Sen. Specter: Let's give this fellow a chance….

Narrator: On January 9th, 2006, the United States Senate opened hearings on the confirmation of Judge Samuel A. Alito to the Supreme Court. The confirmation process involved debates over Judge Alito's judicial qualifications, but it also showcased more fundamental disputes about the meaning and intention of the U.S. Constitution. These disputes have deep roots that flow from the history of the document and from the interpretation of its language.

Cheh: What does 'unreasonable search or seizure' mean? What is 'freedom of expression'? What is 'due process of law'?

Keene: It seems to me that any American who's serious about the kind of society we live in has to care about that document.

Minceberg: Constitutional interpretation is not just an issue for lawyers and judges and members of Congress. It's an issue that affects the rights, the lives, of all Americans.

Narrator: In this program, we examine the document that forms the basis of our public life and explore debates over the words that give it meaning.

[SHOW TITLE]

Narrator: For students of the law, the study of the Constitution begins here. In law schools throughout the nation, first-year students are introduced to the document that will be central to their careers through the study of constitutional law.

Chen: Constitutional interpretation is all about making sense of the fundamental legal document of the United States government. I would regard it as the ultimate question of how we the people decide to govern ourselves. These are the absolute outward limits on what government can do, what it can't do and on the rights that individuals hold against their government.

Cheh: Our Constitution, unlike many that are currently in force around the world, is actually quite sparse. And the reason why there are debates about its meaning is because some of the language is very open-ended. What does 'equal protection of the laws' mean? What does 'due process of law' mean? 'Freedom of expression', do you always have freedom of expression? There are so many concepts in there that are very broadly-based, that it necessarily means that someone has to interpret what it means.

Narrator: Since the 1803 case of *Marbury versus Madison*, the Supreme Court has served as a final interpreter of constitutional questions.

Cheh: In that case, the Supreme Court said that it's the role of the courts, as the body that's given the authority to interpret the law, to interpret the Constitution. The debate is not whether the Court should play that role. Most people can see that that's the Court's role. But what are the kinds of interpretive tools shall they use? Shall they just be confined to the very language of the document? Shall they look at history? Shall they look at the intention of the Framers when they were crafting these provisions? Or should it be more open-ended? Should they think about values that have evolved over time? That's where the debate is.

Narrator: The business of constitutional interpretation involves weighing a variety of interpretive sources and applying them to specific legal controversies. This process allows courts to determine whether particular laws or governmental actions are permitted by the Constitution.

Chen: So what you have is a hierarchy of sources of authority for interpreting the Constitution ranging from the text itself, to the history underlying the framing of the document, to the traditional practice of the people in the governments of the United States, to the decisions of the Supreme Court and of other courts interpreting the document, to popular understanding and to political and pragmatic considerations that the courts themselves may wish to take into account.

Narrator: In the modern era, there are several competing perspectives about how to interpret the document. One of these is known as 'originalism', which requires that the Constitution be read according to original intentions of those who wrote it.

Berns: Well, those who use the term or some variation of the term 'originalism' mean what the Constitution meant originally. And so when people say the Constitution has to be kept in tune with the times, my response to that is – and I'm an originalist – the times, to the extent possible, have to be kept in tune with the Constitution. That was why the Constitution was adopted.

Cheh: The reason why the originalists want to stay close to home with the meaning at the original period of adoption is because otherwise they fear that you license judges to go off on, you know, a sea of interpretation of their own making. As Justice Black once said, it's as if they're a continually-sitting Constitutional Convention if they have no limits. And so no one says that there should be no limits, but once you take the interpretation out of the history, the structure, and the text, what are those limits to be? That's the real hard question.

Narrator: Originalists generally confine their interpretive sources to the language of the Constitution and to its historical understanding. Because of this, they are highly critical of court opinions that grant rights that are not found explicitly within the text of the document, such as the right to reproductive privacy set forth in the 1973 *Roe v. Wade* abortion decision.

Keene: In recent decades in particular, not only the Supreme Court but the entire federal judiciary has come to reflect an ideological belief that we think is contrary to what the Founders believed. And so that the courts have come to the position where oftentimes they are used to enable government to do things that government would not otherwise be able to do, whether its abortion or whatever, to expand it to cover their desires. Well oftentimes we find that when people go to the legislatures and they can't accomplish a purely policy or political objective they say, "Well, maybe we're not going to win that in the legislature. Maybe we can't win it in a referendum. But maybe we can go to court and get the courts to do that for us."

Narrator: Originalism stands in contrast to the views of modernists, who view the Constitution as a living document whose parameters can expand and evolve over time, based on factors that stretch beyond the original intentions of the Framers.

