One Document, Under Siege

Here are a few things the framers did not know about: World War II. DNA. Sexting. Airplanes. The atom. Television. Medicare. Collateralized debt obligations. The germ theory of disease. Miniskirts. The internal combustion engine. Computers. Antibiotics. Lady Gaga. People on the right and left constantly ask what the framers would say about some ...

By Richard Stengel
...event that is happening to say. What would the framers say about whether the

dress ever Libya constitute a violation of Article I, Section 8, which gives Congress the power to de-
clarer war? Well, since George Washington didn’t even dream that man could fly, much less use a
global-positioning satellite to aim a missile, it’s hard to say what he would think. What would the
framers say about whether a tax on people who did not buy health insurance is an abuse of Congress’s
authority under the commerce clause? Well, since James Madison did not know what health insur-
ance was and doctors back then still used leeches, it’s difficult to know what he would say. And what would
Thomas Jefferson, a man who owned slaves and is believed to have fathered children with at least
one of them, think about a half-white, half-
Black American President born in Hawaii (a state that did not exist in 1803)? Again, hard to say.
The framers were not gods and were not infal-
bile. Yes, they gave us the world, a blueprint for the protection of our freedoms—freedom of speech, assembly, religion—but they also
gave us the idea that a black person was three-fifths of a human being. They were not allowed to vote
and that South Dakota should have the same number of Senators as California, which is kind of
crazy. And I’m not even going to mention the Elec-
toral College. They did not give us income taxes. Or Prohibition. Those came later.

Americans have debated the Constitution since the day it was signed, but seldom does it so
reformers for ages to come, and consequently be adapted to the constant changes of human affaires.

Section 8, the longest section of the longest article of the Constitution, is a drumroll of congressional
power. And it ends with the “necessary and proper” clause, which delegates to Congress the power
to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all
other Powers vested by this Constitution in the Gov-
ernment of the United States, or in any Department or Officer thereof.” Limited government indeed.
It is true that the framers, like Tea Partiers, feared concentrated central power more than
disorder. They were, after all, revolutionaries. To them, an all-powerful state was a greater threat
to liberty than disorder and discipline. Jefferson, like many of the antifederalists, did think the Consti-
tution created too much centralized power. Most of all, the framers created a weak Executive be-
cause they feared kings. They created checks and balances to neutralize any concentration of power.
This often makes for disorderly government, but it does forestall any one branch from having too
much influence. The framers weren’t afraid of a little messiness. Which is another reason we
shouldn’t be so delicate about changing the Constitution or interpreting it. It was written in a spirit
of change and revolution and turbulence. It was not written in stone. Its purpose was to create a government that could unite and lead and govern a new country and that the framers hoped should grow in size and strength in ways they could not imagine. And it did.

Some think we have a way of triggering instantaneous constitutional sparring: the rise of Wikileaks fueled the rise of the limits to free speech, and the political
centering the debate. Jefferson questioned the constitutionality of his own Louisiana Purchase.

The model is supposed to be a planogram in the first

We the People. Americans weigh in on the founding document

How much do you know about the U.S. Constitution, which is still in force more than 200 years ago?

Should the government:

2% Nothing at all
13% Not much
67% Some
54% Interpret based on changes in society, technology and the U.S.’s role in the world
54% Interpret based on changes in society, technology and the U.S.’s role in the world
41% What’s spelled out in the Constitution

Apros or disagree: State and local governments are not allowed to hangback and concede

Apros or disagree: The Constitution gives the power to declare war to Congress. Does the
President have authority to invade the military in Libya without congressional
approval, even if the troops are in a supporting role to a NATO mission?

Apros or disagree: Should the government make a decision on what’s spelled out in the Constitution, as the
should be?

The 14th Amendment says that any person in the U.S.
Apros or disagree: States say that the government has the power to make laws that are

Apros or disagree: The Constitution says that the President should have power to declare war.

Apros or disagree: The President should be commander in chief of the Army and Navy of the United States.

Apros or disagree: The president shall have power to declare war.

Apros or disagree: The President does not have authority to make laws that are

President does not have authority to make laws that are

35% Disagree
64% Agree
35% Revise
62% Not revise
44% President has authority
50% President does not have authority

44% President has authority
50% President does not have authority

35% Disagree
64% Agree
35% Revise
62% Not revise

44% President has authority
50% President does not have authority

The Constitution gives the power to declare war to Congress. Does the
President have authority to invade the military in Libya without congressional
approval, even if the troops are in a supporting role to a NATO mission?

