

TRANSCRIPT
“Security and the Constitution
ETS Pictures, Ltd.

(Images of the World Trade Center attacks fill the screen)

NARRATOR: On September 11th, 2001, the United States was confronted with a new and unprecedented terrorist threat.

NARRATOR: Since that day, America has taken steps to secure itself against terrorism, and has undertaken a debate that touches the core of American democracy.

TOM HEFFELFINGER: The goal here is to prevent a recurrence of the terrorist acts we saw on September 11th, 2001.

NARRATOR: As federal officials have sought new methods to combat terrorism, their actions have brought old controversies about the extent of government power into fresh focus.

NANCY CHANG: We appear to be facing a permanent war on terrorism ... one that we've been told will not end in our lifetime. And what I'm most concerned about, is a permanent downward ratcheting of our civil liberties.

NARRATOR: National security and civil liberties converge in this program, as we explore security ... and the constitution.

TITLE: “Security and the Constitution”

NARRATOR: Debates over the scope of the government's emergency powers are rooted in interpretations of the central documents of American democracy - the Constitution from the Bill of Rights.

TITLE: “Peter Erlinder: Former President, National Lawyers' Guild”

PETER ERLINDER: Well I think we have to start talking about the concept of “balance of powers”, which is actually written into the Constitution itself. It comes from philosophical principles that were advanced by Montesque, a French philosopher.

Montesque's view, was that it was necessary to separate the executive branch, from the judicial branch, from the legislative branch ... to create a balance between various aspects of the exercise of government power and government decision making, to make certain that one branch did not get out of control. And in addition to that, we have the protections of the Bill of Rights.

TITLE: "Tim Lynch: The CATO Institute"

TIM LYNCH: Well the whole purpose of the Bill of Rights was based on the the saying of Lord Acton, which was that "power corrupts." And this was something that the founders of this country knew very well. When people get into power, they tend to get corrupted by that power, and then want to expand their power beyond its lawful boundaries ... or they want to exercise that power in an abusive way against their rivals, their political opponents, dissidents.

But the whole idea of the Bill of Rights was to limit those abuses as much as possible, by putting down in writing that individuals have rights.

PETER ERLINDER: The First Amendment talks about the right of freedom of speech, the right to freedom of the press, the right to petition the government. The Second Amendment talks about the right to bear arms. The Fourth Amendment ... the right against unreasonable search and seizures. The Fifth Amendment ... the right to remain silent, to be indicted by a grand jury for example. The Sixth Amendment ... the right to council ... the right to a jury trial ...

NARRATOR: Freedom of speech and other individual rights guaranteed by the Constitution were tested early on in the American republic. During the administration of John Adams, Congress passed the Alien and Sedition Act, which outlawed speech critical of government policy. Widespread public opposition to the Act led to the election of Thomas Jefferson, and the eventual expiration of the law ... but the battle over the Alien and Sedition Acts foreshadowed other constitutional conflicts to come.

PETER ERLINDER: The inclination for all governments to attempt to centralize power, to use extraordinary measures during times of threat ... it's occurred in our history ... the Alien and Sedition Acts were one of those times.

Abraham Lincoln suspended the writ of Habeus Corpus during the Civil War. There were congress people also during that time, who were arrested and imprisoned for speaking out against the war policy. Other times in American

history where this kind of thing has been seen is during World War 1. Many of the First Amendment cases that have come to define the First Amendment, came out of attempts to suppress - and successfully suppress - opposition to World War 1.

(Images from a 1950s film on Communist subversion fill the screen)

1950s FILM NARRATOR: The communist apparatus activated its trained agitators and propagandists...

TITLE: "Michael Andregg: University of St. Thomas"

MICHAEL ANDREGG: After that there was the McCarthy Era ... during the beginning the Cold War and the atomic age. Senator McCarthy was accusing lots and lots of people of being communist agents, and there were black-lists of artists.

There were some communists agents. They tended to miss those, and go after people that just had a socialist political philosophy.

TITLE: "Nancy Chang: The Center For Constitutional Rights"

NANCY CHANG: One of the most troubling instances of over-reaching on the part of the government, was the internment of a hundred and twenty thousand individuals of Japanese decent in the months following the Pearl Harbor bombing.

(Clips from a World War II-era film on the Japanese relocation are seen)

W.W.II FILM NARRATOR: Notices were posted. All persons of Japanese decent were required to register ...

NANCY CHANG: Two thirds of those individuals were American citizens of Japanese descent, and one third were Japanese nationals. They were put away in concentration camps for several years during World War II ...

(Footage from a WWII government film on the Japanese internment)

W.W.II FILM NARRATOR: Santa Anita Race Track, for example, suddenly became a community of about seventeen thousand persons ...

NANCY CHANG: And it has subsequently been determined that not one of them had anything to do with the Japanese attack on the United States.

NARRATOR: While the Japanese internment was controversial even in its day, the Supreme Court ruled against several legal challenges to these war-time detentions. Likewise, during various periods of American history, courts have ceded broad authority to the executive branch in times of conflict, allowing the president wide discretion in his role as commander and chief.