Minceberg: I would argue that the originalist view contradicts what in fact the Founders had in mind. There's a famous quote, I think it was from one of the first Chief Justices, John Marshall, who said, "We must never forget that it is a Constitution we are expounding." The Constitution is not the Internal Revenue Code. It is, by definition, a document that has broad guarantees of liberty and equality into it. And I believe that what the Founders intended was that each generation would apply those broad guarantees to the situations that they found themselves in.

Schwartz: Those who believe it's a living document, and I'm one of those, recognizes that the Constitution was written by people who wore knee britches. We were four million people scattered along thin settlements along the Eastern Seaboard. It took days to get from Boston to New York. We are now a country of three hundred million, which is most powerful in the world in a post-industrial society. One has to interpret that document for today's society, not for the society that was then. I think the Framers knew that.

Narrator: Modernists rely on a broader spectrum of interpretive sources than do originalists. These sources can include contemporary notions of

individual rights or governmental powers, even if those notions are not fully articulated in the constitutional text.

Schwartz: You look to the traditions of the American people, those that were and those that are in the process of evolving, and we develop notions over time. In fact, forty years ago, the Court did not believe that discrimination against women was in the Constitution. The text hasn't changed, but the way we see the world has changed.

Narrator: Originalism and modernism are the dominant strains of constitutional theory today, and each has become largely associated with a particular strain of political thought. Political conservatives tend to favor originalism, while liberals tend to favor the modernist 'living view' of the Constitution. At the same time, other strains of interpretation continue to emerge. One example can be seen in libertarianism, a political philosophy that has produced its own variations of constitutional theory.

Pilon: Well, libertarianism stands for the idea that individuals have rights to be free and that the main function of government is to secure those rights.

Narrator: Libertarian constitutional thought draws on originalism in its desire to constrain the power of the federal government, however it also echoes modernist themes in calling for an expansive view of individual rights.

Pilon: We've seen the big government approach coming from progressivism and the New Deal in the form of massive regulation of the economy. The reaction from the conservative camp was an attempt to roll back some of that. But it was coupled, sometimes, with an attempt to regulate personal behavior in ways that progressive liberalism did not do. So you've seen a reaction to both those schools in the form of libertarianism, which calls for limited government with respect both to economic affairs and personal affairs.

Chen: I don't hold any commitment to any single interpretive methodology. And as in the real world, no one commits himself or herself to a single toolkit for all problems. I don't believe that lawyers, judges, or other interpreters of the Constitution should commit themselves to any one technique. And, you know, the Spider Man principle applies here, "with great power comes great responsibility." You have a greater responsibility to get it right. The more people that you purport to bind, the greater force with which you expect others to respect your constitutional interpretations.

Narrator: While some of the provisions of the Constitution deal with rights retained by individual citizens, others define the powers held by the government. One of these provisions is the Commerce Clause, which grants the federal government the ability to regulate commerce between the states.

Carothers: The Commerce Clause is in Section 8 of Article 1 of the Constitution, which lists all the powers that the Framers gave to the U.S. Congress. And it includes things like providing for defense, establishing post offices and roads, and the commerce section provides that "Congress shall have the power to regulate commerce among the several states." Those are the words.

Chen: If you look at the vast range of things in federal legislation today, the single most important power, just measured in terms of sheer number of words and the sheer number of legal provisions, is the power to regulate commerce.

Narrator: In recent years, the Commerce Clause has been the focus of controversy over the balance between state and federal authority. On one side are originalists and libertarians, who argue for a limited view of the federal government's power to pass laws, and wish to preserve a greater role for state legislatures. On the other side are modernists, who argue that interstate commerce can have a broad meaning, and can empower Congress to pass a wide variety of laws.

The Supreme Court's earliest Commerce Clause decision was *Gibbons versus Ogden*, decided in 1824. In that case, Chief Justice Marshall affirmed that the Commerce Clause allowed Congress to regulate interstate economic activity, including river navigation. Subsequent Commerce Clause decisions have created two separate but parallel histories, each dependent on the perspective of the interpreter.

Carothers: The commerce power as defined by Chief Justice Marshall endured for quite a while, until really the end of the nineteenth century, when the country was undergoing explosive industrial development and economic growth. And there was very much a laissez-faire economic theory abroad, which had its impact on the Supreme Court. And what the Supreme Court did during that period, really from about the turn of the century until 1937, was strike down progressive legislation to deal with the bad side effects of industrialization; like labor problems and health and safety issues and monopolies and price-fixing. Whenever the states or the federal government tried to deal with those, the Court would hold that these were beyond their powers. I regard that as the medieval period of Commerce Clause jurisdiction.

Narrator: Many originalists and libertarians view the decisions of that same era not as aberrations, but as part of a tradition of limited federal power that was broken by court rulings, which favored President Roosevelt's New Deal economic policies.

