Interpreting Executive Privilege: The Case Against the "Rogers Memorandum"

J. Terry Emerson, counsel to Senator Barry Goldwater, would refute (Letters, April 5) my charge that Attorney General Rogers' 1958 memorandum on executive privilege is loaded with "most amazing contradictions and inconsistencies." That charge, he opines, is "more fittingly applied" to my critique. For example, Rogers' reference to a "1789 law making it the duty of the Secretary of the Treasury to give information to Congress cannot compel heads of departments to give up papers and information." The contradiction is self evident; on the one hand, said Rogers, Congress *did* impose a duty by the 1789 Act to give information to Congress; on the other hand, he said, Congress cannot compel the department heads to give it. Drafted by Alexander Hamilton, enacted by the First Congress, and signed by the President Washington, the act can scarcely be called unconstitutional.

Mr. Emerson would explain the contradiction away by arguing that "there is no inconsistency here because the 1799 law *has never been considered as imposing* a requirement on the Secretary." (italics added). But Mr. Rogers himself read the Act to impose such a requirement, "a duty." Then too, the statute speaks for itself:

> it shall be the duty of the Secretary of the Treasury . . . [to] give information to either house of the legislature . . . respecting all matters . . . which pertain to his office.

With Nixonian aplomb Mr. Emerson reads the statute right out of the statute books: "it has never been considered as imposing a requirement on the Secretary." A clear statutory mandate is not so easily dispatched. Moreover, in 1854, Attorney General Caleb Cushing advised the President that

> By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired . . .

It does not explain away Rogers' internal contradictions to argue that the Act was "concerned with warding off Hamilton's officiousness." Whatever the origin of the Act, both Rogers and Cushing stated that it does impose a duty, a statement then contradicted by Rogers.

"Nor has President Nixon asserted any 'blanket immunity,'" states Mr. Emerson. Mr. Nixon's March 11 statement that it is "inappropriate that members of his staff not (sic) be so questioned," constitutes a claim of "blanket immunity" for his staff, a claim denied by John Dean himself on April 20, 1972: no President has "ever asserted a claim that presidential aides have blanket immunity from testifying before Congress on any subject." (Washington Post, March 26, p. A-23.

But enough; it would tax the patience of your readers and needlessly consume space to dwell on other equally untenable Emerson strictures. Let me rather take refuge in Justice Jackson's rule of thumb,

> if the first decision cited does not support it [the proposition] I conclude that the lawyer has a blunderbuss mind and rely on him no further.

Nevertheless, deficient as Mr. Emerson's defense of the Rogers memorandum is, it is yet, so far as I can find, the first published criticism of my 1965 refutation of Rogers. In the intervening 8 years no member of the executive branch, past or present, has undertaken to break a lance with me. The presidential claim of power to dole out to Congress such information as *he* concludes it may see, goes to the heart of our democratic system. And so, old as I am, if Mr. Emerson's client, Senator Goldwater, will supply a forum, I shall be pleased to come to Washington to debate with Mr. Emerson, or with whomsoever Senator Goldwater designates, the proposition,

> Resolved: The Rogers memorandum is a shoddy piece of legal analysis, vulnerable at every joint.

If it can be demonstrated that the Rogers memorandum, which has become the bible of the executive department, is badly flawed, the case for executive privilege crumbles.

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