

A Bipartisan Push to Restore Constitutional War Powers

James Madison once observed that “in no part of the Constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department.” Unfortunately, that wisdom has long been eroded in practice, with presidents of both parties claiming unilateral power to plunge the United States into wars abroad. There is an increasing effort to restore that constitutional balance. In November, two members of Congress, **Rep. Peter Meijer (R-MI)** and **Rep. Jim McGovern (D-MA)**, spoke to Cato’s Caleb Brown for the *Cato Daily Podcast* about their bipartisan bill to bring questions of war and peace back to the people’s elected legislators.

CALEB BROWN: War is a matter for deliberation. In the United States, it’s constitutionally a matter for deliberative bodies in Congress. And yet in recent decades, we’ve seen a substantial transfer of the power to make war over to the executive branch, with expensive and often disastrous consequences. Rep. Jim McGovern of Massachusetts, a Democrat, and Rep. Peter Meijer of Michigan, a Republican, hope to begin the process of clawing back those and other related authorities on behalf of the first branch of government, where they belong. We spoke last week in the U.S. Capitol. So where did everything go off the rails? How did we get to this point?

JIM MCGOVERN: Well, I think it went off the rails because members of Congress of both parties allowed it to go off the rails. They allowed presidents to usurp congressional authority when it comes to issues of war and peace and other national security matters. So it’s up to Congress to reclaim that authority.

BROWN: This should be a front-and-center Republican issue. President Trump, it seems, had awakened an impulse to get out

of these wars and perhaps curtail the presidential power to make war. How does your party, Rep. Meijer, stack up on this core Article I issue?

PETER MEIJER: It does not cut nearly as neatly as some might expect, even though it is a constitutional question. It’s about balancing powers, and we on the conservative side of the aisle like to pride ourselves at least rhetorically on our fidelity to the Constitution’s checks and balances. But the Trump administration was really the first that had a Republican president who was not reflexively hawkish. Think back to George H. W. Bush and Ronald Reagan, for example. You probably have to go back to the Eisenhower administration to find that more dovish vein of thought in a White House held by our party. But that doesn’t mean President Trump was well received within his own party on this issue. You still have members who were opposed to that change under Donald Trump and who are still opposed to the turn toward less war in the post-Trump GOP.

BROWN: What are the mechanisms that need to change here for Congress to reclaim

the power to make the decision about going to war?

MCGOVERN: We have introduced legislation to keep us in line on a statutory basis when it comes to living up to our constitutional responsibilities. Unfortunately what happens, and my colleague just alluded to it, is that sometimes when you have a president of your own party in power you don’t want to make waves. It doesn’t matter whether you’re a Democrat or Republican. That’s the way it sometimes plays out. And so some Democrats don’t want to put any roadblocks in the way of Joe Biden. A lot of Republicans didn’t want to do that to Donald Trump. I think we need to protect ourselves by actually passing legislation that will force us to do our job regardless of who’s in power.

BROWN: I remember President Obama arguing that he had the full authority to drop bombs in a particular foreign country, Syria, but said he would ask Congress to approve a resolution on doing that. And that just seems totally backward. As you said, presidents of both parties want to have that authority. It’s a tool in the toolkit for a president. So are Democrats broadly aligned in favor of reclaiming the war power now, even though there is a president of their own party in the White House?

MCGOVERN: Well, I think as Peter mentioned, it’s complicated on the Republican side, and it’s also complicated on the Democratic side. We have some Democrats who don’t want to do anything right now because Joe Biden’s in office. But having said that, I think this is the moment to do it. President Biden has at least alluded to how he might be open to this discussion. So let’s

take him up on that, and let's see whether we can get something done. Again, the blame here is not on Republicans or Democrats. It's on both of us. And so it's up to both parties to reclaim our congressional authority, and in the long run I think it will result in us upholding our constitutional responsibilities.

BROWN: What about repealing the 2001 Authorization for the Use of Military Force (AUMF), which was passed in response to 9/11? That seems like a logical place to start. The subsequent AUMFs aren't really being used that much. And people of both parties have said, "Well, we can get rid of those" because they're not operative anyway. But the 2001 AUMF is the one that really authorized a lot of mischief that has gone on for a very long time, at great expense to the United States.

MEIJER: There are two different elements when we talk about AUMF repeal. One is ensuring that AUMFs are not being utilized for something far beyond their original purpose. Then you have what we might call the zombie AUMF problem, which is that these old authorizations are just sitting there in the background, but potentially they could be abused. So we need to just clear the slate of all of those. So 2002, 1991, 1957, you can repeal them, and it will have no operational effect today. It's good, but it's just symbolic.

The 2001 AUMF has obviously been extrapolated far beyond al Qaeda and associated forces to groups that didn't even exist on 9/11. We've seen it invoked against groups that are actively fighting al Qaeda while we're bombing them. So I am of the mind that we replace the 2001 AUMF with something that is far more narrowly tailored. We need something that makes us affirmatively address the question of whether we're going to continue these operations. It shouldn't just be a sense of intrinsic momentum but of active and ongoing congressional authorization. One of those shifts in our bill is from the burden being on Con-

gress to tell the president no to the president having to come to Congress and having Congress say yes.