Pilon: During the Progressive Era at the turn of the nineteenth to the twentieth century, we saw a fundamental shift in the climate of ideas. The Progressives no longer thought of government as a necessary evil as the Founders did, but started thinking of government as an engine of good, an instrument through which to solve all manner of social and economic problems. And so they started to engage in a program of political activism. The problem of course, was that the Constitution was written for limited government.

Background: The time will soon come…

Pilon: When the focus of their activism shifted to the federal government from the state level during the New Deal, that's when things came to a head. Roosevelt threatened to pack the Court with six new members. There was a reaction in Congress against that. Nevertheless, the Court got the message and the Court began rewriting the Constitution.

Background: …know only too well…

Pilon: In the *Jones and Laughlin* case in 1937, the Court read the Commerce Clause as a power to regulate anything that affects interstate commerce. That, of course, allows Congress to regulate anything and everything, because there is nothing that does not, at some level, affect interstate commerce.

Narrator: The Court's broad reading of the Commerce Clause expanded over the course of the twentieth century to include many things that did not fall squarely within interstate commerce. In the wake of these decisions, Congress passed laws regulating a wide variety of non-commercial activities, such as bans on the possession of firearms near schools.

Keene: You can't take something that has nothing to do with interstate commerce and then justify it under the Commerce Clause. The whole superstructure for the regulation of economic activity is basically a Commerce Clause activity. So the degree to which you expand or restrict the interpretation of that clause is the governor on just how far the government can go in making decisions that perhaps, in an earlier day, would have been left to the states or the individuals.

Narrator: A broad reading of the Commerce Clause has also allowed the enactment of many federal environmental laws that protect wetlands and endangered species.

Carothers: Well most of the modern environmental laws that are regulating that area of our life today were enacted in the seventies and early eighties, and there's probably a dozen of them. And they were based, in large part, on

its authority to regulate the national economy under the Commerce Clause of the Constitution. And if you look at the results, it's been one of the most successful programs in the post-war period here in the United States. We've seen, since 1970, population growth of nearly fifty percent and yet pollution has gone down. And our view is that you should not tamper with that kind of success and Congress deserves credit, not challenge, for putting that framework in place.

Narrator: A broad view of the Commerce Clause held sway through much of the twentieth century until 1995, when the Supreme Court heard a challenge to the Gun Free School Zones Act, a law passed by Congress in 1990.

Pilon: I'm happy to say that the work of those of us at the CATO Institute and others, in calling for a return to first principles has been noticed by the Supreme Court in a case called *United States v. Lopez* in 1995. In which the court, for the first time in fifty-eight years, found that Congress had exceeded its power to regulate interstate commerce when it enacted the Gun Free School Zones Act.

Narrator: The *Lopez* decision found that the Gun Free School Zones Act was unconstitutional because the activity that it prohibited, possessing a gun within 1,000 feet of a school, did not have a sufficient connection to interstate commercial activity.

Pilon: Now notice what the court is saying here is not that they favor guns at school obviously, rather they were saying that the Congress has no power to regulate in these areas. This is a power that belongs to the states.

Narrator: Other decisions followed which limited the reach of Congress under the Commerce Clause. There was talk of a states' rights revolution on the Court until 2005, when justices heard a medical marijuana case known as *Gonzales versus Raich*. Marijuana is banned by the Controlled Substances Act or CSA, a federal law which regulates the possession and consumption of dozens of narcotic and hallucinogenic drugs.

Evans: This is a federal law, and the reason that the federal government had to do this is because we needed to have a national standard on this. These are things that are part of interstate commerce and, you know, two hundred years ago we decided that Congress, rather than the individual states, had the power to regulate commerce between the states.

Guither: Of course in the early part of the twentieth century, the federal government wasn't involved in drug regulation or prohibition at all. Really that was considered only to be something done in the local level, states and so forth. In fact, the federal government wasn't considered to have the power to do that. If you remember that alcohol prohibition in

1919 came about through a constitutional amendment, because that was the only way they thought they could, at a federal level, outlaw alcohol.

Narrator: Despite the existence of the CSA, a number of states have passed medical marijuana laws that have legalized the use of cannabis for medical purposes. These state laws clash directly with the CSA, which criminalizes marijuana in all of its forms, and holds that marijuana has no medicinal value. California legalized marijuana for medical use in 1996. Soon thereafter, federal agents began to raid homes and facilities where cannabis was being distributed and used under the California marijuana law. The crackdown resulted in a lawsuit filed in Federal District Court, originally known as *Raich versus Ashcroft*.

Guither: *Raich v. Ashcroft* involved two women, Diane Munson, who had been raided by the DEA for six plants; and Angel Raich, who had been getting her marijuana through the Oakland Buyers Club. And that was shut down, so she no longer could. And basically they got together and sued the federal government to prevent the federal government from taking away their medicine.

