

EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY. By Mark J. Rozell.¹ Baltimore, M.D.: The Johns Hopkins University Press. 1994. Pp. xiv, 197. Cloth, \$45.00; Paper, \$14.95.

*Viet D. Dinh*²

In the foreword to this latest treatment of executive privilege, series editor Michael Nelson writes that Mark Rozell is the right person—a nonpartisan political scientist—writing at the right time: “a no doubt short-lived oasis of time in which no controversy about executive privilege is occurring. . . .” (p. x)

Rozell made it just in time. In the year or two between the publication of his book and the writing of this review, there have been at least two noteworthy showdowns between Congress and the administration over assertedly privileged presidential materials. In the Senate’s Whitewater investigation, the White House cited the “governmental attorney-client aspect of the executive privilege” to argue against disclosure of notes of a meeting between White House officials and the President’s private attorneys.³ In the inquiry into the so-called Travelgate affair, the White House invoked executive privilege to withhold documents subpoenaed by the House Government Reform and Oversight Committee.⁴ With the authorization of a new House subcommittee to investigate the Iranian sale of arms to Bosnia, more assertions of executive privilege are to be expected.

Like the budget battle and the government shutdown, invocations of executive privilege and the attendant media hoopla about an impending “constitutional crisis” seem like an annual Washington rite—a paean to the virtues and vices of a divided government. For those who follow and, in particular, who engage in this frequent ritual, Rozell’s book is useful. In 200 mostly readable pages, Rozell provides a good summary of the issues

1. Associate Professor of Political Science, Mary Washington College.

2. Associate Professor of Law, Georgetown University Law Center. Thanks to C. Adrian Vermeule and my research assistant, Brent Binge.

3. See Refusal of William H. Kennedy, III, to Produce Notes Subpoenaed by the Special Committee to Investigate Whitewater Development Corporation and Related Matters, S. Rep. 104-191, 104th Cong., 1st Sess. 53 (1995). I served as Associate Special Counsel to the Committee.

4. See Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194), H. Rep. 104-598, 104th Cong., 2d Sess. 36-37 (1996).

and arguments relating to executive privilege. Rozell is not an absolutist, and his book is not a manifesto. Rather, it states and evaluates the substantive arguments for and against executive privilege. The book also provides a process-oriented analysis of the major executive privilege battles in recent years—thereby breathing political life into the doctrinal debate. Beyond that, unfortunately, Rozell fails to deliver completely on his most original and tempting promise: “to resolve the dilemma of executive privilege.” (p. 7)

In my view, judgments about assertions of executive privilege against congressional inquiries—the determination whether the legislative need for information outweighs the executive need for confidentiality—are best and properly made through a political process of give, take, and, ultimately, compromise between these two branches. Rozell at times seems to acknowledge the primacy of this political resolution but, in the end, advocates some judicial intervention at some unspecified point in the process and with reference to some ill-defined standard.

I

Rozell gives an overwhelmingly broad definition of executive privilege: “the right of the president and important executive branch officials to withhold information from Congress, the courts, and, ultimately, the public.” (p. xi) Fortunately, Rozell confines much of his discussion to the most common and controversial forum for executive privilege, battles between Congress and the President for executive materials.

In the first chapter, Rozell highlights the arguments against executive privilege:

that it lacks any constitutional foundation; that the American constitutional Framers were too fearful of executive branch tyranny to have allowed for such a power; that Congress and the public have a “right to know” and a need to know what the executive is up to; and that the right to withhold information has become a convenient cloak for presidents who abuse their powers.

(p. 8) In Chapter 2, Rozell argues against what he summarized in Chapter 1. He makes the case that the presidential power to withhold certain information from congressional and public scrutiny “has clear constitutional, political, and historical underpinnings.” (p. 21) According to Rozell, that power is not absolute; “[r]ather, the Framers provided the president with a general

grant of power that would enable him to take actions necessary to protect the national security.” (p. 21)

Predictably, much of the discussion focuses on the arguments advanced by Raoul Berger, whose works stand among the most vigorous and rigorous critiques of executive privilege.⁵ Despite the labeling of his analysis as an effort to summarize the debate, Rozell does not hide the ball. He states up front that “this book stands as a challenge to Berger’s analysis” and “the evidence weighs in favor of the constitutional legitimacy of executive privilege.” (p. xi)

The most convincing “evidence” presented by Rozell are those arguments rooted in the text, structure, and history of the Constitution. Those arguments, well developed by others and compiled by Rozell, point to the unmistakable conclusion that the Framers contemplated some executive prerogative to withhold information from congressional inquiry. Let’s review the bidding.

