



Written by [Steve Byas](#) on June 13, 2019

## Trump Asserts Executive Privilege Over Citizenship Question in Census

“It is disappointing that you have rejected the Department of Commerce’s request to delay the vote of the Committee on Oversight and Reform on a contempt finding against the Secretary this morning,” Charles Rathburn, assistant secretary for legislative and intergovernmental affairs at the Department of Commerce, said in a letter delivered to the Oversight Committee of the U.S. House of Representatives on Wednesday morning.



Rathburn advised House Oversight and Reform Committee Chairman Elijah Cummings (D-Md.) that President Donald Trump “has asserted executive privilege over the specific subset of the documents identified by the Committee in its June 3, 2019 letter — documents that are clearly protected from disclosure by the deliberative process, attorney-client communications, or attorney work product components of executive privilege.”

The dispute has emerged over materials related to the addition of a question about citizenship status to the 2020 federal census. The census is specifically required in the Constitution of the United States for the purpose of determining the population of the United States, and in each state, respectively. This data is then used to allocate how many members a state is entitled to send to the House of Representatives.

Nothing is said, however, in the Constitution whether the federal government can ask additional questions in the course of its decennial survey. From the first census under the authority of the Constitution in 1790, census-takers have been directed by government authorities to make other inquiries. By 1850, the government asked for the names and ages of all persons in the household — not just the “head of household.”

The question that the Trump Commerce Department has proposed to ask — concerning the citizenship status of all persons in the household — had been asked for decades, but was only deleted in recent years. One would think that such a question, then, would be rather innocuous. After all, there is no logical reason that a citizen or a legal resident would have any problem with revealing such information.

Opponents of asking the question — mostly Democrats — argue that the inquiry could make the census “less accurate” as those in the country illegally would avoid revealing that information to a census-taker. It is widely understood, however, that many Democrats fear that a census, with that question, would reveal just how serious the illegal immigration problem is in America, and could lead many illegal aliens — and potential Democratic voters — to flee the country. It would also decrease the census head count in certain areas of the country, thus reducing the number of representatives in Democrat-leaning areas of the country.



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Because of this, Democrats who now control the House of Representatives have challenged the addition of the question to the census. By demanding that the Trump administration turn over private communications among the White House, the Justice Department, and the Department of Commerce about whether to add the citizenship question, it is understood that the Democrats in the House hope to demonstrate that the question was added for a political purpose.

The House Committee on Oversight and Reform, chaired by Cummings, who is very liberal, has issued subpoenas to obtain the information, and when that information was not forthcoming to Cummings' satisfaction, the Democratic majority on the committee is now threatening to hold Attorney General William Barr and Commerce Secretary Wilbur Ross in contempt of Congress.

In the letter from the Commerce Department, however, they argue that they have been very cooperative with Congress. "To date," Rathburn wrote, "the Department has produced approximately 14,000 pages of documents, and the Secretary testified before the Committee for nearly seven hours in March. Just yesterday, the Department facilitated the voluntary appearance for a transcribed interview of a former senior Department attorney who testified for approximately six hours. Just last week, the Department agreed to make available its General Counsel and a senior advisor to the Secretary for voluntary transcribed interviews in the next several days."

Trump is certainly not the first president to assert executive privilege — the power of the president of the United States to resist certain demands for information made by the legislative and judicial branches of the federal government. In 1796, George Washington refused to turn over information about the unpopular Jay Treaty with Great Britain to the House of Representatives. He told the House that they had no role in the ratification of treaties, and therefore, had no legal right to demand the information.

Executive privilege is not mentioned in the Constitution of the United States, and its proponents usually cite the principle of separation of powers to defend it, arguing that if presidents were required to deliver all private communications about policy decisions to the legislative branch, that would violate that principle. That being said, the late Raoul Berger, a noted constitutional scholar, in his book *Executive Privilege: A Constitutional Myth*, argues that the presidential claim of authority to withhold information from Congress is without historical foundation.

Regardless of the merits of the arguments of the proponents and the opponents of executive privilege, Congress has given the Department of Commerce the legal authority to conduct the 2020 census. Considering that the insertion of the citizenship question raised no objections in the past, it would seem logical to include the question now. If Congress did not want the question asked, they retain the constitutional power to make all laws — Article I of the Constitution states, "All legislative powers herein granted shall be vested in a Congress of the United States." They could simply pass a law ordering the Department of Commerce to delete the question.

But since it is highly unlikely that such a bill could muster the necessary number of votes to be enacted into law, Democrats in the House have resorted to demands that the executive branch tell them the reasons for the decision to include the question. The executive branch actually has told Congress multiple times why they included the question, but Democrats suspect that there may be other reasons.

Whether one believes in the principle of executive privilege, it seems that short of presidents and other members of the executive branch having every policy discussion recorded and turned over to Congress, members of the executive branch — up to and including the president — should be able to freely speak



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their minds in private in policy discussions. After all, Congress has never demanded that the private judicial conferences of the Supreme Court be made public, and their rulings affect the lives of individual Americans far beyond a citizenship question on the census.

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