Narrator: Government attorneys disputed Raich's claims of medical necessity regarding her marijuana use and held that Congress had the power to regulate cannabis within the state of California. Raich's attorneys challenged the constitutionality of the CSA as it applied to their clients. They held that no interstate interests were involved and thus Congress could not regulate marijuana grown and used only within a single state.

Guither: One of the great things about the *Raich v. Ashcroft* case, which is what it was first called, was it was such a pure case, because it was about marijuana grown totally in California, where it was legal, with doctor's permission, with government permission, with no money changing hands. How can you call that interstate commerce? There's no interstate, there's no commerce, how can that be? So they were going in with a very pure case that way.

Narrator: Raich lost at the District Court level but prevailed in the Ninth Circuit Court of Appeals. The federal government then appealed to the Supreme Court which looked specifically at the Commerce Clause issue raised by *Raich*. In arguments before the Court, the government held that it had the power to regulate commodities within a single state based on a 1942 Supreme Court decision, *Wickard versus Filburn*.

Evans: The *Wickard* case was a case from the 1940s involving a wheat farmer who was growing wheat for his own family's consumption, and an attempt was made to regulate that. It was considered to be part of interstate commerce. And in the *Wickard* case, they said, "Well, wait a minute, I'm

just growing wheat. I'm eating it, you know, and I'm not selling it to anybody. It has no impact on interstate commerce. How can you regulate that?" Well, the way the Court reasoned it is that growing of wheat and consuming it can have an impact on interstate commerce, because you're not then buying it from somebody else. So that has been the law now for in excess of fifty years. You know, if it has an impact on interstate commerce, even though it isn't directly part of interstate commerce in terms of being sold, it can still be subject to regulation. And it doesn't matter how small an impact it has, the courts have clearly come down and said that even if it's a minimal impact, it still is within congressional regulatory authority.

Narrator: On June 6th, 2005, the Supreme Court issued its opinion in the *Raich* case. The Court found in favor of the federal government, holding that Congress had the authority to regulate the use and possession of marijuana, even if it was not sold across state lines.

Guither: *Lopez* and *Morrison* were both cases in recent years that were supposedly signaling a shift of the Court back toward state's rights. And that led a lot of people to think that *Raich* might have some hope, because the Court was shifting in that direction. The upshot was that it ended up being a real setback for state's rights.

Carothers: It seems a little strange to an outside observer, why a case involving whether a state can allow marijuana for medicinal purposes has anything at all to do with whether you can regulate clean water. But there are some relationships. And basically, what people are concluding is that the *Raich* case, to some extent, reinstated a broad view of the power of Congress under the Commerce Clause. So, whatever the intentions of California, whether they were legitimate or not, their law created a loophole and a weakness in the federal framework. And so in terms of the balance of state and federal power, that case, we think, was pretty important in terms of reinstating the view that when there's a big national problem, Congress is entitled to take a comprehensive view.

Pilon: This was not commerce. This was not interstate commerce. This was anything but that. Nevertheless, this is the way the Court came down and so we have today a very uncertain body of law. And so nobody knows today exactly where this is going, but the important thing to note is this: this debate is back in play as a result of the *Lopez* decision.

Narrator: In recent years, the issue of firearms regulation has produced a vigorous political debate. This debate rests upon the interpretation of the Constitution's Second Amendment which reads, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Originalists and libertarians

view this language as clear and unambiguous, and see it as conferring an individual right to own firearms.

Healy: The Second Amendment, at bottom, is about armed self-defense. As armed self-defense on both the community and the individual level. Armed self-defense at the community level against the potential of future oppression by a centralized government; and armed self-defense at the individual level against, you know, less organized forms of oppression. I think it's important to remember, in 1791 we didn't have police forces to speak of, so defense of the population of the people against crime was not, in the first instance, a state responsibility. It was something that was done at the individual and community level.

Narrator: A competing perspective holds that the Second Amendment only guarantees states the right to organize armed militias, such as the National Guard.

Seibel: Well our position is that the Second Amendment does not confer an individual right to own firearms. The Second Amendment has to be interpreted as a whole, and as a whole the amendment talks about service in and relation to a well-regulated militia, which is, as the amendment says, "necessary to the security of a free state." So, the amendment has to be interpreted in that respect.

The "keeping and bearing arms" phrase in the Second Amendment really refers to a military connotation. Keeping and bearing arms in service of the militia, and the militia was clearly a military unit organized by the states and is mentioned in several places in the U.S. Constitution. For example, in the Constitution, Article 1, the militia can be called forth to suppress insurrection. The original draft of the Second Amendment had a conscientious objector clause in it. It said people religiously scrupulous, essentially, shall not be forced to bear arms. So, if this is all about individual ownership, why do you need conscientious objector status?

