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JUDGE KEITH, THE CONSTITUTION AND NATIONAL SECURITY FROM HADDAD TO SINCLAIR

The Damon J. Keith Law Collection of
African-American Legal History
Wayne State University
Spencer Partrich Auditorium
November 18, 2003

I. INTRODUCTION

PROFESSOR ROBERT A. SEDLER*, INTERIM DIRECTOR OF THE
DAMON J. KEITH LAW COLLECTION**:

* Professor Sedler has been at Wayne State University since 1977. Prior to coming to Wayne State, he was professor of law at the University of Kentucky. He has also held permanent or visiting appointments at Saint Louis University, the National University of Ethiopia in Addis Ababa, the University of Iowa, Washington University of St. Louis and Cornell University. He is a member of Phi Beta Kappa and the Order of the Coif. Professor Sedler teaches courses in Constitutional Law and Conflict of Laws. He has published extensively in both fields, and in 1994 published a book, *Constitutional Law—United States*, in the Constitutional Law series of the International Encyclopedia of Laws for an international audience. The book was updated and republished in 2000. Professor Sedler has litigated a large number of important civil rights and civil liberties cases in Michigan and elsewhere. He was named a Gershenson Distinguished Faculty Fellow at Wayne State for 1985-87, and has received a number of awards, including the Detroit Branch of the N.A.A.C.P. Presidential Award in 1986 and the Bernard Gottfried Bill of Rights Day Award from the Metropolitan Detroit American Civil Liberties Union in 1994. He recently was named to the Gibbs Chair of Civil Rights and Civil Liberties in 2000 and named as a Distinguished Professor in 2001.

** The Damon J. Keith Law Collection of African-American Legal History (the Collection) is the outgrowth of a research project by Wayne State University Law Professor Emeritus Edward J. Littlejohn. As he combed libraries looking for information for an article about black lawyers, legal practices, and bar associations in Michigan, Littlejohn learned quickly that there was no one source of historical information, records, or documents on the contributions of African-Americans to the study and practice of law. Institutional records, when they could be found, were fragmented, incomplete, and often, inaccurate. A central depository of complete and accurate data was clearly needed.

This year, the Historical Society for the United States District Court for the Eastern District of Michigan, at its annual luncheon meeting, commemorated the case of *United States v. Sinclair*.¹ This landmark decision rendered by then District Judge Damon J. Keith, and subsequently affirmed by the Supreme Court, held that there was no “national security” exception to the Fourth Amendment’s guarantee against unreasonable searches and seizures. United States District Judge Avern Cohn, the President of the Historical Society, suggested to me that the law school might wish to sponsor an afternoon symposium built around the case and graciously offered the speakers at the luncheon meeting as participants in the afternoon symposium. The Law School, along with the Damon J. Keith Law Collection of African-American Legal History and *The Journal of Law in Society*, enthusiastically accepted the offer. As the convener of the symposium, I thought it might be interesting to expand the topic to include another “national security” case decided by Judge Keith some thirty years later: this time Judge Keith, now a judge of the United States Court of Appeals for the Sixth Circuit, authored an opinion for a unanimous court holding in the “Haddad” case that there was no “national security” exception to the First Amendment’s requirement of public access to governmental legal proceedings, and invalidating a directive issued by the Chief Immigration Judge requiring the closure of “special interest” deportation proceedings.² Thus, the title of

The Collection brings together, for the first time, the substantial historical accomplishments of African-American lawyers and judges. Researchers, students, historians, biographers, reporters, judges and lawyers will now be able to take advantage of a central depository with more than a century of records, documents, photographs, personal papers, oral histories, and memorabilia. The Collection has become an important resource for those seeking information on prominent African-American lawyers or details about important cases, law, and events in African-American legal history.

1. *United States v. Sinclair*, 321 F.Supp. 1074 (E.D.Mich.1971), *aff’d. sub nom* *United States v. United States District Court*, 444 F.2d 651 (6th Cir.1971), *aff’d*, 407 U.S. 297 (1972).

2. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

the symposium, and of this article introducing it, is “Judge Keith, The Constitution and National Security: From *Sinclair* to *Haddad*.”

