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TERMS.

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LETTER FROM B. W. LEIGH, ESQ.

THE GENERAL ASSEMBLY OF VA.
To the honorable Stafford H. Parker,
Speaker of the Senate, and the honorable Linn Banks, Speaker of the House of Delegates, of Virginia.
Senate Chamber, Washington, Mar. 2, 1836.
GENTLEMEN: I am honored with your letter of the 24th ultimo, enclosing a copy of the preamble and resolutions of the General Assembly, upon the subject of expunging from the journals of the Senate of the United States a resolution of that body, and requesting me to lay the same before the Senate.

I adhere to the doctrine of the right of instruction, as laid down in the resolutions of the General Assembly of February, 1812, taken in the plain and obvious sense, and in the full extent, in which it is there expressed; and I shall continue, not only to respect, but also to maintain it, to the utmost of my ability. I deem it, indeed, an important part of the great right of State interposition, as explained and enforced in the memorable resolutions which have illustrated the session of the General Assembly of 1799-1800; and, in my opinion, this right of instruction will be found of inestimable value on all occasions that may arise, presenting questions concerning the just boundaries of power between the Federal and State Governments. If, then, the General Assembly had instructed me to give a vote, according to its sense of propriety, on any constitutional question which I could consider as at all doubtful, especially on a question on which the public mind had been long and deliberately exercised, on which men's judgments had been formed under the influence of no party or temporary excitement, but of dispassionate reason, and yet remained divided and balanced; I should, in such a case, have followed the judgment of the General Assembly, though it had been contrary to my own. For this would not be to violate my oath of office, but only to renounce all vain-glorious pretensions to infallibility, and to pay a proper and conscientious deference to the wisdom of the General Assembly. If the General Assembly had instructed me not to vote for a particular measure, on the ground that it held the measure unconstitutional, then, as it could hardly be unconstitutional to comply with such negative instruction, I should have had no hesitation in yielding obedience to it, however clearly the measure, so disapproved, might appear to my mind constitutional and wise. And as to questions of mere policy, involving no point of constitutional right, I can hardly conceive a case in which I should find difficulty in conforming my vote with instructions given me by the General Assembly. But I do not hold myself bound to obey, and I cannot obey, any instruction that commands me to do an act which, in my conscientious opinion, would be, in itself, a plain violation of the constitution, and in its consequences, dangerous and mischievous in the extreme.

While I thus declare my adherence to the doctrine of the right of instruction asserted by the General Assembly in 1812, which sincerely believing it to be just and true, I then tender my humble aid to maintain, I beg it may be distinctly understood that, upon more mature reflection, I thought the principle wrong, neither the pride of opinion, nor a sense of the advantages which public men usually derive from maintaining their consistency, nor a fear of the reproaches which inconsistency always incurs, (unless, indeed, it be backed with power,) would withhold me from renouncing it.

The first of the resolutions you have transmitted to me instructs the Senators from Virginia, in the Congress of the United States, "to introduce and vote for a resolution, directing the resolution of the Senate of the 28th of March, 1834, declaring that the President, in the late executive proceedings, in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both," to be expunged from the journal of the Senate of the United States, by causing black lines to be drawn around the said resolution, as it stands on the original manuscript journal, and these words plainly written across the face of the said resolution and entry—Expunged by order of the Senate of the United States."

I have reconsidered the resolution of the Senate disapproved of by the General Assembly in reference, as well to its intrinsic propriety, as to the constitutional competency of the Senate, to adopt it; I have reflected on the

question, whether the resolution of the Senate, supposing it wrong, can constitutionally be expunged from the journal; I have, in doing so, earnestly endeavored to discard from my memory the circumstances belonging to the history both of the resolution condemned, and of the resolution condemnatory; indeed, I was called upon to consider the proposition to expunge the resolution of the Senate, before I thought it possible I could ever be personally concerned in the result; and, in every view I have been able to take of the subject, I find it absolutely impossible to obey the instruction now given to me. I cannot obey it, without committing an act which, in my judgment and conscience, would be a plain violation of the constitution of the United States. I cannot obey it, without descending to a degree of slavish baseness that would render me justly despicable, and expose me to the scorn even of those who have commanded the deed. I cannot obey it, without forfeiting my own self-respect forever.