TITLE: “Stansfield Turner: Former CIA Director”

STANSFIELD TURNER: Just as in wartime over history, we have curtailed our liberties in one way or another. Censorship of the press during World War II, for instance, to keep battle information from seeping out. We’ve got to be willing to tolerate some intrusion into our liberties, into our freedoms ...

Philosophically, we always have to keep in mind that we don’t want to destroy what we’re defending. But we also have to extirpate this terrorism.

(Footage of the 9/11 attacks in New York City)

NARRATOR: The attacks of 9/11 brought a new level of unconventional conflict to American shores, and set the stage for a renewed debate over the extent of the government’s powers.

TITLE: “Mark Burgess: Center for Defense Information”

MARK BURGESS: The scale and the scope of 9/11 was huge. It was something wherein terrorists took a very low-tech weapon, and used it to great effect. It shut down the United States for several days. It killed more people than any other terrorist act ever killed. It was witnessed across the United States - and on worldwide television - live. It was very much a departure from terrorism here in the United States, but also a departure from terrorism globally.

NARRATOR: The sweeping scale of 9/11 heightened a discussion that had been going on in defense circles since the 1990’s, about how to best defend the nation against catastrophic terrorism. The diffuse nature of terrorism makes it difficult to combat ... and the specter of terrorists acquiring chemical, biological, or radiological weapons, raises concerns about increasingly disruptive and lethal attacks in the future.

STANSFIELD TURNER: I think because of the threat of weapons of mass destruction, we may very well in the future see hoaxes. I mean, what if someone tells us there's a nuclear weapon planted in the middle of Manhattan island? There'll be tough kinds of decisions to be made in those sorts of situations.

NARRATOR: Counter-terrorism policy in America has featured a shifting combination of foreign and domestic efforts, as well as a shifting emphasis on various law enforcement and military tools.

Since 9/11, the Bush Administration has sought to expand the duties of both the military and law enforcement in counter-terrorism, and has also moved to enhance the authority of the executive branch, by asserting war-time powers.

(Footage of the 2004 State of Union address)

GEORGE W. BUSH: After the chaos and carnage of September 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.

MARK BURGESS: Right from the very start, it's been dubbed a "war on terrorism". And when you portray something as a war, you sort of set the stage for how you're going to prosecute that campaign.

TITLE: "Elisa Massimino: Human Rights First"

ELISA MASSIMINO: The war framework for this counter terrorism effort that the US is engaged in now, has enabled the administration to play off of a long tradition in this country - and kind of a well established judicial tradition - of deference to the executive in wartime. And that has all kinds of ramifications.

NARRATOR: After September 11th, Congress and the Bush Administration moved on several fronts to implement new security measures. One of the first initiatives undertaken by the White House, was to expand the scope of its intelligence gathering authority.

Intelligence gathering by the executive branch has long been a contentious issue, representing a clash between interpretations of the president's role in protecting the national security, and the Fourth Amendment to the Constitution, which governs search and seizure powers.

TIM LYNCH: With the Fourth Amendment, one of the primary protections is the warrant procedure. The framers divided the power to arrest, the power to search, between two separate branches of our government - the Executive Branch (the police, prosecutors) and the judicial branch. So officers do not have the right to raid anyone's home or business whenever they think it's a good idea. They must apply to judges, by submitting applications for search warrants; for arrest warrants. And then if the judge reviews these applications, and if he agrees that they've done solid investigative work - that it's a good application - that there's solid evidence of a crime ... then he will approve the arrest warrant, the search warrant, and it can go and take place.

NARRATOR: With the advent of electronic communications, the executive branch began to assert the right to conduct electronic surveillance for national security purposes, outside of the bounds of the Fourth Amendment ... without warrants or judicial approval.

(Footage of Richard Nixon)

The debate over the president's authority to conduct national security surveillance reached critical mass during the Nixon administration, when it was publicly revealed that President Nixon had conducted widespread surveillance of domestic political activists, as well as his own political opponents.

PETER ERLINDER: I think that it's important to note that one of the most important cases that came out of that period was a case called United States vs. US District Court, in which the federal government under Mr. Nixon, challenged the application of the Fourth Amendment to the Executive Branch. Nixon claimed the absolute power to carry out electronic surveillance against anyone that he designated as being an enemy.

(Footage of the Watergate complex in Washington DC)

The case was decided on a Monday, which happened to be the same Monday that the New York Times reported that the Democratic headquarters had been broken into the night before - at Watergate. The Supreme Court in an eight to nothing opinion, held that the Fourth Amendment did apply to the president of the United States, that he wasn't immune to the limitations of the Fourth Amendment. Had the Supreme Court decided differently, it would not have been necessary to take the bugs out of the Democratic headquarters, because it would have been quite legal.

In the opinion itself, the Supreme Court said that while the president must obey the Fourth Amendment, that in areas of foreign intelligence, there may be an exception. And that exception has to do with espionage ... that there could be some sort of powers that the president might have to combat espionage, that would be outside of normal Fourth Amendment limitations.

NARRATOR: In 1978, Congress passed the Foreign Intelligence Surveillance Act, creating the FISA Intelligence Court. The act created a court of seven judges, who approve applications for national security searches outside of Fourth Amendment standards. The court meets in secret, inside a secure room at the Justice Department.