Healy: 'The right of the people', which we see in the Second Amendment, "the right of the people to keep and bear arms shall not be infringed." 'The right of the people' is a term of art in the constitutional text and in the Bill of Rights. So you see 'the right of the people' in the First Amendment, you see it in the Fourth Amendment, you see it in the Ninth Amendment. And everywhere it appears, it connotes an individual right. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," it's an individual right. The Supreme Court has actually recognized this in passing in a case a few years back, *United States versus Verdugo-Urquidez*, where they make exactly this point; that 'the right of the people' is a term of art connoting an individual right.

Narrator: There have been few Supreme Court cases that deal directly with the Second Amendment. The most recent case, *United States versus Miller*, dates from the 1930s, and parts of it are cited by both sides in the Second Amendment debate.

Chen: The cases simply don't resolve the question cleanly. And that's a very, very stark difference between this area of constitutional law and many others where the Supreme Court guidance is comprehensive and arguably exhaustive.

Narrator: In recent years, lower courts have largely supported the 'collective rights' view of the Second Amendment, with the exception of the Fifth Circuit Court of Appeals, which supported the 'individual rights' view in a case called *United States versus Emerson*. Recently, the two competing views of the Second Amendment have squared off in a series of court challenges to Washington D.C.'s gun laws, which are among the strictest in the nation. In 2003, attorneys working with the libertarian CATO Institute filed suit against the city on behalf of Shelly Parker and other D.C. residents, claiming that the city's gun laws violated their clients' Second Amendment rights.

Gura: There are three laws that we are challenging in particular. First, you cannot have any handgun, period, that was not registered prior to 1976. Second, you may have a long arm that is a rifle or a shotgun, however, you not only have to have it registered, you have to have it disassembled or bound by a trigger lock. The act of rendering it functional makes you a criminal. And the third aspect of the law that we're fighting is that the government requires you to have a permit to move your gun, even inside your house - your nonfunctional disassembled gun - from room to room.

Parker: My only goal in this is to give myself and/or other people in the city if they choose to, to have a handgun in your home, assembled. You know, if the city wants to say I have to be trained for twenty hours every year, or any other restrictions they want to have on it, it's perfectly fine. I would just like the ability to have that or the option to have that in my home should I need it.

Narrator: The *Parker* case was first heard in Federal District Court, where Parker's challenge to the District's gun laws was rejected.

Seibel: The lower court, they upheld the militia interpretation of the Second Amendment, just like all other federal courts essentially have done.

Gura: The lower court basically agreed with the city that the Second Amendment does not protect any individual rights. And the reasoning of the lower

court is largely that well, the Supreme Court has never reached out to reject the collective rights theories espoused by federal appellate courts, and that this supposedly is some kind of comment on the merits of our case. Of course, the District Court also did not talk about the fact that the Supreme Court didn't reach out to overturn *Emerson* either, which agrees with us.

Narrator: The D.C. Court of Appeals recently ruled on the *Parker* case. The appellate court found in favor of Shelly Parker, and held that Washington D.C.'s gun laws violated the Second Amendment. The city has since filed for review by the Supreme Court. The outcome of the case holds the potential to impact both the citizens of Washington D.C., as well as the broader national debate over the meaning of the right to bear arms.

Seibel: If they can get the United States Supreme Court to hold that there's an individual right on firearms, then all federal gun control laws would come under question. Because, if something is a fundamental right, the law then has to be evaluated under what's called 'strict scrutiny'. It's a very close look at the law, and many laws that are evaluated under strict scrutiny are in fact struck down.

Everett: The ramifications of a repeal of D.C.'s gun laws would be extremely serious. And when we've heard from our elected officials here in the District, people like Congresswoman Eleanor Holmes Norton, or our Chief of Police Charles H. Ramsey, who testified in front of Congress last year and said, you know, "If our gun laws are repealed it's going to make the job of my police officers more difficult. It's going to increase the number of homicides we see. It's going to increase the number of suicides by guns that we see." And in a situation in D.C., where you already have thousands of guns being trafficked into the city, to introduce thousands more guns into our city is just not a good idea. And for that reason, it's overwhelmingly opposed by the citizens of the District.

Healy: If the *Parker* case gets to the Supreme Court, and if our plaintiffs are victorious, we will have on the books for the first time, a clear statement from the Supreme Court that the Second Amendment protects an individual right. And the historical and textual evidence for that is overwhelming.