The constitution of the United States contains a provision (such as is to be found in few, if any, of the State constitutions,) that "each House" [of Congress] "shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question, shall, at the desire of one fifth of those present, be entered on the journal." The purpose of the provision is most obvious. It requires each House to record its transactions—to record them all, truly, exactly, and fully—to record them for the information of present and future generations; to furnish evidence, to which the constituent may refer in the examination of the conduct of the representative, or the representative resort for his justification; and to hand down to our posterity, a certain knowledge of all the acts of their ancestors, which may often serve as a guide to direct them, and sometimes a beacon to warn. And unless the provision can be complied with by keeping a partial, false and garbled record of the proceedings of the two Houses—unless this duty to record the truth, can be fulfilled without recording the whole truth—or unless the injunction to keep the journal, can be understood as not commanding us to preserve it; it is impossible, I should think, to maintain, that the record of any resolution or proceeding of the Senate can be expunged from its journal, in the literal sense and true acceptance of that word; that is, wholly blotted out or erased. Indeed, it would be difficult so to expunge any part of the journal, without impairing the record of something else, which all would wish to preserve truly and fairly recorded.

The General Assembly itself, sensible (as I humbly venture to suppose) that the resolution of the Senate in question, cannot be actually expunged from the journal without a violation of the constitution, proposes, that it shall be expunged, "by causing black lines to be drawn around the said resolution, as it stands on the original manuscript journal, and these words plainly written across the face of the said resolution and entry—Expunged by order of the Senate." In other words, if I mistake not the meaning and principle of the instruction, the General Assembly, admitting that the resolution of the Senate cannot, consistently with the constitution, be expunged from the journal literally, yet thinks that it may be expunged figuratively. I pray the General Assembly to consider the danger and the mischief that must flow from a precedent of this kind—which would, in effect, elude a positive injunction of the constitution by a metaphorical use of words, and what is more, a typical doing of deeds. I doubt whether there is a single provision of the constitution, which may not be eluded, and set at naught, by a similar process; and I must add, that this typical method of expunging is more abhorrent from my feelings of constitutional duty and propriety, than the literal. Undoubtedly, the precedent admits of a broader and easier, and therefore more mischievous, application. I pray the General Assembly to consider, too, the hardship of imposing upon the consciences of men acting under the sanction of an official oath, the duty of conforming their official conduct with the rhetoric of their constituents. In the framing of laws, and in legislative proceedings of all kinds, it has always been found wise and necessary to discard all figures of speech, and to adopt the plainest language in its plainest literal acceptation. If I rightly understand the meaning and purpose of the instruction given me, the General Assembly would have me propose and vote for an expunging of the obnoxious resolution of the Senate from its journal, in such a manner, that it shall not be expunged after all, in whole or in part. Now, in the first place, I doubt very much, whether this could be done, even in the method prescribed; and, in the next place, if entertaining the

opinions I do on the subject, I should vote for any such process of expunging, I should be guilty of mental equivocation in the discharge of my official duty. I humbly hope for the pardon of the General Assembly and of all good men, if I cannot, at its command, extinguish the knowledge I have acquired of my mother-tongue; much more, if I cannot disregard the dictates of reason and conscience, which God has planted in my breast, to be the ruler and monitor of all my actions.

I find myself constrained to say, that I cannot obey the instruction for expunging the resolution of the Senate, in any manner, literally or figuratively. This brings me to the consideration of the second resolution of the General Assembly, which declares, that "the Assembly regards the right of instruction as resting on the broad basis of the nature of representation, and one of the vital principles of our free institutions; and that it is the duty of the representative to obey the instructions of his constituents, or resign the trust with which they have clothed him, in order that it may be transferred to the hands of those who will carry into effect the wishes and instructions of the constituent body."

And here, in considering the alternative proposed to me, I cannot but advert to the very peculiar nature of the act which the instruction requires of me, and to some remarkable circumstances in the history on the subject.