The starting argument against executive privilege is that no provision of the Constitution expressly grants the President the power to withhold information. Absent such an explicit grant of authority, the President is powerless. As Rozell quotes William Howard Taft, “There is no undefined residuum of power which [the President] can exercise because it seems to him to be in the public interest.” (p. 9) The easy answer to this opening is the text of the Vesting Clause. Article II, Section 1 provides: “The executive Power shall be vested in a President of the United States of America.” By contrast, Article I, Section 1 provides: “All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives” (emphasis added). By including the phrase “herein granted” and enumerating a rather lengthy list of powers in Section 8 of Article I, the Framers intended *congressional* authority to be limited to the express provisions. The whole of the executive power instead is vested in the President; were it otherwise, the President would be limited to those activities specified in Sections 2 and 3 of Article II, which are rather scant indeed.

The question in the next round for defenders of executive privilege is thus: Does the executive power include the authority

5. See, for example, Raoul Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. Rev. 1043 (1965); Raoul Berger, *The Incarnation of Executive Privilege*, 22 UCLA L. Rev. 4 (1974); Raoul Berger, *Executive Privilege: A Constitutional Myth* (Harvard U. Press, 1974) (“*Executive Privilege*”).

to withhold information from Congress? The Court in *United States v. Nixon*⁶ attempted an answer (in a slightly different context) by noting that the constitutional Convention itself was held in secret, and Rozell reminds us of Madison's statement that "no Constitution would ever have been adopted by the Convention if the debates had been public." (p. 26) Berger offers an answer to this argument: "The fact that the Convention deliberated in secret is quite irrelevant, for in the Constitution it provided for *limited secrecy by the Congress* alone, thereby excluding executive secrecy."⁷ Berger is referring to Article I, Section 5, cl. 3: "Each House 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." Here, too, the rejoinder to Berger is the same as above. The language of the Vesting Clause does not require every presidential prerogative to be enumerated; the President's discretionary authority to withhold information from Congress inheres in the executive power. Otherwise, the State of the Union address—the constitutional provision for which, Article II, Section 3, contains no express authorization to withhold information—would be rather long-winded.

Rozell also marshals an array of contemporaneous writings by the Framers. John Jay's Federalist 64 and Alexander Hamilton's Federalist 70 both list "secrecy" and "despatch" as among the virtues of the executive. (p. 28) And James Wilson, the author of the final version of the first draft of Article II, paid tribute to the executive's "secrecy" and "dispatch" (apparently, as a member of the Committee on Detail, Wilson was more prescient in his spelling) in his law lectures. (pp. 29-30)

There are, of course, two sides to this coin. Congress must have the constitutional authority to investigate the executive, for absent such authority, the President need not provide *any* information to Congress. Berger himself acknowledges the problem: "Neither the congressional power of inquiry nor executive privilege are [sic] expressly mentioned in the Constitution."⁸ Berger argues that an express grant of congressional authority to investigate is not necessary, for an unlimited power of inquiry inheres in the Framers' vision of the legislature. He traces the roots of Congress to the British Houses of Parliament and notes that there was "virtually untrammelled parliamentary power of in-

6. 418 U.S. 683, 705 (1974).

7. Berger, *Executive Privilege* at 206 (cited in note 5).

8. *Id.* at 10.

quiry into executive conduct.”⁹ Relying on James Wilson’s Convention tribute to the House of Commons, “the grand inquest of the Nation,” as a check to monarchical power, Berger would find a similarly unlimited power of inquiry inherent in the Constitution.¹⁰

Berger’s argument fails to appreciate the essential difference between a presidential and a parliamentary system of government and that the Framers separated the powers of governance for a reason. Here Mark Rozell the political scientist shows his strength. Noting the influence of Niccolò Machiavelli and Thomas Hobbes on John Locke and Baron de Montesquieu, the intellectual godfathers of the Framers, Rozell argues that both Locke and Montesquieu favored a strong executive, albeit one whose inherent power must be checked and moderated. These checks and balances, according to Rozell, do not sap the executive of all its “energy,” but rather operate from the premise that the President retains a broad range of residual discretionary authority. (pp. 22-25)

