Written by **Jack Kenny** on July 5, 2011

Time (Magazine) Flies off Course on Constitution

Asked about newspaper publishers who opposed his presidential candidacy in 1952, Adlai Stevenson was prepared with a characteristically witty rejoinder: "Their job is to separate the wheat from the chaff and then print the chaff, " the Illinois Democrat said.

Editors and publishers are still printing the chaff, as was made clear once again by the issue of *Time* magazine that came out last week with a cover date of July 4. It was the magazine's "Tenth Annual History Issue" and the cover story on the Constitution came with the intriguing headline, "Does it Still Matter?" The image on the cover suggests *Time's* answer. It depicts a partially shredded copy of the venerable document. Does it mean that "We the People" have torn the Constitution apart with our quarrels over a document that has been "in constant crisis since 1787," according to the small print on the cover? Well, the article, written by managing editor Richard Stengel, claims the Constitution is *not* in crisis. "Today's debates represent conflict, not crisis. Conflict is at the core of our politics and the Constitution is designed to manage it," Stengel writes. "A crisis is when the Constitution breaks down. We're not in danger of that."

But how should we know when the Constitution "breaks down"? When it is continually ignored by the public officials who are supposed to upholding it and following its mandates, in what sense is it still functioning? Stengel's article continually fudges the issues and nowhere more than on the vital question of war and peace. He concedes that in initiating an air war over Libya without authorization from Congress, President Obama "did not adhere to the spirit of the War Powers Resolution" passed by Congress over President Nixon's veto in 1973. That Presidents since then "have at best paid lip service to the resolution" appears to have undermined the validity of the law rather than the legitimacy of the presidential actions in Stengel's view.

But the statute aside, what about the Constitution itself? Here, Stengel quotes Obama the candidate in 2007 against Obama the President in 2011. "The President does not have power under the Constitution

to unilaterally authorize a military attack that does not involve stopping an actual or imminent threat to the nation," said the Obama of four years ago. No one, not even the evolving Barack Obama of 2011, has claimed Libya has posed an "actual or imminent threat" to the United States. No, this is humanitarian bombing or "air support" of the rebels who are fighting Ghadafi in his and their own country. Does the Constitution, which authorizes armed forces for the "common defense" of the United States, authorize that? And who decides?

Stengel finds "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." Not really. It is up to Congress to declare a state of war exists. It is then up to the President, as commander in chief, to preside over the waging of said war. To claim the President may go to war without a word from Congress, as, for example, Truman did in Korea, is to make a nullity of the "power" of Congress to declare war. That merely leaves it to Congress to announce, if it chooses, a decision the President has made, a task better suited to a press secretary than a Congress. As Alexander Hamilton wrote in The Federalist Number 69:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies — all which, by the Constitution under consideration, would appertain to the legislature. (emphasis in the original)

James Madison, the principal architect of the original Constitution, later referred to the "fundamental doctrine of the Constitution that the power to declare war is fully and exclusively vested in the legislature." Madison also maintained, and the notes of the Constitutional Convention confirm, that the wording of the clause was changed in the convention from "make war" to "declare war" in order to leave to the President the power to repel a sudden attack on the nation. It did not mean that Congress should sit on its hands while the President wages wars halfway around the world against nations that have neither threatened nor attacked us.

Stengel's essay is also loaded with factual errors, most notably his attempt to refute Ron Paul and members of the "Tea Party faithful" who believe the Constitution was written to restrain the federal government. "If the Constitution was intended to limit the federal government, it sure doesn't say so," Stengel confidently asserts. Apparently the Tenth Amendment did not survive *Time's* paper shredder. It states unambiguously: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Indeed, that is the principle underlying the Constitution from the beginning, Madison argued in The Federalist Number 45: "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite." Citing the authority delegated to Congress in Article I, Section 8, "the longest section of the longest article in the Constitution," Stengel calls it a "drumroll of congressional power." But the very next section contains a list, though not as long, of the things Congress may not do, including (drum roll please) suspend the "Privilege of the Writ of Habeas Corpus (except when rebellion, invasion or the public safety require it) pass a bill of attainder or ex post facto law, grant a title of nobility and other prohibitions.