The resolution which the General Assembly proposes to expunge is only the expression of an opinion held by the majority of the Senate for the time being, and the entry of it on the journal, only the record of the fact that such was the opinion of the body. It must be obvious to the mind of all men that the expunging of the resolution from the journal of the Senate can nowise affect the main questions—whether the opinion therein declared was just or erroneous,—and whether or no it was within the competency of the Senate to determine on the subject of the resolution; nor can the de-facement of the record of an historical fact, in whatever manner it may be effected, annual or alter the fact itself, or, in the present case, impair, in the slightest degree, the memory of the transaction. Some hundreds of copies of the journal containing this resolution, have been printed; some deposited in the public archives; and some delivered to members of Congress for the time being, which have thus become private property, and been dispersed throughout the Union; the resolution was published, too, in all the public journals of the day; it stands recorded on the journals of all the State Legislatures that have thought proper to take the subject into their consideration; the General Assembly of Virginia has itself recorded it, in the very resolutions in which it directs the Senators of the State in Congress, to vote for expunging it from the manuscript journal of the Senate. For any direct purpose, therefore, which the expunging of it can serve, viewing the act apart from the intention, nothing can be more absolutely nugatory. The resolution itself, the evidence of it, and the opinion it declares, will all be handed down to posterity by faithful history; nay, even by the very record of the proceeding to expunge it. It is vain to say, as the General Assembly has said in the preamble to its resolutions, that the resolution of the Senate is "an assumption of power not warranted by the constitution, and calculated to subvert the rights of the House of Representatives, and the fundamental principles of our free institutions;" for, if this were really the case, the General Assembly should have levelled some of its censures against the House of Representatives, for neglecting its high trust—for neglecting to vindicate "the fundamental principles of our free institutions," and, especially, its own rights and privileges, against the encroachment of the Senate. I am not aware that that House has made any complaint; perhaps, it understood the subject too well, to do so. It is the Executive only that has protested against this proceeding of the Senate; and the only conceivable purpose which the proposed expunging of it can answer, will be to signalize the triumph of Executive power over a department of the Legislature that has had the firmness to oppose its measures—to set a mark of disgrace and humiliation upon the Senate, and to bind a wreath of inglorious victory around the brow of the President. And even for this purpose, no stroke of the pen was ever more vain, than that which shall mark those black lines around the resolution of the Senate, and write that sentence of expunging on its face—if, indeed, it be not calculated to work the direct contrary effect to that intended. The victory of the President over the Senate may be as complete without it. And if, unhappily, the fruits of that victory shall ripen into their full maturity of bitterness—in times to come, when the constitution of the Senate shall be subverted—when the check it was ordained to hold upon the power of the Executive, and of the popular national

branch of the Legislature, shall be removed—when the substance of the constitution shall be destroyed, and nothing but its empty forms remain; History will paint those black lines drawn around this resolution, and those fatal words of condemnation written across its face, and hold them up as a mournful memento to ourselves of departed liberty, and a warning to some happier race of mankind. If, on the other hand, the Senate shall, by the blessing of Providence, continue to maintain its place in the system,—still exercising the functions for which it was designed,—enjoying freedom of deliberation and independence of action; then will the manuscript volume of the journal, and indeed the single page, containing those memorable circular black lines, be the only volume, and the only page, that will ever be sought after, or read. The process of expunging the resolution, is the surest way to render the memory of it immortal.

It cannot be forgotten, that very shortly before I was first elected to the Senate, the General Assembly of Virginia, upon long and solemn deliberation,

Resolved, "That the recent act of the President of the United States, extending control over the public deposits, by causing them to be withdrawn and withheld, on his own responsibility, from the United States Bank, in which they had been deposited, by the act of Congress chartering the said bank, is, in the judgment of the General Assembly, a dangerous and alarming assumption of power by that officer, which cannot be too strongly condemned. 2. That, while the General Assembly will ever be ready to sustain the President in the exercise of all such powers as the constitution has conferred on him, they nevertheless cannot but regard with apprehension and distrust the disposition to extend his official authority beyond its just and proper limits, which he has so clearly manifested in his recent interference with the Treasury Department of the Federal Government, in the exercise of a sound discretion which Congress had confided to the head of that Department alone. 3. That our Representatives be instructed, and our Representatives be requested, to use their best endeavors to procure the adoption by Congress, of proper measures for restoring the public moneys to the Bank of the United States, or at least causing them to be deposited therein for the future, according to the direction and stipulation of the act of Congress chartering the said bank; at the time of their action on the subject, the said bank be, in their opinion, a safe depository of the public treasure."

Thus, the General Assembly, at that session, expressly affirmed the very proposition (and in far stronger terms) contained in the resolution of the Senate which the present General Assembly condemns; and the resolutions of the former session manifestly presuppose, that it was within the competency of the Senate, as well as the House of Representatives, to act upon that proposition, then in fact pending in the Senate. In consequence of these resolutions, one of the Senators from Virginia resigned his seat; a resignation certainly most unexpected to me; equally unexpected, I believe, to the General Assembly. Neither have I ever believed that the resolutions it had adopted were designed to produce any such result. I was, soon after, elected to fill the vacancy. I shall not say, that the resolutions which had recently been adopted by the General Assembly, constituted my motive for voting for the resolution passed by the Senate some few weeks after I took my seat; for, in truth, this resolution expressed the sentiment I myself had all along entertained and expressed. But, surely, I have a right to refer to the instructions of the General Assembly of 1833-'4, requiring me to vote for the resolution which the present General Assembly instructs me to expunge, and to vindicate and sustain myself by their authority; otherwise, no Senator can ever safely obey any instruction; he must incur the danger of being driven to the alternative now presented to me, of dishonoring himself by voting against his conscience, or of resigning his place, whenever, in the vicissitudes of party warfare, a subsequent Legislature shall think the instruction wrong. It is with the deepest conviction and heartfelt pain, that I say, as I must say, that the proceedings of the General Assembly of Virginia on the present occasion, are calculated, above all things, to impair the right of instruction itself.