Failing a broad, parliamentary-like power of Congress to conduct an unfettered inquest on the executive, Berger would find the congressional power of inquiry implicit in certain constitutional provisions. For instance, “the Constitution contemplates executive accountability to Congress, as the Article II, § 3 provision that the President ‘shall take care that the laws be faithfully executed’ alone should show. Who has a more legitimate interest in inquiring whether a law has been faithfully executed than the lawmaker?”¹¹ The implication of legislative supremacy flowing from this rhetorical question is not as obvious as Berger would assume. Perhaps the disinterested judicial branch properly should decide whether the President has faithfully discharged his constitutional duty. If such judicial power does not attach, for want of a case or controversy, then perhaps the Constitution contemplates that no one should judge the executive. Congress may be interested in how the President is executing its laws, but its interest has no constitutional purchase.

In any event, all this matters little because, beyond any claim of right, Congress possesses ample constitutional means to coerce information from the executive, most simply by tightening the purse strings. The problem for Berger and other congressional absolutists is that, once one acknowledges that Congress’s

9. *Id.* at 10-11.

10. Berger, 22 *UCLA L. Rev.* at 20 (cited in note 5).

11. Berger, *Executive Privilege* at 3 (cited in note 5).

power to seek information is derived only implicitly from general legislative authority or from its coercive powers, then the congressional power of inquiry stands on no better footing than executive privilege. Neither is expressed, but both are necessary and incident to the legislative and executive functions, respectively. Congress may inquire, say, whether its laws are faithfully executed, but the President may withhold information if disclosure would hinder his ability to execute the laws faithfully. Whatever else Article II, Section 3 may imply, it surely grants Congress no license to defeat its ultimate mandate, that the laws be faithfully executed.

A review of legislative-executive controversies in the early years of the Republic illustrates the Framers' appreciation of the duality between congressional inquiry and executive privilege. Rozell notes that although President Washington gave Congress information on General St. Clair's military expeditions, at the same time he took "an affirmative position on the right of the executive branch to withhold information." (p. 34) President Washington likewise cited executive prerogative and refused to comply with the Senate's request for the correspondence of French Minister Morris and the House's request for information relating to negotiation of the Jay Treaty. (pp. 34-35) Finally, Rozell points out that President Adams asserted his right to withhold information during the "XYZ Affair" in 1798. (p. 36) These accounts cast doubt on Berger's assertion that executive privilege "is a product of the nineteenth century, fashioned by a succession of presidents who created 'precedents' to suit the occasion."¹²

II

Accepting some presidential prerogative to withhold information from legitimate congressional inquiry, how does one define the boundaries of such prerogative? This, in essence, is what Rozell refers to as the dilemma of executive privilege. Toward a resolution—"[t]o restore some sense of comity and cooperation between the political branches on issues of executive branch secrecy" (pp. 142-143)—Rozell emphasizes three points. First, "executive privilege is a legitimate constitutional doctrine. . . ." (p. 143) Second, "executive privilege is not an unlimited, unfettered presidential power." (p. 143) These statements do no more than

12. *Id.* at 1.

narrow the sidelines of the game; they pose the dilemma of executive privilege rather than solve it.

The real meat comes in the third point: “The resolution to the dilemma of executive privilege is found in the political ebb and flow of our separation of powers system.” (p. 143) In other words, there are “no clear, precise constitutional boundaries that determine, a priori, whether any particular claim of executive privilege is legitimate.” (p. 143) Instead, Rozell proposes “a proper understanding of the separation of powers doctrine,” one which recognizes that the President has prerogative powers and also that there are inherent limitations on those powers. (p. 147)

Unfortunately, even accepting this “proper understanding,” one is still left with the question that recommends the book and which Rozell promised to answer. That is, how exactly should a battle over executive privilege be resolved? Indeed, it is precisely because I adopt Rozell’s moderate doctrinal view that the question nags. For those who believe in an imperial presidency or in congressional supremacy, the answer is evident.

