

Chapter I

“All Necessary Powers”?: The Constitution

The image on the television monitor was stark. Amid the smoking ruins, a large American flag was flying defiantly. The camera pulled back, focusing on the president standing somberly in front of the ruins.

“My fellow Americans, I speak to you today from Liberty Island, where the Statue of Liberty is still smoldering. Last week, as you know, the statue, a symbol of our nation known throughout the world, was destroyed by terrorists. The Basque Liberation Army has claimed credit, citing our support of the Spanish government in their fight against the Basques. As a result of this attack, as well as that in New York on September 11, 2001, and on Las Vegas last year by remnants of al-Qaeda, I am issuing an order to the appropriate elements of the federal bureaucracy. Let me emphasize that this order is being issued in the interests of national security after extensive discussions with the attorney general, the secretary for homeland security, and members of the Joint Chiefs of Staff. My order is as follows: By midnight, May 30, 2008, six months from today, every American citizen will be required to carry a national identity card. This card will carry information such as birthplace and date, Social Security number, and home address, and it will also carry a unique, DNA-based

identifier. The persons responsible for designing these cards tell me that it will be impossible for them to be forged, due to this new DNA-based identifier. During times of national emergency, this card will help to identify American citizens and enable the law enforcement agencies of this country to track down foreign-born terrorists.

“I realize that this is a radical step for our country. However, we must enable our law enforcement agencies to rapidly distinguish citizen from foreigner in times of emergency like the one we find ourselves in now. We now know that some of the terrorists escaped in the immediate aftermath of the explosion by posing as innocent American citizens. We must not allow this to happen again. As your president, it is my responsibility to take every conceivable precaution to safeguard the lives of Americans. This national identity card is, in my opinion, a relatively benign way to accomplish this goal.

“I join you in your prayers for those lost at this monument. Let us do everything possible to ensure that they are the last Americans to give their lives in a foreign-based terrorist attack on this country. Thank you, and goodnight.” As the camera drew back, President Crockett gazed determinedly at it, as if trying to show that nothing would harm the country again. Immediately, the news analyst turned to those in the studio. Jack Edmunds, news anchor for American Media Market, swiveled to face the man on his left, saying, “Senator Rush, your thoughts on this radical new proposal.”

“Well, Jack, as you know, we in Congress were just informed of the new policy this morning. My colleagues and I have not had much time to study it, but our first concern is whether or not the president has the power to institute such a program. The White House claims that it does have this power, based on the 2009 revision to the USA Patriot Act of 2007. That act, as you will remember, gives the president ‘all necessary powers to fight foreign terrorist attacks.’ In his interpretation, the faithfully executed clause of the Constitution gives him the power to institute a national identity card program to fight attacks by foreign terrorists. Many of us in Congress disagree. The faithfully executed clause does allow the president to interpret the laws passed by Congress. But when we

revised the Patriot Act, the intent was to increase our security through traditional methods. A national identity card is a radical departure from traditional beliefs in this country. President Crockett is violating the separation of powers principle. It should be up to Congress to implement an identity card if we feel it is necessary. We will be holding hearings beginning next week to determine whether or not this new policy exceeds the president's powers.”

“Somehow, Senator, that is not surprising,” said the anchorman dryly. “However, you don't seem to find the idea of the national identity card troublesome, just the fact that the president seems intent on implementing the system without prior authorization of Congress. Many people find the whole idea of the national identity card repulsive. What do you think, Janine Aliton, as a representative of the ACLU?”

“Frankly, Jack, I'm bothered by the whole idea. Like the senator, I'm unsure whether the president actually has the constitutional power to implement such a program. I also have doubts about the constitutionality of a system of national identity cards. Such a system reeks of totalitarian government and is anathema to many Americans. My maternal grandparents were refugees from the Soviet Union. Through national identity cards, the Soviet government was able to infringe on many aspects of its citizens' lives. This is not something we feel comfortable with here in America.”

“Hold on now, Janine,” interrupted Steven Stitler, the White House spokesperson. “This government has no intention of tracking or spying on American citizens. The identity cards are essential to national security. You know as well as I do the problems facing law enforcement in this country today. Security at many of our national monuments, at big events like the Super Bowl, at airports, is extremely difficult. With this system, law enforcement can pass American citizens through security and concentrate their efforts on those who are not citizens. This would be a means of easing life for American citizens and allowing law enforcement to scrutinize the rest of the people for terrorist affiliations. It would also solve a major problem. Despite the reforms after September 11, 2001, the computers at the FBI, CIA, and INS still can't talk to one another.