Gura: Another goal of the litigation of course, goes beyond the Second Amendment. And if we can take one right and read it out of the Constitution based on a very creative semantical theory, then there's no reason why, in the future, people who are hostile to other portions of the Bill of Rights, would not invent some other kinds of reasons as to why 'people' in the First Amendment doesn't really mean individuals, 'people' in the Fourth Amendment doesn't really mean individuals, and so on.

There are many, many people out there who are hostile to individual rights, either all of them or specifically some of them. And we simply cannot go down the path of reading out rights out of the Constitution because somebody disagrees with it.

Narrator: Years after the terror attacks on the Pentagon and World Trade Center, the events of 9/11 continue to reverberate through American society and American law. The post-9/11 era has spurred numerous constitutional controversies, including disputes over the reach of presidential war powers, both abroad and at home.

Recently, questions were raised about the bounds of presidential surveillance authority in the wake of reports that the executive branch had been eavesdropping on international telephone calls without warrants. The controversy surrounding the issue provides insight into competing theories about the extent of executive power. Debates over the extent of presidential power have arisen during previous times of national conflict. These debates have involved the scope of the president's duties listed in Article II of the Constitution.

Radsan: Article II is one of the three articles in the Constitution that lays out powers for one of the branches of government. It lays out the power for the executive branch, the presidential power. There's something that vests the executive power in the president. There are some enumerated powers. We say that the president is the commander-in-chief of the army and the navy. There's a power to receive ambassadors. But it's only on a page or two.

Narrator: Wartime has also featured conflicts of the scope of the president's unenumerated, or inherent, powers.

Radsan: A classic example of inherent power would be the ability to repel an attack on the United States. We have cases going back to the Civil War. The *Prize Case* is the famous one, where after the Confederacy had taken Fort Sumter, Lincoln decided to impose a blockade. Supreme Court ruled that that was within his power, his inherent power, to repel an attack on the United States.

Keene: Historically, most legal scholars have recognized that the presidency can rely on these so-called inherent powers under certain circumstances and in certain emergencies. The tension has always been when should this be allowed. The immediate controversy of course, is the NSA wiretapping.

Background: …have the need to…

Narrator: After September 11th, President Bush authorized the National Security Agency to conduct warrantless eavesdropping on certain telecommunications as a counterterrorism measure. The full extent of this wiretapping program is not known, but it has been reported to include international communications in which one caller is a U.S. citizen.

Background: …and if the Congress had been watching these agencies in which we invest…

Narrator: The current controversy over NSA wiretapping is set against a backdrop of related history. After revelations about warrantless domestic spying conducted by the Johnson and Nixon Administrations, Congress passed the Foreign Intelligence Surveillance Act of 1978. This law established a secret court, which was intended to provide the exclusive means for obtaining foreign intelligence wiretaps in the United States or involving U.S. persons. Since 9/11, President Bush has asserted that his inherent presidential powers allow him to bypass the FISA court in certain circumstances.

Keene: The president has indicated that he does not intend to seek warrants under FISA, because in prosecuting war against terrorism he has the right to do whatever he thinks is necessary, regardless of Congress's desire to limit those rights.

Radsan: Does the president have power, as the commander-in-chief, to decide to do that wiretapping despite what FISA says? Or is the president prevented from doing anything other than go through FISA? So those that support the president say he has this commander-in-chief power, what he's doing is legal. Those that criticize him say that FISA is the exclusive remedy or the exclusive means, I should say, for doing wiretapping related to national security interests within the United States, at least with one point of the communication within the United States.

Narrator: While originalist thinkers generally agree that the Constitution limits the government's authority in many areas, they increasingly differ over whether such limitations apply to presidential war powers. These disputes were on full display at the 2006 Conservative Political Action Conference, when former Republican Congressman Bob Barr debated former Justice Department lawyer Viet Dinh on the subject of warrantless wiretapping.

Dinh: As I said, the conservative movement has a healthy skepticism of governmental power. But at times, unfortunately, that healthy skepticism needs to yield to the threats facing our nation. That threat today is real.

Narrator: During the CPAC debate, Viet Dinh took the administration's position that the president has inherent authority that supersedes the FISA wiretapping law passed by Congress.

Dinh: But the proper point I would submit is not whether the president is above the law, but whether anybody is above the Constitution, including the United States Congress. To pose the question is to answer it. The statutes of the United States falls under the Constitution and not the other way around.

Barr: Do we truly remain a society that believes that despite intentions, despite motivation, every president must abide by the law of this country? I, as a conservative, say yes. I hope you, as conservatives, say yes to that question.

[Barr in interview]

Barr: It is not consistent with any meaningful interpretation of original intent to allow a president to say that "in wartime, I can do whatever I think is necessary in order to fulfill the responsibilities of a commander-in-chief as I and I alone define them." That appears very clearly to be the position of the Bush Administration. If in fact the government suspects that John Doe is communicating with known or suspected Al-Qaeda operatives, certainly we want the government to be able to find out if that is in fact true, and if they are communicating regarding terrorist acts. But that does not mean that the Bush Administration or any other administration should be free to go ahead and gather evidence on that American citizen without following the law. And if the law says you go to a court first, then the government is obligated to do that.