The Constitution gives the power to declare war to Congress. Does the
President have authority to invade the military in Libya without congressional
approval, even if the troops are in a supporting role to a NATO mission?

Apros or disagree: States say that the government has the power to make laws that are

Apros or disagree: The Constitution gives the power to declare war to Congress. Does the
President have authority to invade the military in Libya without congressional
approval, even if the troops are in a supporting role to a NATO mission?

The 14th Amendment says that any person in the U.S.
Apros or disagree: States say that the government has the power to make laws that are

Apros or disagree: The Constitution says that the President should have power to declare war.

Apros or disagree: The President should be commander in chief of the Army and Navy of the United States.

Apros or disagree: The president shall have power to declare war.

Apros or disagree: The President does not have power to declare war.

Apros or disagree: The President does not have authority to make laws that are

President does not have authority to make laws that are

35% Disagree
64% Agree
35% Revise
62% Not revise
44% President has authority
50% President does not have authority

44% President has authority
50% President does not have authority

35% Disagree
64% Agree
35% Revise
62% Not revise

44% President has authority
50% President does not have authority

The Constitution gives the power to declare war to Congress. Does the
President have authority to invade the military in Libya without congressional
approval, even if the troops are in a supporting role to a NATO mission?

The Constitution gives the power to declare war to Congress. Does the
President have authority to invade the military in Libya without congressional
approval, even if the troops are in a supporting role to a NATO mission?

Apros or disagree: States say that the government has the power to make laws that are

Apros or disagree: The Constitution gives the power to declare war to Congress. Does the
President have authority to invade the military in Libya without congressional
approval, even if the troops are in a supporting role to a NATO mission?

The 14th Amendment says that any person in the U.S.
Apros or disagree: States say that the government has the power to make laws that are

Apros or disagree: The Constitution says that the President should have power to declare war.

Apros or disagree: The President should be commander in chief of the Army and Navy of the United States.

Apros or disagree: The president shall have power to declare war.

Apros or disagree: The President does not have power to declare war.

Apros or disagree: The President does not have authority to make laws that are

President does not have authority to make laws that are

35% Disagree
64% Agree
35% Revise
62% Not revise
44% President has authority
50% President does not have authority

44% President has authority
50% President does not have authority

35% Disagree
64% Agree
35% Revise
62% Not revise

44% President has authority
50% President does not have authority

The Constitution gives the power to declare war to Congress. Does the
President have authority to invade the military in Libya without congressional
approval, even if the troops are in a supporting role to a NATO mission?

The Constitution gives the power to declare war to Congress. Does the
President have authority to invade the military in Libya without congressional
approval, even if the troops are in a supporting role to a NATO mission?
Resolution, passed in 1973, which requires the President to withdraw U.S. forces from armed hostilities if Congress has not given its approval within 60 days. The Administration argues that what we’re doing in Libya does not meet the threshold of hostilities in the legislation so the resolution does not apply.

Let’s be honest. No President wants to have his powers as Commander in Chief curtailed. Presidents basically say, I’m the Commander in Chief, and my duty is to protect and defend the U.S., and I can’t be tied down by congressional foot dragging or posturing on C-SPAN. When it comes to presidential Executive power, where you stand is where you sit. And if you’re sitting in the Oval Office, presidential power looks pretty good. All Presidents—regardless of party—tend to have expansive views of Executive power. And pretty much every presidential candidate, including then Senator Obama, criticizes the sitting President for overreaching. Candidate Obama supported the War Powers Resolution. In 2007 he said, “The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.” When it comes to being Commander in Chief, Presidents have a lot more in common with one another than with whatever their own party says when it is out of power.

Since the signing of the Constitution in 1787, Congress has declared war exactly five times: the War of 1812, the Mexican War, the Spanish-American War and World Wars I and II. And since 1787, Presidents have put U.S. military forces into action hundreds of times without congressional authorization. The most intense of these actions was the Korean War, to which President Truman sent some 1.8 million soldiers, sailors and airmen over a period of just three years, and 36,000 lost their lives—but he never sought or received a congressional declaration of war. Congress has not declared war since World War II, despite there being dozens of conflicts since then.

