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About Those Constitutional Norms, Mr. Attorney General

by [Deborah Pearlstein](#)

November 21, 2019

Among the many jaw-dropping moments in Attorney General Bill Barr's [address to the Federalist Society last Friday](#) was the assertion that he had been unable to glean from his “friends on the other side” any clear answer as to what constitutional norms President Donald Trump was really breaching. In his words:

When I ask my friends on the other side, what exactly are you referring to? I get vacuous stares, followed by sputtering about the Travel Ban or some such thing.

Thanks to [norms-tracking catalogues like *Just Security's*](#) and a rich and growing body of scholarship on the topic since Trump's election, the attorney general need not reach far beyond his particular, “sputtering” friends for a more thorough accounting of exactly which norms this president has trampled — from his manifest obstruction of justice during the Russia investigation to his preference for acting officers over Senate confirmed appointees, not to mention his use of the office of president to enrich himself and his businesses. Indeed, the impeachment inquiry now underway — in which the Trump administration refuses to provide witnesses and documents central to the decision to block security assistance funds appropriated by Congress for Ukraine — offers yet another example of presidential conduct chafing against established norms. Among others, the president's non-cooperation in the Ukraine investigation breaches the bipartisan understanding that the president has a responsibility to come clean with Congress about foreign affairs activities conducted in America's name.

Ironically or not, we have a rich history of disputes between Congress and the executive branch over foreign affairs to thank for the clarity of the norm that presidents should inform Congress about their international undertakings. In the modern era, the response to President Richard Nixon's deeply controversial, secret air bombing campaign in Cambodia helped solidify one such norm. At President Nixon's insistence, the Pentagon

had developed an elaborate “dual reporting” system, making it possible for pilots and navigators involved in the missions to file reports of fuel and ordinance use, but to ensure that even the Pentagon’s already secret records would falsely show no indication of any bombing runs into Cambodia. After one military flight supervisor expressed concern about the falsification of records and asked who they were meant to keep the information from, he was reportedly told, “the Foreign Relations Committee.”

Congress did not find out about the nature of the months-long bombing campaign until July 1973, when a whistleblower reported it. Even before Watergate, it was the Cambodia scandal that triggered the first resolution calling for Nixon’s impeachment and, more importantly, led to the enactment of the War Powers Resolution (WPR) requirement of congressional notification, passed by overwhelming bipartisan majorities over Nixon’s veto. (Indeed, as opposed as he was to the WPR’s congressional authorization provision, even Nixon came to endorse passage of its notification requirement.)

The pattern repeated itself not 20 years later, when the Reagan administration famously tried to sell U.S. arms to Iran in exchange for the release of American hostages, and to use the proceeds of those sales to support the Contra rebels’ insurgency against the Nicaraguan government in violation of a federal law prohibiting U.S. assistance to the group. Conscious that planned force-related activities would face staunch congressional opposition, executive branch officials worked actively to conceal their actions from Congress. After the Iran-Contra scandal came to light, it prompted sweeping investigations by the executive branch, Congress, and a special counsel. And, after a [16-percentage-point drop](#) in President Ronald Reagan’s job approval rating — which one poll described as the largest single drop for any U.S. president in history — Congress also produced overwhelmingly bipartisan landmark legislation making it more difficult for future administrations to keep the same kind of secrets again. Separate from the legislation’s requirements, Reagan made “relevant excerpts” of his personal diaries available to congressional investigators, and likewise took the position (embraced until now by presidents since) that he would not use executive privilege to block congressional inquiries into allegations of personal wrongdoing, illegal or unethical conduct in the executive branch.

The point here is not that these historical episodes have changed, much less ended, executive instincts to secrecy. They have not. But they do offer strong evidence of a bipartisan norm that rejects presidential withholding of information from Congress about significant foreign activities. For norms are distinguishable not because they stop the suspect conduct; every norm or law for that matter is violated sometimes. What distinguishes a norm as such is that its violation is met repeatedly with some form of practical (social, political, professional, bureaucratic) disapproval.

And history is not the only evidence. I have had the pleasure over the past year of surveying dozens of senior national security policy officials who served in the Bush and Obama administrations, collecting their views on the role of law and lawyers in constraining executive branch national security decision-making. The most senior respondent served as a Cabinet secretary; the most junior served as a senior director on the National Security Council staff. While the officials had widely divergent politics and differing views on a variety of topics, there was stunning unanimity on a few points. The necessity of congressional notification was one of them. Whether before a particular force-related initiative or soon after, whether because they believed it would be illegal, “un-American” or simply “unsustainable” – it was out of the question not to come clean to Congress.

The current scandal is different from these past examples in important ways. The United States did not secretly use military force in Ukraine, or secretly fund a rebel insurgency. But as last week’s testimony made clear, the national security consequences of the administration’s equivocation and delay were potentially just as serious. And in withholding the delivery of critical and already congressionally appropriated military aid to Ukraine, the Trump administration just as surely defied the will of Congress. Barr may not like the current House investigation into the president’s withholding of security assistance to Ukraine, but refusing to hand over information to Congress about how the funds were stalled and why, definitely belongs on this administration’s growing list of norms now breached.

Photo by Drew Angerer/Getty Images

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