The question breaks down into two separate inquiries: who decides and by what standard. In doctrinal terms these inquiries are the same as two steps in traditional justiciability analysis—whether there is law to apply and, if so, whether the judiciary is the proper forum to apply that law. With respect to controversies between Congress and the President over executive privilege, I think these two normally independent inquiries are merged, and the answer to both is “No.”

There is no discernible substantive standard with which to judge claims of executive privilege against Congress. Assertions of executive privilege rest on the notion that the President retains some constitutional prerogative of executive judgment, “in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.”¹³ The prerogative is not absolute, as Rozell and I agree, and may have to yield to the legislative need for information. The point at which the privilege yields—that is, the balance between legislative need for information and executive interest in confidentiality—is of necessity case specific. Leaving aside the absolutist positions, there is no way to determine ex ante the optimal level of protection for executive confidentiality for every congressional inquiry.

13. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

More important, I do not think that, even in any given individual case, a third party, i.e., a court, can determine the precise point at which the legislative need for information outweighs the executive interest in confidentiality. Executive decisions, including whether to disclose sensitive information, affect and are affected by a myriad of political, ideological, and practical factors, and there is little to recommend a court substituting its own consideration of these factors. By the same token, the legislative need for a particular piece of information turns on the purpose of the inquiry, the existence of other information, and the importance of that piece of information to legislators who may be contemplating legislative action. The contingent nature of the valuation of both the executive interest in confidentiality and the legislative need for information means that the balance between the two is doubly contingent and therefore not fit for adjudication by the judiciary (or perhaps any other outsider to the dispute).

If not in the judiciary, then where? If not in reference to a discernible substantive standard, then to what? I think the answer lies in the process of political interaction between the two competing branches. The President may, in his discretion, withhold information from Congress. But Congress may challenge the exercise of that discretion. It has constitutional authority to investigate executive branch activities and, when confronted with assertions of executive privilege, possesses ample tools to challenge the recalcitrant administration. It can, for instance, hold nominations, stall legislation, stop funding, and, ultimately, impeach executive officials. If Congress wishes to challenge the President's constitutional prerogative to withhold information, it can use its own constitutional prerogative to extort the information from the executive by deploying this arsenal of coercive legislative weapons.

Indeed, if its legislative need for information is truly legitimate and compelling, then Congress should deploy its legislative arsenal in pursuit of that information. Just as the President should not be given a free pass on assertions of executive privilege, Congress should not be able to take the relatively costless avenue (in political terms) of passing the controversy on to the judicial branch. As Justice Powell wrote in a different but related context, "If the Congress chooses not to confront the President, it is not our task to do so."¹⁴ It is through the process of give,

14. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

take, and compromise between the President and Congress that controversies between the two branches are to be resolved.

Rozell's thesis that "[t]he resolution to the dilemma of executive privilege is found in the political ebb and flow of our separation of powers system" (p. 143) can have two quite different meanings. At some points, Rozell seems to say that the resolution depends entirely, both in process and in substance, on the political interaction between the President and Congress, as I have outlined above. Thus, he suggests that, to combat executive overreach, Congress should exercise "to full effect the vast array of powers already at Congress's disposal[.]" (p. 149) and that the outcome in disputes depends on "mutual accommodation and compromise" between the two branches. (p. 150) With respect to a substantive benchmark for judging assertions of executive privilege, Rozell writes:

Our constitutional system cannot guarantee certitude with regard to how every information policy dispute in government will be resolved. Nor should it. Two executive privilege claims that, on the surface, appear equally valid may be treated very differently from one another given different circumstances (e.g., political composition of Congress, membership of a particular investigating committee, popularity of the president, etc.).

(pp. 153-54) In other words, it seems, the answer lies in the political process.

But there is a second meaning to Rozell's stated resolution, one that does not depend entirely on the interaction between the two political branches. By the "ebb and flow of our separation of powers system," (p. 143) Rozell may intend also to include the judicial branch. Thus, he advocates intervention and adjudication by the judicial branch as an alternative to constitutional deadlock:

Institutional conflict between the political branches should most often resolve informational controversies. Constant judicial intervention in such controversies is neither practical nor desirable. Nonetheless, the courts must often get involved . . . in disputes that the political branches cannot resolve without judicial intervention.