The War Powers Resolution was meant to counteract what Nixon, and Johnson before him, had done in Vietnam. Congress felt manipulated and deceived and wanted to affirm its power as the war-declaring body. But the law is not exactly a macho assertion of congressional prerogative—it politely asks for an authorization letter and then gives the President a three-month deadline. Yet since 1973, Presidents have at best paid lip service to the resolution. Presidents of both
parties have used military force without prior approval from Congress—for example, in Libya in 1986, in Panama in 1989, in Somalia in 1992, in Bosnia in 1995 and in Kosovo in 1999. But in an age of potential nuclear war, global terrorism and missiles that can be launched in seconds and take only minutes to travel thousands of miles, the President must be able to act quickly. In 1787 it took months to order uniforms and muster troops—and declarations of war were written on parchment with quill pens. It seems clear that when it comes to Libya, Obama did not adhere to the spirit of the War Powers Resolution. He did not ask for authorization, even though he would probably have had congressional support back in March. The White House argues that the operations “do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve U.S. ground troops.” In short, the Administration is saying, You call this a war? We’re not even the lead dog.

The question is, Do Americans really want to let Congress have the sole power to commit U.S. forces to action? The law permits the President to act unilaterally, at least for the first 60 to 90 days. But Congress is trying to have it both ways: it wants to reassert its primacy, but it’s not sure whether it really wants to end the action in Libya. If it did, lawmakers have one very clear power that could stop the action overnight: they can defund it.

This is all part of the cat-and-mouse game of checks and balances. The War Powers Resolution is a check on presidential power, but the President seeks to balance this by, well, ignoring it. That’s not unconstitutional; that’s how our system works. The larger question is whether the War Powers Resolution is constitutional. And the Constitution is in conflict with itself here: the Commander-in-Chief clause vs. the Congress-must-declare-war clause. There’s a lot of white space between these two assertions. Republicans are now questioning Obama’s use of Executive power. But the greatest proponent of Executive power in modern times was George W. Bush. In fact, it was John Yoo, Deputy Assistant Attorney General in the Office of Legal Counsel for Bush, who wrote that when it came to his role as Commander in Chief, there were “no limits on the Executive’s judgment.” And, of course, candidate Obama was very critical of that.

Despite the fact that 10 Congressmen, including Ron Paul and Dennis Kucinich, have sued the President for violating the War Powers Resolution, this matter will not end up in the Supreme Court. Congress does not really want the responsibility of deciding whether to send troops to places like Libya. It just doesn’t want the President to do so in a way that makes it look superfluous and impotent.

II. THE DEBT CEILING

‘The Congress shall have power ... To borrow money on the credit of the United States.’
Article I, Section 8

‘The validity of the public debt of the United States ... shall not be questioned.’
14th Amendment, Section 4

No one disputes that Congress has the power to tax. That’s one of the very first enumerated powers in the Constitution. The framers created a central government in part to be able to pay off the debts from the Revolutionary War. The country was broke. You might not like the power to tax, but it is one of the basic tenets of representative government. The Boston Tea Party slogan was “No taxation without representation!” It wasn’t “No taxation.”

There are those in Congress and beyond who suggest that the U.S.’s not raising the debt ceiling and defaulting would be a lesson to a spendthrift government not to borrow more than it can repay. But the idea is that we can default on our debt is not only reckless; it’s probably unconstitutional. No one is saying the debt is wise and prudent—far from it—but defaulting on it flies in the face of one of the few absolute proscriptions in the Constitution, Section 4 of the 14th Amendment: “The validity of the public debt ... shall not be questioned.” The idea is that the U.S. shouldn’t weasel out of its debts. It does not say that we can’t undertake dumb obligations—the Constitution can’t prevent bridges to nowhere—but that we need to pay off the public obligations that we do set for ourselves, whether those are Social Security payments to retirees or interest to Chinese bankers. When Congress borrows money “on the credit of the United States,” it creates a binding obligation to pay that debt.

The debate over raising the debt ceiling is mostly cable-TV playacting. The party out of power is always against raising the debt limit, and the party in power is always for it. When Bush needed to raise the debt limit in 2006, then Senators Obama and Joe Biden voted against it, with Obama saying that raising the limit was “a sign of leadership failure.” Since 1962, Congress has enacted 75 separate measures to alter the limit on the debt, including 17 under Ronald Reagan, six under Jimmy Carter and four under Bill Clinton. Congress has raised the debt limit 10 times since 2001. It isn’t a partisan issue.

At the same time, there’s nothing unconstitutional about the public debt’s exceeding the size of the GDP. It’s not wise, and we might look like Greece, but it’s not unconstitutional. And there’s nothing