TITLE: “Jonathan Turley: George Washington University”

JONATHAN TURLEY: I had to go into the FISA court on a limited basis when I did a long internship with the National Security Agency. And so you go into the FISA court, and it's a skiff, a room designed to defeat any efforts of surveillance. Its a metal room ... it makes most traffic courts look grand in comparison ... and there's a single judge there. And he signs applications.

You have to realize that before FISA, there was such extreme disagreement over the authority of the president, that national security searches were done with virtually no standards. And there was a desire to create some type of systemic approach to national security searches. However, the result was something of a constitutional mutation ... They created a court that would effectively run on a standard lower than the Fourth Amendment standard on the Constitution.

The framers of the Constitution could not have been more clear ... that when it comes to searches and seizures by the government, they have to be done under a standard of probable cause - probable cause of crime. But the FISA court does not require probable cause of a crime. What's somewhat disingenuous or deceptive, is that they use the term “probable cause.” The term “probable cause” referred to under the FISA statute, refers to probable cause of the suspicion of being a foreign agent - not of a crime. That's a standard that you can make easily, with any affidavit.

And on top of that, you can also add aiders and abettors ... so if you simply give a ride to somebody from a meeting that turns out to be suspected of having foreign contacts under FISA, then *you* can be subject of a FISA search. And a FISA search

is no joke ... I mean a FISA team can go into your home, scrub your computer, search your home, bug your home, put things like “magic lantern” devices on your keyboard, and be out of there in twenty minutes ... and you’ll never know that they were in your home. You’ll never know that your privacy was violated.

NARRATOR: Many civil libertarians have long opposed aspects of FISA, claiming that its secrecy encourages abuse ... objecting to the fact that only the government can appeal FISA decisions ... and noting that the court has rejected only one surveillance application since 1978.

TITLE: “Coleen Rowley: FBI Special Agent”

COLEEN ROWLEY: Now you can look at that two ways. One way, is that the FISA court is nothing but a mere rubber stamp - that’s one interpretation. The other interpretation though - and if you glean this through news reporting and news articles - is that the Department of Justice at the time was so intent on not having a bad record with the FISA court, that they were only presenting what you could term “slam dunk” cases for surveillance ... and actually had perhaps a higher standard - a very high standard - of what was needed in these declarations. So there’s actually two completely opposite ways of looking at that fact.

NARRATOR: FISA was expanded by anti terror legislation passed in 1996 after the Oklahoma City Bombing. After 9/11, as the threat of international terrorism became more pronounced, debates over FISA once again emerged.

COLEEN ROWLEY: Terrorism has attributes of both crime - in almost all cases a terrorist act is a crime. And it also has attributes of intelligence gathering, and of course trying to protect the national security. It kind of falls really between the two.

So it gave you options of going to a criminal court, if you were investigating terrorism as a crime ... Or if you were considering it to be a intelligence matter, and trying to protect the national security, then you could attempt to go to the FISA court.

The problem, though, that developed ... was that there was a perception that it was an easier task to get an order from the FISA court, than it would be to get it from a district judge - to show probable cause of a crime. So because of that, the authorities - the FISA court and the Department of Justice - developed

mechanisms which we called “the wall” to show that this was not being abused ... that the FISA court was not an “end run” around the criminal process.

And this became - when terrorism again developed, because it’s right between intelligence and criminal - this became almost to the point of insane, because our criminal agents could not really talk to our intelligence agents. They couldn’t share information, because if they were seen to be sharing information then it was, “Well why didn’t you get a criminal warrant?”

(News footage of congress voting on the PATRIOT Act)

NARRATOR: The passage of the USA PATRIOT Act further expanded the reach of the FISA court. Under the PATRIOT Act, the gathering of foreign intelligence no longer had to be the primary purpose of a FISA search - only a significant purpose. This change to the FISA statute opened the way to use FISA directly for criminal prosecutions.

NANCY CHANG: It is possible now for the government to obtain intelligence information under the Foreign Intelligence Surveillance Act, and then present that evidence in a criminal proceeding. We have the danger of law enforcement doing an “end run” around the Fourth Amendment.

TITLE: “Tom Heffelfinger: US Attorney, Minnesota”

TOM HEFFELFINGER: The information that the FISA court deals with, the information we deal with when we’re trying to prevent terrorism, is classified top secret information. Do you want to go into a public forum, and tell a judge on public pleadings, that you know where Osama bin Laden is living? Of course not. In order to be effective in preventing terrorism, in order to be effective in managing top secret information, we have to have a court that operates under the same top secret provisions as does law enforcement.

JONATHAN TURLEY: For those of us who have been critics of FISA for years ... we always heard the same refrain. Former general counsels of the NSA and CIA would say, “You can’t point to a single time where the court was misled”. And in fact, that same defense was heard after 9/11 when FISA was expanded. You had people in the administration who were making that argument, even though they knew that there was an unpublished report documenting dozens of such cases. And now we know that the US government misled the FISA court in dozens of cases - the very abuse that has long been denied.

You know, these abuses are not surprising, but what's surprising is that the court finds dozens of cases in which it was misled or lied to, and the response of Congress was to expand the authority of the government under FISA.