I should have a right, too, after having acted in conformity with instructions given by the General Assembly at one session, and seeing the same opinions prevail at a succeeding session, to appeal from the mandate of the present Assembly, to the people, at the next elections. And this would seem the more reasonable, if it should be considered, that some of the State Legislatures have, at their sessions of 1834-'35, instructed their Senators to vote for expunging the resolution of the Senate in question; and, though their instructions have been disregarded, have, at their last sessions, declined to repeat and enforce them. But I choose to place myself, at once, upon different and higher ground, and to act up to the principles, reasons, and motives which, in reality, dictate the conduct I am going to pursue.

It cannot escape observation, that while the General Assembly instructs me to expunge the resolution of the Senate, which I voted for in conformity with the instructions of the Assem-

ble of 1833-'4, the present Assembly has not expunged the resolutions of the former Assembly. And though (if I am rightly informed, a proposition has been made to rescind the former resolutions, even that proposition has not yet been acted on. So that I am to understand, that the General Assembly is instructing me to do, in respect to a former resolution of the Senate, that which it will not do itself, in respect to resolutions passed at a former session of its own body. I must bespeak pardon for remarking, further, that, though proceedings have been had in Congress, and some laws have been passed, violating, in the opinion of the General Assembly, the dearest rights of the people—take, for example, the edition law; and I though, too, many laws have been passed by the Federal Legislature, which, in the opinion of the General Assembly, transcended its constitutional powers, and encroached on the rights of the States; yet it has never, heretofore, occurred to the General Assembly, in any case or at any time, to assert and vindicate the rights of the people, or the rights of the States, against such assumptions of power by Congress by an expunction (literal or typical) of the obnoxious proceedings from the journals of the two Houses. And now, for the first time, when a simple resolution of the Senate is supposed (by some unaccountable misconception of its import and intention) to encroach upon the rights of the national branch of the Federal Legislature, which, probably, has not perceived, and, certainly, has not complained of, the encroachment—or (to speak plainly) when the Senate has presumed to question the rights and powers claimed for the executive department by the President, who alone has complained and protested against its proceedings—I see the General Assembly of Virginia coming forward to vindicate the rights and powers claimed by the President, by this process of expunction, which it has never thought of resorting to, for the vindication either of the rights of the people, or the rights of the States. I mention these strange contrasts, because, they have raised the gloomiest apprehensions, in my mind, of an approaching danger to our republican institutions, and because those apprehensions have had an important influence in determining my judgment and my conduct, under the extraordinary instructions, which the General Assembly has thought proper to give me.

The General Assembly can have no reason to doubt, and I am quite sure, does not doubt, that I voted for the resolution of the Senate which it condemns as unconstitutional and mischievous, under a sincere conviction that it was constitutional, wise, and even necessary to assert and vindicate the authority of the laws; neither can it doubt that this is still my opinion; yet, without dignifying to suggest any reasons to enlighten and convince my understanding, the General Assembly gives me a peremptory instruction to propose and vote for the expunging of this resolution from the journal of the Senate; and it insists, that I must obey its will and command—or resign my office. It instructs me to vote to expunge from the journal, that which it knows, as well as I do, is there truly recorded; it instructs me to deface, and in a manner to falsify, a public record, which it knows the constitution explicitly requires the Senate to keep; and (to remove my scruples) it prescribes the expunging of the resolution from the journal, figuratively and typically, in such a manner as can only serve to elude the positive injunction of the constitution, and to signalize the humiliation and disgrace of the Senate, without at all affecting the historical evidence of the fact; it instructs me to do this—or resign. It instructs me so to expunge, as not to expunge, the resolution; it requires of me, in a word, a jesuitical equivocation with my oath and conscience; and (considering the knowledge it must have of the opinions I entertain it commands me to incur dishonor, shame and guilt—or resign. It requires me, in effect, to give my recorded sanction to the prerogatives claimed by the President, in his memorable protest against the proceedings of the Senate, and to the limitations he thinks proper to set upon the rights, powers, and privileges of this body; well knowing the opinions I have avowed on the questions of constitutional right, and, I hope, not doubting their sincerity, the General Assembly commands me to inflict this (in my sense of things) vital blow upon the constitution of my country—or resign. I cannot shut my eyes against the truth—plain and glaring upon the very face of the transaction—that such instructions were not given me, with any expectation, or view, or perhaps even wish, that I should yield obedience to them. There is, in truth, no choice between the alternatives proposed to me; and I believe, most undoubtedly, that it was not designed to leave me any choice; that the real and the only purpose of the instructions, was to compel me to resign—to instruct me out of my seat. Indeed, it seems to me, that this design is almost avowed in the preamble and resolutions you