Judge Damon J. Keith is a living legend. In his 37 years as a Federal District Judge and as Judge of the United States Court of Appeals for the Sixth Circuit, he has championed the cause of civil rights and civil liberties. Most significantly, he has asserted the dominance of the Constitution and the Bill of Rights, and he has interposed the Constitution against the government’s efforts to undercut the civil rights and civil liberties of the American people. The *Sinclair* case involved a 1971 prosecution against John Sinclair and Lawrence “Pun” Plamandon, the co-founders of the White Panther Party, and a third member, John Forest, for a conspiracy to blow up the CIA recruiting office in Ann Arbor in 1968. The government admitted that it had wiretapped certain conversations of Plamandon and had not obtained a warrant to do so. In those days, the government was also waging a so-called “war on terrorism.” Then, it was “domestic terrorism,” and in the name of “protecting national security.” Richard Nixon’s Attorney General, John Mitchell, had propounded the “Mitchell doctrine.” Under the “Mitchell doctrine,” the government claimed that the United States Attorney General, as agent of the President, had the constitutional power to authorize electronic surveillance without a court warrant in “the interest of national security,” and further that the Attorney General had the authority “to determine unilaterally whether a given situation is a matter within the scope of national security.”

For the government to wiretap without a warrant flies in the face of the underlying Fourth Amendment principle that the government must obtain a search warrant before it can conduct a lawful search, and that, in order to obtain a search warrant, the government must demonstrate that it has probable cause to believe that criminal activity exists. As the District Judge in *Sinclair*, Judge Keith squarely interposed the Fourth Amendment against the “Mitchell doctrine.” The proposition that the government can wiretap without a warrant in “national security” cases, said Judge Keith, is one that “[t]he Court is unable to accept.”³ “We are,” he said, “a country of laws and not of men.”⁴ Judge Keith went on

3. 321 F. Supp. at 1077.

4. *Id.*

to confront directly the government's argument that wiretapping without a warrant was necessary to protect against "domestic terrorism": "In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less to understand, the contemporary challenges to our existing form of government. If democracy as we know it, and as our forefathers established it, is to stand, then, [quoting from the affidavit of the Attorney General] "attempts of domestic organizations to attack and subvert the existing structure of the Government" cannot be in and of themselves a crime. Such attempts become criminal only where it can be shown that the activity was/is carried on through unlawful means, such as the invasion of the rights of others or by the use of force or violence."⁵ Judge Keith concluded by noting that if probable cause had been shown, a warrant to search may have properly been issued, but that to give the Attorney General the power to order a wiretap without a court warrant "was never contemplated by the framers of our Constitution and cannot be tolerated today."⁶ Therefore, "in wholly domestic situations, there is no national security exemption from the warrant requirement of the Fourth Amendment."⁷

Judge Keith's decision was unanimously affirmed by the Supreme Court.⁸ Justice Powell, writing for the Court, picked up on Judge Keith's point about wiretapping in the name of "national security" posing a danger to freedom of dissent. He stated: "[n]ational security cases, moreover, often reflect a convergence of First and Fourth

5. *Id.* at 1079.

6. *Id.*

7. *Id.* at 1080.

8. Judge Keith issued an order requiring that the government make full disclosure of the monitored conversations to Plamondon. He also issued an order for an evidentiary hearing at the end of the trial to determine whether the indictment or any evidence that the government introduced at the trial had been tainted by the illegal wiretap. The government then filed a petition for a writ of mandamus to stay Judge Keith's order in the Sixth Circuit. The Sixth Circuit held that the surveillance was unlawful and that Judge Keith had properly required disclosure of the overheard conversations. The Supreme Court granted the government's petition for a writ of certiorari.

Amendment values not present in cases of ‘ordinary’ crime... History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect ‘domestic security.’ Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.”⁹ As did Judge Keith, Justice Powell also gave short shrift to the government’s argument that “internal security matters are too subtle and complex for judicial evaluation.”¹⁰ “If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.”¹¹

Today, we take it for granted that the government must always obtain a warrant for a wiretap, and that there is no “national security” exception to the warrant requirements of the Fourth Amendment, but at the time of *Sinclair* this was not so clear, and the argument that the government was entitled to wiretap without a warrant in the name of “national security” had a good deal of support in political and legal circles.¹² It was Judge Keith who interposed the Fourth Amendment against the

9. 407 U.S. at 313-14.