NARRATOR: The debate surrounding the PATRIOT Act extends to other provisions as well. Section 215 of the PATRIOT Act grants the FISA court the ability to authorize the seizure of records and items ... and Section 213 allows judges to permit law enforcement agents to search locations surreptitiously, and then to delay notification of the search.

TIM LYNCH: So the problem here is that agents could be in somebody's home, they could be looking around, they could be photographing things, they could be copying things from the computer, taking photographs of things ... and the homeowner will not know that the agents have been there until weeks, possibly months later.

TITLE: "George Getz: The Libertarian Party"

GEORGE GETZ: The "sneak and peek" search provision in the PATRIOT Act ... the interesting thing is that politicians had tried to get that provision passed a couple years before 9/11. They had stuck it in to a drug bill. But we were able to repeal it, working with some groups ... the Libertarian Party lobbied against it. But along comes 9/11 and - presto - the "sneak and peek" provision rears its ugly head, and there it is again in the PATRIOT Act. And so I think it's fair to ask whether politicians are capitalizing on the 9/11 attacks, in order to impose a political agenda that they had earlier.

COLEEN ROWLEY: The government's term is "delayed notice", and the civil libertarians' term is "sneak and peek". And again, I don't view this as much of an expansion of the prior law.

The good thing about delayed notice, is that's all it is - is delayed. It's not that the person who's the subject of the search will never find out, it's just a question of time. And it will - it can be argued in court later on ... if the evidence is located and it's going to be used against the person, they will have the right to argue these things to a judge.

STANSFIELD TURNER: It's going to be a very interesting and delicate set of issues for the American public in the next decade ... and fortunately in the

PATRIOT Act, they put a “sunset” clause ... and after five years, a good bit of it, at least, expires unless the Congress revalidates it. I think that’s very important.

COLEEN ROWLEY: The 10 or 11 provisions of the PATRIOT Act that are coming up for renewal in a year in 2005 ... I think it would behoove people to really have a better understanding of what these actually amount to, so they have an ability to judge what liberty - if any - they’re giving up, and what amount of security or additional protection they’re getting. And if they don’t understand the provisions of the PATRIOT Act, if they don’t understand some of the other initiatives going on, I don’t know how we can have a democratic, informed consent in this country.

(Footage of FBI headquarters in Washington DC)

NARRATOR: In the years since 9-11, the Bush administration has worked to enhance general law enforcement powers, and in the process, has transformed the FBI.

MARK BURGESS: The FBI has now become - their chief mission has become - an anti-terror mission, as opposed to an anti-crime mission. So you’re seeing that law enforcement at the federal level - but also right down to the local law enforcement level - is being changed in that degree.

NARRATOR: As part of this restructuring, the Justice Department has stressed a preventative strategy in terrorism investigations.

TOM HEFFELFINGER: The strategy of the old law enforcement, which was to respond to a crime, investigate, prosecute the perpetrator, and throw them in prison ... that doesn’t apply when the bad guy is prepared to commit suicide in order to accomplish his crimes. The goal here, undoubtedly, is to prevent a recurrence of the terroristic acts, like the ones we saw in September of 2001.

NARRATOR: In order to facilitate this strategy, Attorney General Ashcroft made changes to Department of Justice policies, including guidelines regulating FBI criminal investigations. Prior to 9/11, FBI agents were subject to guidelines adopted in the 1970’s, after revelations about widespread FBI surveillance of peaceful political groups. These policy directives have since been dropped, along with the central idea of the guidelines - the criminal predicate.

TITLE: “Michael Ratner: The Center For Constitutional Rights”

MICHAEL RATNER: And what we mean by a criminal predicate, is that you simply can't walk into a meeting I'm having if you're an FBI agent, and take down the notes of everybody who's there, and surveil everybody, and record my speech, then put that into a file and open a file on me. What you need before you can do that, is some criminal predicate ... and this was a threshold that came about, to a large extent, after what happened with COINTELPRO, really.

TITLE: "Jim Redden: Author, Journalist"

JIM REDDEN: The program that people have read about or heard about known as COINTELPRO, or Counter Intelligence Programs, was really not a single program, but a series of initiatives targeted at specific groups. One of the early targets was the Communist Party USA, where the FBI and local law enforcement infiltrated the Communist Party and spied on its members. But there were also others ... especially as the civil rights movement and the anti-war protests picked up steam ... and they began specific initiatives to go into those organizations as well.

(Footage from a 1950s FBI promotional film)

J, EDGAR HOOVER: In furtherance of our service to each citizen...

NARRATOR: Critics of the Attorney General's changes to FBI guidelines, point to FBI director J. Edgar Hoover's COINTELPRO program, as the principle example of how broad investigative authority can be abused.

TITLE: "Ramon Bosque-Perez: Hunter College"

RAMON BOSQUE-PEREZ: It was certainly far beyond law enforcement. It was an operation that simply singled out some organizations, and tried to disrupt their activities ... independent of if those organizations were engaging, or not, in illegal activities.

NARRATOR: The Center for Puerto Rican Studies at Hunter College has compiled a substantial archive of declassified COINTELPRO documents detailing FBI infiltration and disruption of Puerto Rican independence organizations.

RAMON BOSQUE-PEREZ: What is amazing is that 94, 95 percent of all the documentation belongs to legal organizations, working in the open, engaging in legal political activities.

