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 contra-dictions 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 Con-gress cannot compel heads of departments to give up papers and informa-tion." The contradiction is self tion." The contradiction is self evident; on the one hand, said Rogers, Congress did impose a duty by the 1739 Act to give information to Con-gress; on the other hand, he said, Congress cannot compel the depart-ment, heads to give it. Drafted by Alexander Hamilton, enacted by the First Congress, and signed by the Pres. dent Washington, the act can scarcely be called unconstitutional.

Mr. Emerson would explain the contradiction away by arguing that "there is no inconsistency here be-cause 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, 2a duty." Then too, the statute speaks for itself: DO C

it shall be the duty of the Secretary of the Treasury . . . [to] give information to either house of the legislature . . . respecting all mat-ters . . . 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 man-date 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 2011 14-12-73

duty, a statement then contradicted

by Rogers, Or VOW VIII "Nor has President Nixon asserted any 'blanket immunity,'" states Mr. Emerson. Mr. Nixon's March 11 state-Emerson. Mr. Nixon's March 11 state-ment 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 asserted a claim that presidential aides have blanket immunity from testifying before Congress on any sub-ject." (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 unten-able 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 con-clude that the lawyer has a blunderbuss mind and rely on him no further.

Nevertheless, deficient as Mr. Emerson's defense of the Rogers memo-randum 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 Gold-water designates, the proposition,

Resolved: The Rogers memorandum is a shoddy piece of legal an-alysis, 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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