Narrator: One Supreme Court opinion that provides guidance on this question comes from the 1952 *Youngstown Sheet and Tube* case. *Youngstown* dealt with President Truman's attempt to seize an Ohio steel plant during the Korean War in order to prevent plant employees from going on strike.

Radsan: The question then is, did the president have the power to do this? Congress had considered giving this kind of power to the president before and had decided not to. So that's the backdrop. Truman passed his action and he was, in the executive order itself, inviting Congress to do something. That if Congress disagreed they could pass a statute, and if Congress agreed they could do something. Congress, as it often does, did nothing. Then the question for the parties was, was this a constitutional action by the president? The majority opinion is not referred to or discussed that much these days. The majority opinion is very simple. It said the President was making law in this case; the President is not allowed to make law, this was unconstitutional. The majority opinion is

avoiding a whole body of administrative law where we all know the president makes law. The question was, was the president's actions proper in those circumstances?

The more useful or more famous part of the *Youngstown* opinion, the 'steel seizure' opinion, is Justice Jackson's concurrence that says presidential power is going to be highest when Congress, either implicitly or by express action, has said 'we support you.' There is a middle category where Congress's actions are neutral. Jackson called that the 'twilight zone.' "We don't know what Congress wants to do but we know what the President wants to do." And then there's the third, the lowest category, that's when the President wants to do something and that contravenes, goes against, what Congress has decided explicitly or implicitly. That's putting the President in the lowest category, so that all he has there are his inherent or exclusive powers to take the action. In the steel seizure case, the Court ruled that the president did not have the power to take control of the steel mills, that this was executive power, on those facts, that went too far.

Keene: What happens is, during a wartime situation, the structures of the Constitution are under more tension and threat than at any other time because the Constitution is designed, as I said earlier, not to empower government but to restrict government. And when you get into a wartime situation the executive branch, in trying to pursue that war, oftentimes with the acquiescence of the legislature and even the courts, says, you know, "this is not a time for niceties. This is a time where we're fighting for our survival and let's do what we need to do and clean it up later." The problem is that precedents set during wartime are often used in times of peace and that we don't always go back as far as we were, so that you get a ratcheting up of executive power over the individual. But it's usually done, and it's done in this instance, with popular acquiescence. Because when people are under threat, there's always a tendency to trade their rights, their individual protection and their civil liberties, for security. And the government is always there to broker that deal.

Narrator: In January of 2007, the Bush Administration reversed its arguments about inherent presidential authority to conduct warrantless eavesdropping and submitted its wiretapping program to the FISA Court for review. In August of 2007, Congress passed legislation authorizing the president to intercept calls between U.S. persons and individuals outside the U.S. without warrants, so long as the surveillance was directed at parties overseas. This legislation has a six-month sunset clause, and the new surveillance powers that it grants will need to be renegotiated at a future date. In the meantime, the policy and constitutional debates over this issue continue.

Background: The right to hold property in the United States and the state of Minnesota is a fundamental right.

Narrator: In 2005, the Supreme Court ruled on a case involving the seizure of Suzette Kelo's home by the city of New London, Connecticut. In the process, the Court set off a nationwide controversy. The *Kelo* decision involved the Takings Clause of the Fifth Amendment, which allows the government to take private property in certain circumstances, through a process called 'eminent domain'.

Reitz: 'Eminent domain' is the authority that a local government has to acquire property. Traditional uses are like building of roads, building of parks, sometimes schools. It can be used for redevelopment, and probably that would be the main use of it, would be redevelopment. But things that a community deems are public use or good for the public, good for the community, that would be an area where eminent domain could come in.

Narrator: The Fifth Amendment limits eminent domain to situations where the taking of private property will provide a public use. In practice, the use of eminent domain has varied from community to community, as has the definition of 'public use'.

Anderson: Until the 1950's, the power of eminent domain was used for things that were traditionally considered public uses. Things owned and used by the public: schools, roads, bridges, courthouses, and post offices. However, in the 1950's that all shifted with the case called *Berman versus Parker,* a 1954 United States Supreme Court case where the Supreme Court said that the removal of blight was a public purpose under the Constitution. That was a very subtle but significant shift in the way the Supreme Court understood the power of eminent domain. 'Public purpose' doesn't appear anywhere in the Constitution, it says 'public use'. But as I said, this subtle but significant shift signaled to Americans that the way the Supreme Court would interpret the public use clause was changing.