One thing that distinguishes COINTELPRO operations from other types of activities, is that this is what's called "aggressive intelligence." It wasn't only surveillance. It wasn't only putting together reports on organizations, investigating individuals ... It went beyond that. Far beyond that. It was aggressive intelligence in the sense that it tried to disrupt the activities of the organizations.

TITLE: "Larry Gossett: Active in civil rights causes during the 1960s"

LARRY GOSSETT: And they used tactics like wire-tapping, following people, but actually sending people into the organizations to be spies, to be provocateurs ... to cause problems, and report intelligence. They would even write letters, and say that two members were messing with the same girl, to try to get them fighting amongst each other - particularly the leadership.

The other thing that gave me suspicion that the police were trying to disrupt our movement, was that we had new people coming in that nobody knew, and all of a sudden they would come to these meetings and act like they were "blacker" than everybody else: "Yeah, what we should do is tear it down, burn the mother down" ... and try and get people involved in criminal activity where they could be led into a set-up. So they did a lot of things besides wire-tap. They actually tried to disrupt and destroy these organizations ... and in some cases, they were successful.

TITLE: "Dennis Stovall: Vietnam Era Anti-War Activist"

DENNIS STOVALL: I do know a number of people who I was active with, who have remained paranoid all of their lives as a result of that surveillance. It gets people afraid. It makes them wary of friendships. It makes them suspect other people. You always wonder who in the room is doing the reporting, the watching, the telling.

(Footage of Martin Luther King)

NARRATOR: The most prominent COINTELPRO target was civil rights activist Doctor Martin Luther King, who was surveilled at the direction of FBI director Hoover. FBI agents also engaged in disruptive activities aimed at Dr. King and his political organization, including sending this letter in 1964 ... urging him to commit suicide.

(Footage of letter, including excerpt reading "you are done".)

NARRATOR: Political surveillance during the 1960's was not limited to the FBI. Local police agencies often maintained their own files, and shared information with federal officials. During the 1960's and 70's, politically oriented intelligence units existed in many metropolitan police departments - from New York City, to Portland Oregon.

JIM REDDEN: I currently work for the Portland Tribune newspaper, and we did a series of stories titled "The Secret Watchers" in 2002 ... and what happened was the city of Portland, like all major cities, had a police intelligence division that - among other things - was tracking political dissidents in the 50's, the 60's, and the 70's. They got involved in monitoring groups that nobody in their right mind would think are dangerous, such as bicycle or food co-ops. I think merely having the word "co-op" in the name, was enough for the Portland police to open a file.

TITLE: "Bonnie Tinker: Operated a battered women's shelter in Portland"

BONNIE TINKER: Well I just got a call from a reporter that said they'd like to come talk to me about the files on me that they'd found, that the Portland police had. And I had no idea what they were talking about.

But then the reporter came to my office, and gave me this file with this police report in it, and I started reading it ... and I was absolutely appalled to think that they were circulating information like this as if it were truth.

The files were evidently based on my involvement with the National Coalition Against Domestic Violence ... they thought I was the national chair, which I was. They also said that I had helped the Black Panther Party set up their national structure, and that I was mad when they wouldn't let me be a member ... and I have no idea what caused them to concoct that notion.

It didn't seem to me that there was really any information of much use ... Although the one piece of information that's interesting in retrospect ... they were very concerned that we had set up a national network of safe houses for women who had been beaten by their husbands - and it even said something about "Women who had been beaten by their husbands" ... because they said that this national network of safe houses, could be used to harbor terrorists in the future.

JIM REDDEN: They gathered hundreds of files ... thousands of people. There were some prosecutions. There were people who actually committed serious

crimes here in this town, blowing up recruiting centers, bank robberies, things of this nature, which they also caught. So it wasn't all just watching people for their political beliefs. They also caught politically motivated criminals and put them in jail.

(1970s news footage of rubble of a Greenwich Village townhouse)

NEWS ANCHOR: The townhouse disintegrated into a mass of mortar and rubble...

NARRATOR: Due to its mix of ideology and criminal activity, terrorism causes particular investigative challenges. While most protest groups opposing the Vietnam War were involved in legal First Amendment expression, some factions did participate in criminal actions ... such as the Weather Underground, a splinter group of Students For A Democratic Society. From the late 1960's and into the 1970's, members of the Weather Underground engaged in a series of bombings throughout the United States.

JIM REDDEN: Political groups, and especially those political groups that consider themselves radical or revolutionary, pose a real problem for law enforcement. I've had an opportunity in recent years to see a lot of police intelligence files from the 1960's and the 1970's. One of the things that really surprised me, were the amount of reports the police were getting that the anti-war groups were in fact planning serious crimes.

So a lot of these reports were probably bogus. Some of them may have been planted by the police themselves as a means to look further at the groups. But some of them appeared to be serious. So what is law enforcement supposed to do? On the one hand, you can look at it in very simple terms - law enforcement shouldn't monitor people because of their political beliefs - but out in the real world, it gets a lot more complicated than that. And I think it does pose a real dilemma to law enforcement.

(News footage of an arson scene)

NEWS ANCHOR: Graffiti pointed investigators to ELF - Earth Liberation Front...