This program would include the development of a centralized database for important information and also fund new computer systems for all aspects of the federal government, enabling the different departments to share information.”

“But Steven,” Jack Edmunds jumped back into the discussion, “this would seem to discriminate against noncitizens. It also would not have stopped a Timothy McVeigh. Keep in mind that although the last three terrorist acts in this country have been perpetrated by foreigners, we do have militia groups here. I can see the possibility of this program inciting domestic terrorism by some of the militia groups, which already feel the government is doing too much to take away their privacy.”

“No program is perfect,” replied Steven, “and we are attempting to defuse the militia groups through other means. The bottom line is that we must do everything possible to prevent further foreign-based terrorist acts in this country. I believe many Americans would be willing to give up a little of their privacy in return for security.”

“Janine Aliton, what do you reply to that?” asked the anchor, a slight smirk on his face.

“I agree that no program is perfect, and I also agree with you, Jack, that this program is discriminatory. Noncitizens who are legally in this country would be targeted by law enforcement. The vast majority of them are innocent of any crime. I disagree with Steven; I don’t think the majority of Americans will sit still for this kind of government intrusion in their lives. This program also says nothing about legal resident aliens. Where would they fit in? Would they also be subject to intense police scrutiny? I also wonder about the information on these cards. You may say that they will only contain state information that the government already has, but I wonder. Will these cards state religion, as a way of tracking possible Muslim terrorists? Will they include information on criminal background? Wouldn’t the government like to know, at public events or in sensitive locations, if a person has a history of involvement in militias or supremacist groups? And what about travel history? If I had a history of traveling to places where there are a lot of terrorists, would that be noted on my card?”

Steven interrupted before Janine could answer: “I know the ACLU is concerned about protecting the rights of all people in America. Let me ask you this: Suppose when you leave here today you stop at a mall to do some shopping. There are a large number of elderly ladies at the mall. Just as you walk into a store you hear shots being fired. Those twenty white-haired little old ladies had pulled out Uzis and were killing people. What are you going to do the next time you see a group of little old ladies? It is unfortunate, but sometimes law enforcement must use profiles. In fact, they would be derelict in their duty if they did not. Just as we test only women, not men, to see if they are transmitting illegal narcotics to an unborn fetus, law enforcement does sometimes need to target specific groups.

“So yes, noncitizens would face greater scrutiny; they already do. It is unfortunate for them, but more than 10,000 Americans have died at the hands of noncitizen terrorists in this country over the last five years. If the government doesn’t act, it is not doing its job. The administration has been talking about the problem of legal resident aliens. One of the suggestions that has been made is to have a card for them also, but with a different-colored border. Resident aliens might be subject to greater scrutiny than citizens, but less scrutiny than foreign visitors.”

Janine looked at Steven thoughtfully. “Your example is not quite appropriate, Steven. Of course law enforcement shouldn’t test men to see if they’re transmitting illegal drugs to a fetus. But are you saying that it is appropriate for law enforcement to test all women for illegal drugs to make sure they’re not transmitting them to the fetus? Or only all pregnant women? The Supreme Court has disagreed with this position in the past. And by the same logic, you’re saying that if a woman is raped, then all men should provide a DNA sample to find the rapist. Our political and judicial systems do not work that way.

“I agree with you that terrorism is a serious problem in this country. And you do make some valid points. But we have the Constitution for a reason. Our Founding Fathers were afraid of government going too far. I think this is an example of what they feared. They wanted to limit government for a reason. Giving too much power to the national govern-

ment creates problems. In addition to discriminating against noncitizens, there are other problems with these cards.

“I’m concerned, for example, about the DNA-based identifier. For this system to work there will have to be a centralized databank of the DNA of every American citizen. Who will have access to this databank? Will it be used solely to check identity at security screenings, or will law enforcement agencies be able to access it to investigate crimes? Will insurance companies find a way to access this information before granting health insurance? There are troubling questions here.”

Jack Edmunds turned to Chris Colter and asked, “What are your thoughts, Chris?”

“Janine made a good point. The Founding Fathers did limit our government. However, they could never have envisioned the terrorist attacks against this country. We need to consider dramatically amending the Constitution to eliminate certain individual rights, like privacy rights and the rights of the Fifth Amendment, so more people like me won’t end up burying their husbands. We also need an amendment that says that noncitizens are not covered by the Constitution or Bill of Rights. As it is, the Supreme Court has said that even admitted terrorists have all the protections of the Constitution and Bill of Rights. It is fundamentally wrong that they can attack our country and institutions and still be protected by our laws.”