MCGOVERN: Peter's right about that. A big problem is that these AUMFs have no sunset provisions, which is one of the problems we're trying to address. They go on forever, and they get interpreted and reinterpreted



“
We're using
AUMFs that
were voted on
years ago.
”

continuously. So we find ourselves involved in military conflicts, and we are told that they're justified by an AUMF, but when that AUMF was passed that conflict or that scenario was never even envisioned.

I was here in Congress when we voted in 2001 to authorize the use of military force in Afghanistan. To be honest with you, I struggled with that vote mightily. But at the time, I was reassured by the Bush administration that this was really narrow, that we were only going to seek out those who were re-

sponsible for 9/11. Well, obviously, here we are in 2021, and that was not the case. It was used for a number of things and interpreted very broadly. Had I known that back then, I probably would not have voted for it. This idea that we're using AUMFs that were voted on years ago to justify military scenarios that we never even contemplated back then, there's something seriously wrong with that.

MEIJER: Right. Where are we now? We're two decades on. The Taliban control Afghanistan, Osama bin Laden is dead. There are terrorist groups that are far more virulent that we couldn't have imagined back then. . . . We need to be asking, which groups have already been sufficiently degraded by the authorities that were given to the executive and to the operations that have been carried out. I think it's important to remember as well that there's a question of measuring outcomes, which right now Congress doesn't have to do. If the president had been forced to articulate just what they were going to do and then also prove that it had worked to convince Congress to give them that authority on a continual basis, that might have produced a far better outcome because then the president would've been held to account, the questions would've been asked, and the answers would have had to have been articulated.

BROWN: Even though, as we mentioned earlier, President Trump in some ways was less hawkish than past Republicans, most of his vetoes were over Congress expressing displeasure with his actions related to arms transfers and to exceeding his authority with respect to war powers. What is the automatic mechanism in your bill that puts the onus back on Congress to either continue to allow a president to engage in certain activities or automatically ceases that activity absent authorization?

MEIJER: Well, right now the president says, for example, "I'm going to sell weapons to

someone.” The Senate is going through this right now with some air-to-air missiles being sold to Saudi Arabia. The president does that unless both houses of Congress have veto-proof majorities to stop him. So the burden is solely on Congress to get sufficient numbers. And the president can basically do what they want. We need to switch the presumption the other way, to requiring affirmative congressional consent rather than just the passive lack of an objection. And that’s one of the things we’re proposing, regarding arms sales and using military force directly.

BROWN: It’s actually easier to impeach and remove a president, which only takes a simple majority in the House, than it is to get the supermajorities required in both chambers to stop the president from making war.

MCGOVERN: That’s absolutely right. But let me just tell you a little secret that a lot of people don’t like to talk about up here. Members of Congress don’t like to take tough votes on issues of war, arms sales, or national security matters because sometimes they’re tough votes. And so it’s a lot easier to be on the sidelines, and they say, well, “I would have done this,” or, “I would have done that.” But to cast a vote on a regular basis, to do the kind of oversight that we think is our obligation to do, it puts people in an uncomfortable spot. I was also here when we voted on the Iraq War. I voted against that authorization. But at the time of that vote, the public opinion polls were overwhelmingly in support of what President Bush was trying to do. Then public opinion turned pretty quickly. And a lot of people who voted for it wish they hadn’t. But having to cast that vote put them in a position of accountability for the decision. So that’s one of the challenges that we have to deal with because people are going to have to take responsibility.

BROWN: In your proposal, what automates the process of ending a presidential overstep without explicit congressional assent?

MEIJER: How our bill would handle that is slightly different depending on the category. But the first thing is that I think there’s a recognition on both sides of this issue that the president does have some inherent fast-



“
Biden has indicated a willingness to engage on this.
”

response ability to deal with a rapidly developing situation. So we don’t want to overly curtail that. Just like in the Constitution, the president has Article II powers around self-defense that have been used to justify a lot of periodic or one-off engagements. But after that point, once we’re beyond that immediacy, then it’s time to get Congress involved.

One change involves the War Powers Resolution of 1973, which has a 60-day clock for the president to come get authorization.

We curtail that down to 20 days. After that point, it has to be affirmed by Congress if that is going to continue. And if Congress doesn’t approve, that action is immediately ended. The funding is cut, which is an important thing the current law doesn’t do. And we’re aggressive about cutting off funds, much more so than the War Powers Resolution passed in the aftermath of Vietnam.

BROWN: Do you feel like there’s a coalition that can get this over the line and a president who’s willing to sign it?

MCGOVERN: President Biden has indicated a willingness to engage on this matter. It’s up to us to try to figure out whether we can get the majorities to do this. Now, I chair the rules committee, and we’ve had a hearing already. We’re going to do another hearing on this legislation in the near future. The ranking Republican, Tom Cole from Oklahoma, is very interested in this topic. I have a lot of other very conservative Republicans on the rules committee who have expressed interest in supporting this. And on the Democratic side, I’ve got a lot of support from some of my colleagues. The experience of the past few decades is weighing heavily on many of us.

Now, there are what I would call more-establishment figures who I think are reluctant to go down this road. We’re going to have to convince them, but this is not a Democratic or Republican issue. There are liberals, conservatives, and moderates who all feel we need to do something like this. There is also legislation on this in the Senate. We’re going to move it through the process, hopefully next year. We’re going to have hearings. We’re going to have a thoughtful discussion. And I think it will be interesting because the people who will be speaking in favor of it are not going to be all Democrats or all Republicans. You’re going to see a very broad coalition, both across the parties and within each party. ■