TONY BOUZA: I can't emphasize enough, the importance of developing intelligence. People have agendas ... so figure out, attend a few meetings, send somebody undercover to attend some meetings, read their pamphlets. Try to figure

out what this organization is composed of. Who are the ones you need to watch? And be discriminating in who you arrest.

(More news footage of the arson scene)

NEWS ANCHOR: The FBI is looking for links...

COLEEN ROWLEY: It's a tough thing, but we have to weed out false tips. And certainly even in criminal cases, people furnish us false information for purposes that are completely unrelated to the crime. This can happen, and it's our task - or the FBI's task - to weed through. So we do this in every case, and unfortunately the pressure in the terrorism arena is causing us to really lower that threshold to the point where perhaps, most everything is being looked into.

NARRATOR: As part of its preventative strategy, the Justice Department has announced that it will investigate every terror related tip that it receives. This policy has caused concern among some critics, who believe that a lack of individual discretion on the part of FBI agents will result in unnecessary investigations, and an influx of data that cannot be effectively analyzed.

Other observers point to a series of recent law enforcement bulletins, which they claim signal a return to COINTELPRO style tactics, in which law enforcement is conflating protest activity with terrorism. In October of 2003, an FBI intelligence bulletin devoted to terrorism information, instead contained summaries of action undertaken by anti-war demonstrators, such as videotaping police actions, and raising money over the Internet. Likewise at a state level, the California Anti-Terrorism Center issued a bulletin announcing an anti-war protest at the port of Oakland.

TITLE: "Mark Schlosberg: ALCU of Northern California"

MARK SCHLOSBERG: This is the only piece of information that we have in terms of a CATIC bulletin, but it does raise our concern about why is this anti-terrorism information center, which was set up to combat terrorism - the likes of Al Qaeda - why is this center issuing a bulletin about a protest at the port of Oakland? And that raises real serious questions for us about how this center is being used, and what regulations are in place to prevent intelligence abuse.

MICHAEL ANDREGG: And really the ultimate protector of American citizens is a belief system among the folks that are doing that law enforcement ... If they

believe that the constitution is really what they're trying to protect, they will guard against some of the most egregious excesses. If they don't care about that, then any additions to their power increase the potential for abuse.

COLEEN ROWLEY: The mindset, and the prevention at all costs, the "no tip will go uncovered" ... these are not governed by the letter of the law in the PATRIOT Act. And these are probably much bigger issues. They're behind it all, and to the side of it all, but they are probably bigger issues right now affecting civil liberties than the PATRIOT Act itself.

NARRATOR: In the weeks after 9/11, armed National Guard soldiers became a common sight at major airports. These troops were called up by state governors at the request of President Bush, and were paid for with federal funds. The Bush administration has also sought to increase the role of federal troops in domestic security operations, by establishing a domestic military command.

MARK BURGESS: NORTHCOM is in effect a military version of the Department of Homeland Security. It was formed as an umbrella for the various military commands and military units which are responsible for North America. It doesn't actually have any troops under its command as such - it is a staff. Troops are allocated as needed.

NARRATOR: Military involvement in law enforcement has long been controversial. A standing military was resisted by many early Americans, and military participation in law enforcement operations has been outlawed since the Civil War.

TITLE: "Steven Aftergood: Federation of American Scientists"

STEVEN AFTERGOOD: There is a law which enshrines the distinction between the military and civilian law enforcement. It's an 1878 law called the Posse Comitatus Act. It's the law that says you can't ask the army to carry out police functions in the United States.

TIM LYNCH: The role of the military and the role of the police - they have two very different missions. The role of the military is basically to find the enemy, and to destroy the enemy - to inflict maximum damage on the enemy. The role of the police force is very different. We want the police to bring suspects into a court of law using the absolute minimum amount of force that's necessary to do so.

NARRATOR: The Bush administration undertook a review of the Posse-Commitatus Act soon after 9-11, but several major changes had been made to Posse-Commitatus years before - during the 1980's and 1990's. These changes amended the law to allow military involvement in counter drug efforts, which were viewed by many administration officials as related to national security.

TITLE: "Jose Palafox: Author, Researcher"

JOSE PALAFOX: So you see this whole construction of drug trafficking as a national security threat ... and so that's how you are able to chip away at things like the Posse Commitatus Act by saying "We have a national security threat, and the way to stop this is to stop them at the border."

NARRATOR: During the 1980's and early 1990's, federal military personnel were tasked with drug interdiction duties at the Mexican border, and National Guard soldiers flew counter-drug missions within the continental United States.

TITLE: "Colonel Robert King: Iowa National Guard"

COLONEL ROBERT KING: Guardsmen have been instrumental in tracking and identifying and discovering very large amounts of marijuana, cocaine ... other drugs ... as well as manufacturing plants for them. Something that needs to be identified, is that they are not law enforcement officers. They have no arrest authority. They don't carry weapons. They work completely in a support role, whether it be in transportation or doing analysis work, communications, reconnaissance, surveillance, and those types of activities.

NARRATOR: As military operations at the US-Mexican border increased, armed combat troops were brought in to aid law enforcement agents on counter drug patrols.