Before Jack could say anything, Janine jumped back in. “I’m sorry for your loss, Chris, but I don’t think we should jump to the conclusion that we should start limiting rights in this country. That would create even more trouble. Why not also advocate getting rid of habeas corpus? Let the government throw suspected terrorists in jail and never hold a trial—that’s what happened after the attacks on the World Trade Center, with the detainees at Guantánamo Bay.”

Chris shook her head. “By what logic do you defend the right of foreign terrorists to all of the same protections as American citizens? It’s like you want to give the mugger the gun he needs to mug you with. These people are using our system against us. There is something fundamentally wrong with that. If the FBI catches a terrorist, they can’t even

question him without an attorney. I say we should torture that person to get information if we have to. Homeland Security knew something was planned before this bombing. Obviously they had an informant or something. Why shouldn't we have taken that person, used truth serum, torture, something, to find out what was being planned so we could prevent this latest atrocity?"

Janine smiled at Chris. "Again, I'm sorry for your loss. But the reason that everyone on American soil is protected by the Constitution is based on our history of being a political haven for people from all over the world. Our ancestors came to this country for political freedom, the freedom to try to make the world better. If we deny constitutional protections to the terrorists, we become no better than they are. We also help the terrorists accomplish their goals, by showing that our freedoms are not absolute."

The senator and the White House spokesperson watched the two women, but before either could speak, Chris replied rapidly, "The Constitution and the principles it embodies will do us no good if we're dead. I am a law-abiding citizen. If the FBI wants to listen to my phone conversations, read my email, or even search my house, I don't care. If that can help stop future terrorist attacks, I'm willing to allow it. Keep in mind, our government has been trying since September 11, 2001, to stop terrorists from attacking us, and it hasn't worked. We've made it too difficult for the government to do its job. I also see no problem with a national DNA databank. This would help solve crimes, and if you've done nothing wrong, what do you have to worry about?"

"Senator, you've been quiet. What are you thinking?" Edmunds tried to draw the senator back into the discussion.

"I have to admit, points have been raised that my colleagues and I had not considered. In our preliminary discussions, we have been focusing on whether or not the president actually has the power to implement such a program, or whether it should be up to Congress to authorize national identity cards. While I agree with Ms. Aliton that there would be some discrimination, I can tell you that I personally have received a lot of feedback from my constituents regarding national security. I tend to agree

with Steven that the majority of Americans, like Ms. Colter here, would give up a little privacy in return for safety. I also don't think that the majority of Americans would worry about law enforcement accessing the database to solve crimes. We would have to ensure that the information remained only in the hands of law enforcement. I agree that insurance companies should not be able to access the database. I don't think we need to dramatically alter the Constitution, though. History has shown that when we suspend protections of individual rights, innocent people do suffer. There are also questions about how to pay for these cards. It will be a costly investment, as we would need not only the cards themselves, and the databank, but also the mobile readers to verify the DNA identifier."

"Hold it right there, Senator," Steven intervened. "Although the president didn't raise it in his speech, funding has already been discussed. There will be a tax placed on all foreigners who enter this country legally, for example at airports. It will be collected by customs inspectors. It will go to pay for the cards and all costs associated with them. At the time of entry into the country, all foreigners will also give their fingerprints and a DNA sample. This will help to find criminals and keep known terrorists out of this country. Keep in mind, it will also stimulate sectors of the economy. Businesses will compete to develop cheaper card readers. And before Ms. Aliton interrupts, let me make something clear: The guard at the Super Bowl will not get your entire history. What will happen is that when asked for your card, you will swipe it like you swipe your credit card in a grocery store. You will then insert your finger into the machine, and a cell will be scraped off. The machine will compare the DNA from the cell and card with the DNA in the databank. If all three match, you're cleared and the machine says 'approved,' just as with your credit card. All three must match, so this means that identity theft will become a thing of the past."

"Really, Steven!" exclaimed Janine. "Do you think foreign-born terrorists are just going to come in by plane and give us this information? And other foreigners, who are not terrorists but value their privacy, what do you think they'll do? Is it possible that they'll come to this country ille-

gally? As it is now, we can't protect our borders and keep illegals out of the country.”