10. *Id.* at 320.

11. *Id.*

12. Justice Powell noted that the use of warrantless surveillance in “internal security” cases “has been sanctioned more or less continuously by various Presidents and Attorney-Generals since July 1946.” *Id.* at 310-11. When the case was before the Sixth Circuit, Judge Wieck dissented from the majority holding, arguing that the responsibility rested on the President to “protect the people at home from destruction of their Government by domestic subversives,” and that, “[t]o require the President of the United States to have probable cause before he can investigate spies, subversives, saboteurs, fifth columnists, and traitors would effectively frustrate and prevent any meaningful investigation of these persons.” 444 F.2d at 675 (dissenting opinion).

government's claim of national security in *Sinclair*, and his path-breaking decision in that case is now the law of the land.

Let us now fast forward thirty years to the present. The government once again asserted "national security," this time as a part of the so-called "war on terrorism," to justify the barring of public access to governmental legal proceedings. And again, in *Detroit Free Press v. Ashcroft*,¹³ Judge Keith, now a Judge of the United States Court of Appeals for the Sixth Circuit, was in a position to interpose the Constitution, here the First Amendment, against the government's claim of "national security." The case arose when, as a part of the government's response to the "egregious, deplorable, and despicable terrorist acts of September 11, 2001," immigration laws were being "prosecuted with increased vigor."¹⁴ In connection with the increased vigorous enforcement of the immigration laws, Chief Immigration Michael Creppy issued the "Creppy directive," requiring that the deportation hearings in "special interest" cases be closed to the press and the public, including family members and friends of the alien charged with an immigration violation. One of these "special interest" deportation hearings involved an Ann Arbor clergyman, Rabih Haddad, who had long overstayed his tourist visa, and who operated an Islamic charity that the government suspected supplied funds to "terrorist organizations."¹⁵ Haddad's family members, Congressman John Conyers, the *Detroit Free Press*, and other newspapers, brought suit contending that the blanket closure order violated the First Amendment. United States District Judge Nancy Edmunds agreed, and issued a preliminary injunction requiring that the deportation hearing be open.¹⁶ The government appealed to the Sixth Circuit, and Judge Keith wrote the unanimous Sixth Circuit opinion affirming Judge Edmunds' decision.

13. *Supra*, note 2.

14. The quoted terms are taken from Judge Keith's opinion in *Ashcroft*, 303 F.3d at 682.

15. 303 F.3d at 684. Haddad was ultimately found to be out-of-status by long overstaying his visa and was deported to his native Lebanon.

16. *Detroit Free Press v. Ashcroft*, 195 F.Supp.2d 937 (E.D.Mich.2002).

At the heart of Judge Keith's opinion was recognition of the overriding importance of the First Amendment in the American constitutional system.¹⁷ While acknowledging the government's plenary power over immigration, that power, said Judge Keith, had to be exercised within constitutional constraints, most particularly the constraints of the First Amendment. Indeed, precisely because the government's power over immigration is so broad, and because the Constitution extends very little protection to an alien facing deportation, as Judge Keith stated, "The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty." And, quoting from past Supreme Court decisions, he went on to say: "An informed public is the most potent of all restraints upon misgovernment. [They] alone can here protect the values of democratic government."¹⁸

The First Amendment requires that the press and the public have a right of access to all governmental legal proceedings, and that any restriction on such access must meet a high standard of justification.¹⁹

17. At the same time that the Supreme Court decided *Sinclair*, it also decided *New York Times v. United States* [The Pentagon Times Case], 403 U.S. 713 (1971), in which the government unsuccessfully tried to justify a prior restraint on publication in the name of "national security." In that case, the government sought an injunction that would prevent the *New York Times* and the *Washington Post* from publishing the contents of a classified study entitled, "History of U.S. Decision-Making Process on Vietnam Policy." The government claimed that the study would harm "national security" by disclosing information about how the United States became involved in the Vietnam War and so making it more difficult for the government to negotiate an end of the war. The Court majority held that the government failed to carry its heavy burden of showing justification for a prior restraint. In *Haddad*, the government was not seeking a prior restraint, and the government's "national security" justification was purportedly more immediate and pressing than its justification in *New York Times*. But, as Judge Keith made clear, that justification was insufficient to override the First Amendment right of the public and the press to have access to governmental legal proceedings.