JOSE PALAFOX: So there's been a historical trajectory from the early 1980's, where they were sort of just providing research and training, to the 1990's where you actually see the deployment of troops.

NARRATOR: In 1997, US marines shot and killed Ezequiel Hernandez, a US citizen tending a herd of goats near the Mexican border. This incident was widely cited by observers critical of military involvement in law enforcement duties.

TIM LYNCH: So when you put military people into domestic law enforcement type situations, I think you're asking for trouble. You're looking for unnecessary confrontations that may involve deadly force ... so I think you'll be seeing unnecessary shootings, unnecessary killings if the military is drawn in to domestic policing type activities.

NARRATOR: Other law enforcement support activities pursued by the military have generated little controversy, such as the establishment of National Guard civil support teams for responding to incidents involving weapons of mass destruction.

COLONEL ROBERT KING: The several civil support teams across the country have a mission of going in and assisting the local incident commander - whether that be the mayor, the fire chief, the police chief, the state commander of the police or whoever ... Identify the agent that was used, the chemicals, or the explosives ... and then make recommendations to that person as to what types of actions need to be taken at that time.

TIM LYNCH: We will probably not see a proposal in the Congress to outright repeal the Posse Commitatus Act. What we're likely to see is the administration and the Pentagon expand the existing legal loopholes to the Posse Commitatus Act. For example, the Posse Commitatus Act is mainly directed toward the US military. It does not say anything about the role of National Guards troops - that's governed by state law. The president may be tempted to deploy National Guard troops, by asking governors to deploy troops in certain situations. That is one way of getting the military more involved in domestic policing, but at the same time not raising questions of Posse Commitatus.

NARRATOR: One of the roles that the military has been tasked with since 9/11, is the detention of certain US citizens identified by the Executive Branch as "enemy combatants." This legal designation was announced by administration officials in the early stages of their counter-terror campaign, and has generated significant controversy.

MICHAEL RATNER: There's normally two tracks of law. One is regular civil law that we're used to - where people are alleged to have committed a crime, and they get brought before a grand jury, or they get indicted, and they go to a trial, and they either get convicted or they don't. That's the normal way you deal with a crime.

The second track they can treat people under is what's called military law. And that is for people picked up in the battlefield - in Afghanistan, or in Iraq. Those people are fighters against us. They should be treated as prisoners of war. There's a third track, that no one has ever heard of. It's called enemy combatants.

JONATHAN TURLEY: John Ashcroft has asserted the authority to unilaterally declare a US citizen to be an enemy combatant, strip him of all his constitutional rights, and hold him indefinitely.

NARRATOR: The enemy combatant case that has generated the most controversy has been the case of Jose Padilla - a former Chicago gang member apprehended by the FBI at O'Hare airport, in connection with a grand jury investigation.

TITLE: "Andrew Patel: Counsel in Jose Padilla case"

ANDREW PATEL: Mr. Padilla was arrested on a material witness warrant saying that he had information material to a grand jury investigation, that was going on in the southern district of New York.

TITLE: Donna Newman: "Counsel in Jose Padilla case"

DONNA NEWMAN: The grand jury material witness warrant - the arrest - is not a charge of a crime. What it is, it says, "Gee, you, Mr. Smith - you have information. The grand jury would like that information, and because of any number of factors we believe you won't stay here to give us that information."

NARRATOR: Padilla was held by the Justice Department for over three weeks. Donna Newman was assigned as legal counsel, and was able to meet with Padilla during his detention in New York.

DONNA NEWMAN: So the initial discussions with the prosecutor or the court certainly did not give me any indication that this was going to be the kind of case that it turned out to be.

On June 10th, I'm in my car... and going to court on another case ... and I get a call on my cell phone. I pick it up, and it's the prosecutor. I say, "Hey, how you doing?", you know ... Thought he maybe had some news about the change of time ... He said, "Your client has been designated 'enemy combatant,' and he's been shipped off to a military brig". And of course I thought he was kidding.

ANDREW PATEL: On June 9, which was a Sunday, the president of the United States signed an order saying, “Jose Padilla is an enemy combatant and I want him held by the military.” That’s it.

(FOOTAGE OF Attorney General Ashcroft)

JOHN ASHCROFT: I am pleased to announce today ... a significant step forward in the war on terrorism.

NARRATOR: The Justice Department accused Padilla of being a member of Al Qaeda, and of plotting to detonate a radiological device known as a “dirty bomb”.

MARK BURGESS: A dirty bomb is basically radioactive material encased with conventional explosives. The conventional explosives explode, and the radioactive material is dispersed. If a dirty bomb was set off in New York City for instance, there would be twenty minutes in which something like twenty city blocks would have to be evacuated. People would die from the initial conventional blast as would happen with a normal bomb. So it would create a huge problem.

NARRATOR: Citing the gravity of the threat, the White House suspended Padilla’s constitutional rights, and transferred him to the military for interrogation. At the military brig, he was held incommunicado with no access to the civil courts or to legal council, for over two years.

ANDREW PATEL: When he was first transferred to the military, Ms Newman called the facility and said, “Can I write to him?” And they said, “Oh sure.” And then, being a good lawyer she asked a follow up question: “Will he get what I send him?” And the answer to that was, “Well that’s an entirely different issue.”