Narrator: Following this opinion, many state courts granted local governments broad discretion in making public use determinations.

Reitz: It's been the history in the state of Minnesota that the eminent domain decisions in the courts have gone with the Minnesota state statutes, which in fact then does favor the local government. That is the history that we have in the state of Minnesota.

Narrator: Over the past several years, the use of eminent domain has become increasingly controversial as cities have broadened their definitions of 'blight removal' and of 'public use'. In 2005, shopping mall owner Dan

Vang became involved in eminent domain litigation when the city of Brooklyn Center condemned his property based on a finding of 'blight'.

Vang: Their definition of 'blight' was very broad. Their definition was so out of spectrum that the judge himself, in the court transcripts says, "Well, according to what you're saying, I could go up to a new building and use that word." Even he was taken by that. The word 'blight' is very, very subjective to whoever uses it.

Narrator: The *Kelo* case involved another use of eminent domain that has become increasingly common in recent years, the taking of private property to spur private redevelopment. Litigation in the *Kelo* case began in the year 2000, after the city of New London condemned Suzette Kelo's home to make way for the construction of an office complex for the Pfizer Corporation.

Anderson: In the late 1990's Pfizer was in discussions with the city of New London to relocate its global research headquarters. What Pfizer wanted was office space, a hotel conference center and arena. They wanted the neighborhood next to the Pfizer facility to be transformed according to their wishes.

Narrator: Represented by the Institute for Justice, Suzette Kelo took her case to the Supreme Court. In its decision, the Court ruled against Kelo and expanded the definition of 'public use' to include takings for the purpose of economic development.

Keene: The *Kelo* case says that if government can enhance its revenues, then it can take property. We now have the situation around the country where literally thousands and thousands of homeowners are being threatened by municipalities to say that if we just take your house away from you, we can build a Wal-Mart on the property and get more tax money, or we can build a luxury condo. In Florida, you've got a community trying to condemn something like six thousand homes so they can turn a middle-class community into an upper-class beachfront community and enhance the revenues to the local government. Under the *Kelo* decision, but certainly not under the Constitution, that activity is legal. That's a vast expansion and reinterpretation of what the Founders intended.

Chen: I think the idea underlying the *Kelo versus City of New London* decision was to leave this tool potentially in the local government toolkit. Not that the tool necessarily is a good idea. The Constitution, in Justice Scalia's phrase, doesn't prevent governments from engaging in folly, in economic or political or social folly. You can do stupid things and still be constitutional. The Constitution is not an all-purpose stupidity check, that's not its purpose. And it may well be a bad idea to engage in a particular economic development/urban renewal project, but it isn't

necessarily unconstitutional. What the Supreme Court says in this one area among many others, is by no means the last word.

Background: The bill is now sitting on the Senate floor…

Narrator: In the *Kelo* opinion, the Court noted that states who disagreed with their ruling could set their own limits on how eminent domain powers were used within their jurisdictions.

Background: …reduction of abandoned property tax…

Narrator: As a result, eminent domain reform bills were introduced in state legislatures across the country. In Minnesota, the legislature considered a number of eminent domain reform bills during its 2006 session, and eventually passed a law limiting the ability of Minnesota governments to take property for economic redevelopment.

Schlander: The legislation clearly says that public use is not just economic redevelopment, increasing the tax base, creating jobs. Those things, by themselves, will no longer be good enough for a court to find that a taking is for a public use.

Chen: The interesting thing about the *Kelo* decision is the amount of political energy that was then unleashed and directed toward what I think most constitutional theorists and most lawyers who think about these issues and care about them, would regard as a very positive and healthy response. And that is to say look, this is one issue where the crafting of additional rights through state law, through state constitutions, is something that the political system as a whole, at least for now, would like. It's a good reminder to all of us that a constitutional decision is frequently the beginning and not the end of a political discussion.

Minceberg: Constitutional interpretation is not just an issue for lawyers and judges and members of Congress. It's an issue that affects the rights, the lives, of all Americans.

Keene: It seems to me that any American who's serious about the kind of society we live in has to care about that document, and has to care about what the Founders wrote and about the limits that they put on government.

Background: What is it that that rule is not accomplishing in terms…

Chen: That's what ultimately I want my students and my readers to understand. I want them to leave this institution with a respect for the power, the authority, the majesty, and the tradition, and the real practical impact of constitutional interpretation. This stuff matters. We ought to treat law not

as a parlor game, not as an intellectual exercise in navel-gazing, but rather as an applied science, a practical enterprise where things change and they change for good or for ill precisely because of the decisions that we make. So what I want my students and what I want my readers to walk away with, every single instance, is this appreciation for how important the craft is. These things matter. Go about it carefully. Go about it with humility. And hope with all your might that you get it right.