While giving a nod of approval to such constitutional provisions as "freedom of speech, assembly and religion," Stengel argues that the framers "also gave us the idea that a black person was three-fifths of a human being, that women were not allowed to vote and that South Dakota should have the same number of Senators as California, which is kind of crazy." That last might seem crazy to a believer in a simple majoritarian democracy, but the framers were establishing a republic that protected the interests of the small states from being overridden by the votes of the large. How is that any more "crazy" than protecting the free speech rights of an individual to voice opinions contrary to the deeply held beliefs of a large majority of his countrymen? Both are limitations on majority rule.

The framers wrote nothing into the Constitution prohibiting women from voting. The Constitution left qualification of voters to the states. Guaranteeing the franchise to women was achieved the same way slavery was formally abolished and Prohibition was adopted and then repealed: by constitutional amendment, not by an improved "interpretation" of what our evolving standards require.

The Constitution never said anyone was "three-fifths of a human being." The question was about how people should be counted for the purpose of taxation (when federal taxes were apportioned among the several states) and representation in the lower house of Congress. The slaveholding states, not surprisingly, wanted slaves to be fully counted in order to increase their states' representation in Congress and counted not at all for the purpose of taxation. The free states wanted it the other way around, especially with regard to representation, as they feared the growing influence of the slaveholding states in Congress. The compromise was that the number of people in each state would be determined by "adding to the number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons." The Constitution did not create slavery in the United States, it merely recognized its existence, albeit with some deliberately ambiguous phrasing. Indeed, the words "slaves" or "slavery" did not appear in the Constitution until the adoption of the Thirteenth Amendment, which abolished the institution.

All in all, there is less sense than nonsense in the article, which takes up ten full pages of the magazine. "What would the framers say about whether the drones over Libya constitute a violation of Article I, Section 8, which gives Congress the power to declare war?" Stengel asks in one of his many rhetorical questions. "Well," Stengel answers, "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." I confess ignorance as to what Washington dreamed, but drones or no drones, wouldn't the more relevant question be, what would Washington think about waging war — regardless of what the current President may call it — without the consent of Congress? Similarly, Stengel tells us it is futile to speculate on what the framers might think about a tax on people who don't buy health insurance, since James Madison didn't know what health insurance was and doctors in his day used leeches. But what does that have to do with Congress's power of taxation or whether a person's decision not to purchase a particular product or service is subject to the power of Congress to regulate "interstate commerce"?

All the speculation about what the framers "would say" is a vain chasing after the wind. We only know what they did say and, more importantly, what the Constitution says. There seems to be a marvelous inconsistency here. Those who insist on a broad interpretation of government powers under the Constitution frequently advise "strict constructionists" that what matters is not the exact wording of the document, but its broad principles, capable of adaptation to our modern circumstances; except when they are telling us that since the framers didn't know our modern circumstances, their broad principles are indiscernible or, at best, ambiguous. It would be like saying we can't be sure if a government ban on

cable or broadcast talk shows would violate the First Amendment protection of "the freedom of speech" because Washington and Madison knew nothing of radio or television.

Compounding the confusion, the cover story includes a poll under the heading. "We the People: Americans weigh in on the founding document." One of the questions asked was: "Agree or disagree: A woman should have the right to terminate a pregnancy in its first few months." The poll shows 64 percent in agreement, while 35 percent disagree. But the question was obviously loaded. People tend to respond favorably to "rights" stated affirmatively. Suppose it had been worded differently: "Agree or disagree: a pre-born infant should have the right to live." Might the outcome have been different?

More to the point, in what way is speculation over what right people "should" have a question about the Constitution, which tells us of legal rights we do have? The document says nothing having to do with either pregnancy or the termination of same, the ventriloquism of the Supreme Court notwithstanding. *Time's* poll does what the Court has done; it confuses policy preferences with constitutional mandates.

Perhaps the key to Stengel's approach to the Constitution is summed up in a single sentence displayed in large bold type on the final page of his article. "We cannot let the Constitution become an obstacle to a future with a sensible health care system, a globalized economy, an evolving sense of civil and political rights." Ah, yes. Oaths or no oaths, lawmakers should not let the Constitution of the United States, the "supreme Law of the Land" stand in the way of a "progressive" agenda. That's why we have broadminded and imaginative lawyers and judges.

And paper shredders at *Time* magazine.