“Janine, you're under the mistaken impression that we still have privacy in this world. With all of the technological advances and databanks, no one really has any privacy anymore. Also, you're ignoring some of the other benefits from these cards. We would be able to identify fathers so they'd be required to pay child support. The cards would also help in an accident, because the medical history would be readily available. As we develop the process, we will also code the cards with security clearances, so that someone who has no problems in their background would get a higher security clearance than someone with a criminal background. The cards would be updated every five years, so they'd be current. There is a lot of social good that can come out of these cards.” Steven looked pleadingly at Janine, almost begging her to agree with him.

Janine shook her head. “Can you tell me with good faith that after the emergency the government will abandon these cards? Or will they become an accepted part of life? The information that the FBI is currently compiling on our emails, reading habits, and so forth—is that going to be put on the cards or in the databank? Is this going to be a way for the IRS to catch people who haven't paid their taxes? If I go to an airport and I haven't paid my taxes, will that show up on my card and will security then take me to jail? You're shaking your head, but aren't these valid questions?”

Before Steven could answer, the anchor jumped in, trying to regain control of the discussion. “Another thing, Steven, is the concern that the government is just using this to introduce the idea of implanted computer chips. Before you laugh, you do realize that some parents are implanting chips in their children, don't you? I can see the government arguing that too many people are losing their cards, so we should go to chips.”

Steven shook his head. “Everyone is taking this too far. We're just trying to provide some security for the country.”

Jack Edmunds turned to Senator Rush. “Senator, I would like to return to your major concern for a moment. Who does have the authority to implement such a program? I'm not a constitutional scholar, but it does

seem to me that the president would have such authority under the revised Patriot Act. What do you think, Janine?”

“Jack, as you know, my area of specialization is the Bill of Rights. However, I feel the Constitution is not clear on this issue. Congress writes the laws, and it is up to the president to faithfully execute the laws. This elastic clause is the problem. To faithfully execute the law, in my mind, the president must determine what Congress intended when writing the law. If Congress intended to give the president all power to fight foreign terrorism in this country, then the president probably has the power to implement this proposal.”

Jack gave the camera his “thoughtful” look. “Couldn’t the Supreme Court rule on this question? That would solve the immediate problem.”

“Unfortunately, Jack, our system doesn’t work that way. The judiciary can only step in when someone can prove they’ve been harmed. So once the identity card system goes into operation, it can be challenged in court. And, given the mood of the Supreme Court in these troubled times, combined with their historic reluctance to limit the power of the federal government in national security matters, I doubt the Court would put a stop to these cards,” Janine replied sourly.

“But you’re focusing on the cards themselves. I was wondering if the Court could decide who had the authority to implement the program, Congress or the president,” Jack came back rapidly. He hated it when people did not address the issue he had raised.

“I suppose it is feasible that some members of Congress could sue the president for harming them by usurping Congressional powers,” Janine replied, “but I am more concerned about the whole idea of the cards. It just seems to fly in the face of what it means to be an American.”

“Thanks for outlining your position for us, Janine. We are now being joined by Annabelle Moore, distinguished constitutional scholar. Annabelle, what do you have to say about the issues that have been raised here tonight?”

“First of all, Jack, thank you for inviting me to join this discussion. Let me say that, from an historical perspective, President Crockett probably can go ahead with his national identity card program. During times of

national emergency the Constitution tends to fall by the wayside. We saw this during the Civil War when Lincoln suspended habeas corpus, during the First World War when Wilson used the government to set prices, and, of course, during the Second World War when Japanese Americans were interned. Presidents can disregard the Constitution if Congress lets them.”

“What do you mean, if Congress lets them? What can Congress do to stop the president, other than holding hearings or possibly filing a lawsuit?” Jack put on his mystified look for the audience. “Both of these courses of action are clearly within the realm of Congress but would take time. What could Congress do?”

“Jack, too often we make things harder than they are. Yes, Congress can and should hold hearings; that is part of their oversight responsibility, part of checks and balances. But part of the separation of powers is the fact that no one branch of government can work independently. Congress today can do the same thing that past Congresses have done when they disliked a presidential program, what Congress in fact did do toward the end of the Vietnam War: they can cut off the funding. The Constitution gives Congress sole power of appropriation. The president cannot implement this new program without funding. All Congress has to do is refuse to allocate the funding. By law, the president cannot use funds from another program to fund a new program. This is the way Congress can control a president. As we know, Congress has sometimes refused to withhold funding; they funded the internment camps, for example. But if Congress really feels this program is wrong and is willing to take the political heat for opposing it, they can prevent the president from implementing the national identity card system.”