(p. 153) What is unclear, however, is when such judicial intervention is appropriate. To begin with, there is no such thing as a constitutional deadlock. In an ultimate endgame, Congress can impeach the President. And the President can resign, as Presi-

dent Nixon did, or he may fight the impeachment. Either way, the controversy is resolved without judicial intervention.

More important, it is unclear whether the political branches would want the judiciary to get involved in a purely interbranch dispute between Congress and the executive.¹⁵ The statute authorizing the Senate to seek civil enforcement of its subpoena in federal court, 28 U.S.C. § 1365, excludes from its jurisdictional grant any subpoena issued "to an officer or employee of the Federal Government acting within his official capacity."¹⁶ This limitation was inserted after then-Assistant Attorney General Antonin Scalia argued that the question "whether or not the legislative need for information outweighs the executive need for confidentiality . . . is the very type of political question from which, even under *Baker v. Carr*, 369 U.S. 186 (1962), the courts abstain."¹⁷

Congress, of course, can entangle the judiciary in interbranch disputes by issuing criminal contempt citations against administration officials. However, this too may simply be a stratagem in the political battle, a way to up the ante, rather than a genuine appeal for judicial intervention in interbranch disputes. Thus, despite many threats (which often led to negotiated settlements), since the criminal contempt of Congress provisions¹⁸ were enacted in 1857, only once has a full body of Congress voted a criminal contempt citation against the head of an executive department or agency.¹⁹

In any event, it is not clear that even a criminal contempt citation against an administration official would necessarily draw in the judiciary. The contempt of Congress statute provides that, after a congressional body votes a citation, it is sent to the appropriate U.S. Attorney, "whose duty it shall be to bring the matter before the grand jury for its action."²⁰ But whether Congress can so command the U.S. Attorney to institute criminal proceedings

15. By this formulation I leave aside demands for executive materials in connection with a criminal prosecution, such as *United States v. Nixon*, 418 U.S. 683 (1974). Such a case pits not Congress against the President, but an individual's rights against governmental interests, and thus raises different, perhaps more easily answered, questions.

16. 28 U.S.C. § 1365(a) (1979).

17. Executive Privilege—Secrecy in Government: Hearings before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess. 83 (1975).

18. 2 U.S.C. §§ 192, 194 (1857).

19. See James Hamilton and John C. Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 Harv. J. Leg. 145, 147 (1984).

20. 2 U.S.C. § 194 (1857).

is an open question, one that implicates the traditional executive discretion whether or not to prosecute alleged wrongdoing.

The Burford controversy is illustrative of this process. In 1982, the House cited EPA administrator Anne Gorsuch Burford for refusing, pursuant to an assertion of executive privilege by President Reagan, to produce documents relating to an ongoing investigation. The U.S. Attorney to whom the contempt citation was sent pursuant to 2 U.S.C. § 194 cited prosecutorial discretion and refused to initiate criminal proceedings. A congressman threatened impeachment of the U.S. Attorney and the Attorney General for failure to execute the law faithfully,²¹ but nothing came of the threat. Instead of criminal proceedings, the U.S. Attorney joined a declaratory relief action by the Department of Justice seeking to invalidate the congressional subpoena. The district court exercised its discretion to dismiss the suit and urged the branches to negotiate a settlement.²² The showdown ended when the Administration agreed to give Congress limited access to the documents. The U.S. Attorney then finally presented the House contempt citation to the grand jury, which did not return an indictment. These events perhaps best illustrate that, even in extreme circumstances, the political process does work to resolve disputes between Congress and the executive.

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My substantive criticism of Rozell's resolution of the dilemma of executive privilege, in the end, is that he does not follow through on his professed belief in "the normal ebb and flow of politics as envisioned by the Framers of our governing system." (p. 153) It is a slight slip of faith, but one that significantly detracts from the coherence of Rozell's theory such that the reader is left wondering whether Rozell has fulfilled his promise to resolve the dilemma.

My disappointment notwithstanding, the book is a valuable contribution to the literature on executive privilege. It is a good survey of the debate, and it presents the arguments in a digestible format. I think the book does more, but, if nothing else, it serves its author's purpose in revitalizing executive privilege simply by providing participants in the political process access to the tools necessary to enliven the debate.

21. 129 Cong. Rec. 59 (1983); 128 Cong. Rec. 32905 (1982).

22. *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983).