(Footage of Paul Wolfowitz)

PAUL WOLFOWITZ: He researched nuclear weapons...

NARRATOR: Members of the Bush administration claimed that Padilla’s activities constituted such an extraordinary threat, that he should be removed from the civilian court system, and subject to military jurisdiction. Padilla’s attorneys argued that the criminal justice system was already dealing with Padilla effectively.

ANDREW PATEL: Mr. Padilla was arrested in Chicago by the FBI, with the order of the court ... and was allowed to speak to a lawyer for three weeks before the military showed up.

DONNA NEWMAN: And in fact, the information the president had which led him to designate Mr. Padilla, was the very same information that was given to chief judge Mukasey, in order for him to sign the grand jury material witness warrant.

NARRATOR: The administration's enemy combatant concept relies on Ex Parte Quirin, a case dating from WW II, in which president Roosevelt ordered the military to detain eight German national saboteurs captured on Long Island, and to try them before a military tribunal.

While the White House is basing its actions on the Ex Parte Quirin case, Jose Padilla's lawyers are relying on a separate case dating from the Civil War - Ex Parte Miligan. The Miligan decision states that in time of war, citizens shall be tried in civil courts, when those courts are open and functional. His lawyers are also relying upon the Non-Detention Act of 1971, which states that only Congress, and not the president, can authorize military detentions of American citizens.

Padilla's legal team appealed to the Second Circuit of Appeals, which ruled in August of 2003 that Padilla must either be transferred to criminal custody and charged, or released. The Bush administration has appealed this decision to the Supreme Court, who will rule on this case later this year.

TIM LYNCH: This enemy combatant controversy, I think, represents the most serious threat to the Bill of Rights and the civil liberties of Americans that we've seen since 9-11. The president is asserting extraordinary power under his commander-in-chief authority, which I think sweeps way beyond his proper boundaries under the Constitution.

MICHAEL RATNER: If we're talking about a serious consequence of the War on Terror, it's executive detentions, that the United States, up until 9/11, totally trashed countries for doing. Totally trashed them.

NARRATOR: The debate over executive detention is not new. It was raised during the Japanese Internment, but it also surfaced briefly during the Iran-Contra affair, when the Miami Herald ran an article detailing an emergency detention plan, called "REX 84".

TITLE: “Ross Gelbspan: Former Editor, Boston Globe”

ROSS GELBSAN: REX 84 brought yet another agency into this mix, and that was FEMA - the Federal Emergency Management Agency. Its normal function is to deal with natural disasters, flood relief and so forth and so on. It has capacities for handling large quantities of people and so forth. And the idea under REX 84, was that FEMA would set up very, very large detention centers ... and in the case of a national emergency, the police forces would round up and FEMA would detain - first all the undocumented aliens that were in the US - but also an undefined number of political activists who were opposing administration policies. And apparently they went so far as to create some large holding areas, I believe in Arkansas and Texas.

REX 84 never got off the ground. All that ever happened, that I’m aware of, was that it was raised by some senator in some Senate hearings, and that senator was told, “That information is classified,” and it was not to be discussed, and he was cut off before he could really inquire about REX 84.

(Footage of Iran-Contra hearings)

SENATOR INOUYE: May I most respectfully request that that matter not be touched upon ...

TITLE: “David MacMichael: Former CIA Analyst”

DAVID MACMICHAEL: How serious this was, I don’t know. I mean it’s on paper, and it’s a matter of public record. It’s shocking ... at least to my point of view. How seriously this was taken at the time I’m not prepared to say. But it was there, and it is a stark reminder to people of how certain branches of the government, or the people who run those branches, think and are prepared to act.

(Footage of 9/11 aftermath in New York City)

NARRATOR: As threats posed by terrorism continue to evolve, Congress and the White House continue to seek, and to implement new security powers.

TOM HEFFELFINGER: Nobody envisioned flying airplanes into buildings as a weapon, and so we’ve updated the laws ... and the recognition that this is international, global in scope, and therefore our laws need to represent that.

STANSFIELD TURNER: Since 9/11, we've agreed that we will intrude into American lives and privacy more than we have normally done. How much of this do we have to maintain over the long run? And how close can we come to eroding the very things we're defending?

NARRATOR: Increasingly, citizens and lawmakers have begun to critically evaluate a number of controversial security measures enacted in recent years. Since 2001, over 300 city governments have passed resolutions opposing federal policies seen to infringe on constitutional rights. In congress, both Democrats and Republicans have proposed changes to the the USA PATRIOT Act, and other security laws.

TIM LYNCH: We're talking about things that are being established in the law now, that will have implications ten, twenty, thirty years down the road ... for future generations. And I think that people who are taking the long view, are coming together with people on all points of the political spectrum to recognize that these things represent a danger to liberty and privacy. And that's why they need to come together, to oppose these things and to try to have them corrected. There are plenty of things the government can do to make us more safe, without restricting our civil liberties.

PETER ERLINDER: This deep seated concern for the over-reaching of governmental power during periods of national emergency is something that is part of the American political reality. It's a story that has been repeated through our history, and of course the story now is in the process of being told. But the dynamic that we're seeing develop is not new. The American people are beginning to speak.

(CREDITS)