have transmitted to me. For the preamble recites, as a motive for the proceeding, that "the Assembly deem it their solemn duty again to reassert the duty of the representatives to obey or resign;" and then, after giving me an instruction which the Assembly knew that I could not obey without crime and foul disgrace, it resolves,—that it is the duty of the representative to obey the instructions of his constituents, or to resign the trust with which they have clothed him, in order that it may be transferred into the hands of those who will carry into execution the wishes and instructions of the constituent body."

It was impossible that I should have remained ignorant of, and it is equally impossible for me to forget, the political operations in Virginia during the past year. I know that the design of "instructing me out of my seat"—or (in courtly phrase) "giving me a walking ticket," was early and openly avowed and recommended; that it was an advantage not a little vaunted, which the victors promised themselves from the success they achieved at the last annual elections; that the scheme of the instruction was proposed and discussed, and the very method of typical expunction which the General Assembly has adopted strenuously recommended, as the proper and sure means of driving me to a resignation, in the public prints, which are sometimes the organs, and sometimes the dictators, of party plans. I know, moreover, that the proceeding was aimed at me—particularly at me; and that, to insure its success, no effort has been spared to exaggerate my faults, such as they are; to falsify the history of my life, simple and obscure as hitherto it had been, and barren of incidents; to misrepresent all my motives, sentiments, and actions; and to raise such a storm of public indignation against me as should make me bend like the willow in the fable, and preserve a worthless existence by yielding, rather than be torn up by the roots like the sturdy oak, and laid forever prostrate on the earth. I shall fulfil my destiny with firmness and composure. Let me thank my enemies for having given me a consequence which my own merits would never have achieved, that enables me to act a conspicuous and useful part in the defence of the "free institutions" of my country. I ought to be grateful to the General Assembly for placing me as it were, at the head of a forlorn hope in the contest now waging for the preservation of the constitution and the laws; and though I am as sensible of the danger, as I am of the honor of the post assigned me, I hope, with the blessing of God, to approve myself not altogether unworthy of it.

If the General Assembly had any object at heart, pursued directly for its own value, and not as a means of accomplishing, by indirection, other objects, plainly unjust and unconstitutional,—and should give me an instruction to use my endeavors, in my official station, to promote its views—an instruction, which it believed I could conscientiously obey—an instruction framed with no design to force me to a resignation; and if, in such a case, I should think the end aimed at unconstitutional, and should be, therefore, unwilling to be an active agent in accomplishing it; the case would be a very strong one, indeed, and attended with very peculiar circumstances, in which I would retain my seat, and stand as an obstruction to the accomplishment of the measure desired. But regarding the present instruction as mainly directed to the purpose of forcing me "to resign the trust with which" the General Assembly "has clothed me, in order that it may be transferred into the hands of those who will carry into execution the wishes and instructions of the constituent body"—which wishes and instructions I think plainly contrary to the letter and spirit of the constitution; and deeply convinced, as I am, that my resignation would more vitally affect the integrity of the constitution, than even an implicit obedience to the instruction; I have, therefore, come to a resolution, that I cannot, ought not, and will not resign.

I pray the General Assembly to accompany me for a brief space, and to accompany me with patience, in a consideration of the practical consequences of the precedent and of the doctrine, (for precedent will soon grow into doctrine,) which it proposes to establish—namely, that the State Legislatures may give instructions to their Senators in Congress, which they believe they cannot obey without conscious dishonor and crime, and therefore will not obey, in order to force them to the alternative of resignation.

The unavoidable effect will be, to change the tenure of the senatorial office, from a term of six years, which the constitution has ordained, to a tenure during the pleasure of the respective State Legislatures that elect them; to make the Senate, which was plainly designed, and that for the most obvious purposes, to be the most permanent body in the Government, in effect, and in practice, the most fluctuating, transient, and unstable. [See 4th page.]