18. 303 F.3d at 683 (citing *Grosjean v. Am. Press. Co.*, 297 U.S. 233, 250 (1936); *New York Times v. United States*, 403 U.S. 713, 728 (per curiam) (Stewart, J., concurring)).

19. The leading case on this issue is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

In *Ashcroft*, Judge Keith ruled that this right of access includes access to deportation proceedings.²⁰ Judge Keith then found that the Creppy directive could not meet the constitutionally required standard of justification. The purported “national security” justification for the closure of “special interest” deportation proceedings was based on the claim that “dangerous information” might be disclosed in some of these cases. However, as Judge Keith noted, the directive was not limited to a “small segment of particularly dangerous information,” but to the contrary, applied to a broad, indiscriminate range of information, including information likely to be entirely innocuous.”²¹ In addition, the government did not articulate any definable standards to determine whether a particular case was of “special interest.”²² Nor did the government make any showing that its purported “national security” concerns could not be addressed on a case-by-case basis, with the immigration judge making particularized findings as to why closure was required in each case.²³ Thus, the Creppy directive violated the First Amendment by “categorically and completely closing all special interest hearings without demonstrating, beyond speculation, that such a closure is absolutely necessary.”²⁴

In ringing language, Judge Keith set forth the underlying basis for the First Amendment’s protection of the public’s right to know: “Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully and accurately in deportation proceedings. When

20. 303 F.3d at 694-705.

21. 303 F.3d at 692.

22. *Id.*

23. *Id.* at 707-10. This part of the decision makes it clear that under the First Amendment, deportation proceedings cannot be closed unless the immigration judge makes specific findings on the record that complete or partial closure is warranted, so that the reviewing court can determine whether closure was proper and whether less restrictive alternatives are available. Since those findings were not made in this case, the closure order violated the First Amendment.

24. *Id.* at 710.

government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment ‘did not trust any government to separate the true from the false for us.’ They protected the people against secret government.”²⁵ Judge Keith concluded by reminding us that the horrific events of September 11 should strengthen, not diminish, the Nation’s commitment to the values of the First Amendment: “Without question, the events of September 11, 2001 left an indelible mark on our nation, but we as a people are united in the wake of the destruction, to demonstrate to the world that we are a country deeply committed to preserving the rights and freedoms guaranteed by our democracy. Today, we reflect our commitment to those democratic values by ensuring that our government is held accountable to the people, and that First Amendment rights are not impermissibly compromised. Open proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy.”²⁶

The government did not appeal from Judge Keith’s decision, and subsequently announced that there were no more “special interest” deportation cases from which the public and the press would be excluded.²⁷ The latest threat to the First Amendment right of access to governmental legal proceedings had come to an end.

In *Sinclair* and *Haddad*, some 30 years apart, Judge Damon Keith has interposed the Constitution against the government’s efforts to curtail constitutional rights in the name of “national security.” For so doing, he truly may be denominated, in the words of New York Times columnist Bob Herbert, as a “real American hero.”²⁸

25. *Id.* at 683.

26. *Id.* at 711.

27. Two months after *Haddad*, a divided Third Circuit upheld the government’s right to exclude the public and press from the “special interest” immigration hearings under the government’s claim of “national security.” *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.2d 198 (3d Cir. 2002).

28. Bob Herbert, *Secrecy is Our Enemy*, N.Y. Times, Sep. 2, 2002, at A15.

II. PANEL DISCUSSION

HUGH M. DAVIS²⁹, CONSTITUTIONAL LITIGATION ASSOCIATES, PC AND COUNSEL FOR THE DEFENSE IN *SINCLAIR*:

Today, I would like to try to give you an overview of how remarkable this case was and how happenstance turned the attention of the national media and the national legal establishment to the Nixon-Mitchell-Kissinger-Hoover, domestic security (COINTEL PRO) program.

After the Detroit rebellion of 1967, literally there was an activist on every corner. You couldn't turn around without running into one group or person or another who were fervently working for social change. I became captivated by that, having led quite a dull and normal life up until that point, and volunteered because I had been able to use my privilege to avoid the draft. I promised myself that I would represent anyone who opposed the Vietnam war *pro bono* until the war was over, and volunteered to become the first staff attorney in the National Lawyers Guild office here.