The anchor nodded his head, looking sagely at the camera. Annabelle always made him look good. She continued speaking after taking a sip of water.

“But, Jack, there is another potential problem here that needs to be studied. And that is states’ rights.” She paused again as Jack looked puzzled for the audience. Annabelle went on, “The Tenth Amendment reserves to the states those powers not given to the national government.

I can envision governors arguing that this is a matter for the states to pursue themselves, that they have the right to issue these cards, just like driver's licenses. Now, the federal government will argue that this is a national government matter, like passports. But passports are for foreign travel. These cards essentially would be like a domestic passport, and I can see where there would be an argument that the federal government does not have the power to issue such cards. Keep in mind that various cities and states refused to support some provisions of the original Patriot Act and refused to help the federal government implement some of the programs associated with it. In order to compile these cards and this database, the federal government would need a great deal of help from the state governments. States could simply refuse to cooperate."

"Now wait a minute, Annabelle," interrupted Jack, "surely the federal government can do whatever it needs to in order to protect us from terrorism."

"Not quite, Jack," Annabelle smiled. "The wording of the revised Patriot Act, like the original, is so vague that many citizens are upset. They are pressuring their state governments, and this new card system would give state governments the perfect case to test the limits of the federal government. You need to keep in mind that the states are part of the checks and balances of our system."

"Well, Annabelle, as always, you've put your finger on the crux of the matter. We will have to see how Congress and the states decide to respond," concluded the anchorman.

Annabelle interrupted him. "Jack, there is one other thing I would like to address . . ."

Jack, startled out of his traditional closing, turned to her. "What is it?" he asked abruptly.

"Given the problems our society currently faces, the fear and the uneasiness, I think the media has a duty to act responsibly, to remind Americans why their liberties are being restricted," began Annabelle.

Jack jumped in, "We are acting responsibly. This program is an example of that. We're showing the American people what the government is doing and explaining the possible problems."

“Yes,” replied Annabelle, “you are doing that. But the airwaves belong to the public, and we have the right to expect you to sometimes do what is right rather than concentrate on pleasing your advertisers. No, let me finish, Jack. I’m a big sports fan, and it really bothers me that the broadcast media no longer show the national anthem before sporting events. Instead they cut to commercials. As long as we are at war with terrorists, I feel that the media should show the performance of the anthem to remind people of those we have lost and those who are putting their lives on the line while we relax, watching a game. Can you give me a good reason why you can’t show the anthem?” Jack glared at Annabelle. “I’m sorry, but we’ve gone over our allotted time. We’ll have to discuss this another time. Thank you, America, and goodnight.”

Points to Ponder

Agree or disagree with the following statements, and give your reasons:

1. A system of national identity cards would be a good idea. It would help law enforcement and would not seriously impact our privacy. After all, the government already has most of the information that would be included on such cards.
2. The constitutional separation of powers was a good idea when implemented but today causes confusion and unnecessary gridlock. We need a government that can function rapidly.
3. It would be better if the Supreme Court gave advisory opinions. This way we would know if a proposed law or program would pass constitutional scrutiny.
4. Sometimes it is acceptable for the government to discriminate against a group of people, like legal aliens in this scenario.
5. Often the separation of powers and the system of checks and balances do not work, as in some of the historical cases mentioned by Annabelle. Usually it is because Congress is unwilling to oppose a program that is wrong but enjoys popular support.

6. During a national emergency, it is understandable that the government will infringe on citizen's rights. When the government decides the emergency is over, things go back to normal.
7. Congress sometimes intentionally writes vague laws, like the Patriot Act, so as not to have to take responsibility for unpopular programs.
8. Almost every modern president has tried at one time or another to exceed the powers given him by the Constitution. The demands placed on the president today make that inevitable.
9. The media are not acting responsibly by fulfilling the role given them by the Founders. They are supposed to be a part of our system of checks and balances but often fail to address issues of importance regarding our government.
10. The Constitution is too limiting of our government, preventing the government from effectively fighting terrorism. We need to amend it as Chris indicates.
11. We should allow the government to use torture to get information from suspected terrorists.
12. We need to keep limits on the government, as the Founders envisioned. Otherwise the government will violate our fundamental rights.

Essay Questions

1. Discuss the problems associated with the separation of powers and checks and balances. Is this system of government outmoded or a protection of our rights? Use examples from this story to illustrate your points.
2. Explore the philosophy of the Constitution and our protections, discussing why our rights and limitations on governmental power should or should not extend to all those on U.S. soil, including any who might be here illegally and planning to harm this country.