never heard any fact which explains the meaning of this to me, yet I inferred that something had happened of which I had not heard. I shall be perfectly happy if either of you are named, as I consider the substituting, in the place of Cushing, a firm unequivocating republican, whose principles are born with him, and not an occasional ingraftment, as necessary to compleat that great reformation in our government to which the nation gave it's fiat ten years ago. They have compleated & maintained it steadily in the two branches dependent on them, but the third, unfortunately & unwisely, made independent not only of the nation, but even of their own conduct, have hitherto bid defiance to the public will, and erected themselves into a political body with the assumed functions of correcting what they deem the errors of the nation. Accept the assurances of my great esteem & respect."

Does Mr. Lee go back to Bordeaux? If he does, I have not a wish to the contrary. If he does not, permit me to place my friend & kinsman G. J.1 on the list of candidates. No appointment can fall on an honest man and his talents tho' not of the first

1 George Jefferson.

order, are fully adequate to the station. His judgment is very sound, & his prudence consummate. Ever affectionately yours.