

Executive Privilege and Individuals outside the Executive Branch

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White House assertions of executive privilege for presidential communications have historically been confined to individuals who were executive branch employees when those communications occurred. While the idea that executive privilege could extend to individuals outside the executive branch predates the Trump Administration, it appears that recent testimony by Kris Kobach, former Kansas Secretary of State, and Corey Lewandowski, former manager of Donald Trump's 2016 presidential campaign, are likely the first times the executive branch has actually made such an assertion to Congress.

Use of Executive Privilege

For decades, Presidents have asserted executive privilege by instructing current and former executive branch officials to refuse to respond to congressional questions about communications with the President and the deliberations of the executive branch. While the Supreme Court recognized in *United States v. Nixon* that the privilege is rooted in the Constitution, it also held that the privilege is not absolute and that the value of confidentiality within the executive branch needs to be balanced against the other branches' need for information. While the *Nixon* decision related only to court access to presidential records, this principle has also applied to congressional access. Since that time, Congress and the executive branch have developed a shared understanding of some aspects of executive privilege through decades of negotiations and the precedents established by self-imposed limits on executive privilege in prior presidential Administrations.

Assertion of Privilege Regarding Kris Kobach

On June 3, 2019, staff of the House Committee on Oversight and Reform conducted a voluntary, [transcribed interview](#) with Kris Kobach on his role in the Trump Administration's efforts to add a citizenship question to the 2020 census. Kobach declined to answer some questions posed by the staff because the Administration had instructed him not to answer questions regarding his communications with President Trump, citing executive privilege. The White House had also directly informed the committee of its position in a [letter](#) from Deputy White House Counsel Michael M. Purpura to the Chairman Elijah Cummings on May 21, 2019.

According to a June 7, 2019, [memorandum](#) to the Members of the Committee prepared by majority staff, the chairman and majority staff had objected to the extension of executive privilege to Kobach before, during, and after the interview because Kobach did not hold a position in the executive branch. While Kobach was a volunteer member of the

Presidential Advisory Commission on Election Integrity from May 2017 to January 2018, he has never held a permanent position in the Administration.

Assertion of Privilege Regarding Corey Lewandowski

On September 17, 2019, Corey Lewandowski appeared before the House Committee on the Judiciary. The committee had [subpoenaed](#) Lewandowski to answer questions on his role in matters discussed in the report of Special Counsel Robert Mueller. Prior to the hearing, White House Counsel Pat Cipollone issued a [letter](#) to Chairman Jerrold Nadler stating that "Mr. Lewandowski's conversations with the President and with senior advisers to the President are protected from disclosure by long-settled principles protecting Executive Branch confidentiality interests" and informing Chairman Nadler that the White House had "directed Mr. Lewandowski not to provide information about such communications." During the [hearing](#), Lewandowski declined to answer certain questions regarding his communications with President Trump based on that instruction. Like Kobach, Lewandowski has never held a permanent position in the Administration.

The chairman [objected](#) to this assertion of executive privilege in a statement issued before the hearing and stated that he would consider holding Lewandowski in contempt for declining to answer questions.

Kobach's and Lewandowski's Assertions of Privilege Appear to Be the First by Individuals outside the Executive Branch

While there are numerous examples of current and former executive branch officials asserting in testimony before Congress that their communications with the President are privileged, Kobach and Lewandowski appear to be the first individuals outside the executive branch instructed to do so.

While it is the case that the White House cited a 2007 [opinion](#) of then-Acting Attorney General Paul D. Clement that, *inter alia*, argues that executive privilege over presidential communications could extend to communications between the President and individuals outside the executive branch, it does not appear that any Administration has taken this position when asserting executive privilege prior to the Kobach and Lewandowski cases.

Considerations for Congress

This apparently novel assertion of executive privilege poses at least two potential questions for Congress:

- 1. Should Congress take further action to attempt to obtain additional testimony from either Kobach or Lewandowski?
- 2. What precedent will Congress's action in these cases set for future information disputes?

Congress has several options when witnesses decline to answer questions. First, the body may choose to take no action, potentially indicating that it accepts that the witness's declination either was warranted or does not justify additional action. Second, the body may negotiate further in an attempt to reach an accommodation. Third, Congress could compel further testimony by issuing subpoenas, filing civil lawsuits seeking disclosure, or holding witnesses in contempt of Congress.

Historically, executive privilege disputes between the White House and Congress have frequently been resolved by negotiations between the branches that lead to Congress receiving the information it believes it needs to conduct oversight. In some prior cases, however, courts have become involved.

Regardless of how Congress chooses to respond, that response may set a precedent for future executive privilege disputes. Prior practice has played an important role in defining the contours of the relationship between Congress and the presidency, especially when those contours are not explicitly set out in the Constitution.