

**THE WHITE HOUSE**

WASHINGTON

June 3, 2019

The Honorable Elijah E. Cummings  
Chairman  
Committee on Oversight and Reform  
House of Representatives  
Washington, D.C. 20515

Dear Chairman Cummings:

I write in response to your letter of May 30, 2019, regarding the Committee's forthcoming interview of former Kansas Secretary of State Kris Kobach, which we understand is currently scheduled for Monday, June 3, 2019, at 10:00 a.m. As you know, we have previously instructed Mr. Kobach's attorneys that, given applicable legal principles, Mr. Kobach should not answer any questions during his interview about his communications with the President or senior White House advisers.

Contrary to the claims in your letter, we have a well-established legal basis for instructing Mr. Kobach not to answer questions about his communications with the President or senior White House advisers. As you know, a President's communications seeking advice or information in connection with the discharge of his duties are confidential. *See United States v. Nixon*, 418 U.S. 683, 708 (1974) ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and to do so in a way many would be unwilling to express except privately."). Similarly, communications made or received by senior White House advisers in the course of advising the President on official government matters are also confidential. *See In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) ("Given the need to provide sufficient elbow room for advisers to obtain information from all knowledgeable sources, the privilege must apply both to communications which these advisers solicited and received from others as well as those they authored themselves."). Based on this well-established and longstanding precedent, Presidential administrations from both political parties have consistently protected communications involving the President and senior White House advisers from disclosure.

The Committee's argument is that because Mr. Kobach was not employed by the White House or within the Trump Administration, Mr. Kobach's communications with the President and his senior advisers cannot be privileged. That is simply not true under the law. As we noted in our prior letter, in 2007, the Department of Justice ("DOJ") issued a legal opinion stating that the President and senior White House advisers may solicit information from individuals outside the government, and those communications fall within the scope of executive privilege. *See Assertion of Executive Privilege Concerning Dismissal of U.S. Attorneys*, 31 Op. O.L.C. 1, 6 (2007) (opinion of Acting Attorney General Paul Clement) ("[T]he President and his advisers

will be fully informed only if they solicit and receive advice from a range of individuals.”). The 2007 DOJ opinion has been in effect for over a decade, including throughout the Obama Administration, and it is rooted in longstanding legal precedent, which is cited in the opinion. Thus, our position is obviously not a “dangerous new tactic,” as the Committee wrongly suggests, but rather a straightforward application of longstanding legal precedent.

Therefore, Mr. Kobach’s communications with the President or senior White House advisers fall squarely within the scope of executive privilege, and the Committee has not demonstrated that its interests justify overriding a privilege claim. The Committee asserts that it needs Mr. Kobach’s testimony to determine the reasons why the Administration added a citizenship question to the 2020 Census. However, as the Committee acknowledges, the Secretary of Commerce has already testified about why the citizenship question was added to the 2020 Census. Moreover, the Committee has not explained why Mr. Kobach’s testimony is “demonstrably critical” to any legislative judgments the Committee might make regarding the census. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Put another way, your letter identifies a number of different legislative reforms that Congress might enact regarding the census, but nowhere does the Committee explain why those reforms cannot be enacted without Mr. Kobach’s testimony. Under *Senate Select*, the Committee cannot rely on broad generalizations that privileged information is important to its investigation; rather, it must “point[] to . . . specific legislative decisions that cannot responsibly be made without access to [the privileged] materials.” *Id.* at 733.

Based on the foregoing, our direction to Mr. Kobach stands. It is based on a straightforward application of precedent. As always, we stand ready to accommodate the Committee’s legitimate oversight requests, but we will not hesitate to assert the legal rights of the Executive Branch, founded in the Constitution, in response to requests that encroach on longstanding Executive Branch confidentiality interests. I welcome the opportunity to discuss any of these points at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Pat A. Cipollone". The signature is written in a cursive, flowing style with a large initial "P" and "C".

Pat A. Cipollone  
*Counsel to the President*

cc: The Honorable Jim Jordan, Ranking Member