I was sitting there in August of 1970 when two strange looking guys with a lot of hair and wearing purple t-shirts came in, portraying themselves as the chief of staff and minister of information of the White Panther Party, a group with which I had not previously had any experience. They said that Pun Plamondon, who was on the FBI's top ten, had just been arrested for throwing a beer can out of a van in the Upper Peninsula, and that he was charged with bombing the CIA building in

29. Hugh M. "Buck" Davis co-founded Constitutional Litigation Associates, P.C., in Detroit in 1995. He was one of the trial counsel on the first multimillion-dollar police misconduct verdict in Michigan (*Jennings v. Detroit* 1979). He wrote the Annual Survey of Civil Rights Law in the Sixth Circuit for the DCL at *MSU Law Review* (1979). Mr. Davis served on the executive boards of the Michigan Trial Lawyers Association and the National Lawyer's Guild. He attended Hampden Sydney College in Prince Edward County, Virginia, and taught at the Freedom School while the public schools were closed to avoid integration. He graduated from Harvard Law School in 1968 and joined VISTA, assigned to Detroit Community Legal Counsel, a law reform group representation office. Mr. Davis received a national law reform community lawyer fellowship to the Wayne County Neighborhood Legal Services Research Office. He helped establish and staff the Detroit National Lawyer's Guild Anti-war Defense Office, and has been involved in civil rights and employment litigation in private practice since 1972.

Ann Arbor. Who knew there was a CIA building in Ann Arbor? But in the fall of '68 there were in fact a series of eight bombings in Detroit.

There was a very strange young man by the name of David Valler who began giving interviews to the editor of the *Detroit News*, and headlines were appearing, "Is This the Bomber?" And he never denied it. Ultimately, he went to jail. He was sentenced and during that period of time apparently began to cooperate with the FBI and implicated leaders of the White Panther Party, including John Sinclair, who was already doing nine and a half to ten years for two joints. Pun Plamondon went underground when the indictment came out and became the first white revolutionary on the FBI's top ten in modern times.

Jack Forrest, who is in the audience back there, was the deputy minister of information for the Detroit chapter of the party, and had known Valler quite well. They were indicted. I won't go into the merits of the charges against them. Just let me say that Plamondon recently said in a newspaper article that he was framed for a crime that he doesn't deny committing.

His rationale for that is this kid Valler, who supposedly left the dynamite in the trash can in Ann Arbor, which subsequently went off in front of the CIA office, claimed that Plamondon had told him that he had done it, and Plamondon, who was outraged by that, said I'm not saying I didn't do it, but I didn't go around telling people I did. So that's the basis of his claim.

David Sinclair was the chief of staff, holding together 40 young idealistic counter-cultural so-called revolutionaries, living in a couple of communes in Ann Arbor, none of whom had jobs. It was pretty strange. They were really more intent on paying the rent than overthrowing the government. But as Judge Guy said at lunch today, they were at least as good at guerilla theater as they were guerilla warfare. J. Edgar Hoover bought in all the way and believed that John Sinclair, after the Democratic National Convention and the disturbances there and the Chicago 7 trial, of which Len Weinglass was a part, was a major security threat.

When we did the wiretap civil case later (Geneva Halliday was the U.S. Attorney on the other side, and the only other person besides me, I believe, who's heard those tapes in this particular room), we found out that these people were considered to be so dangerous that the wiretaps

on the White Panther Party headquarters in Ann Arbor were routinely distributed to the special agent in charge of 50 to 70 FBI offices around the country. Which meant that every time a kid in Portland picked up the phone and said "Can I join the White Panther party," Plamondon would say "You're it." So that would become the Portland chapter and the Portland FBI office would open up a file on these kids smoking dope in their garage. It was a very strange setting.

David Sinclair said, "Listen, I'm going to go to New York and get Kunstler and Weinglass to come in and defend us; will you act as local counsel." I was 27 years old. I had never done a federal case. I said, "Sure." I never thought that Kunstler and Weinglass would agree. I never thought it would happen. And when it did, we became the center of a legal and political and media maelstrom which went on for about six months.

If you listen to those tapes and you look at what happened, the FBI did to the White Panther Party in about six months what it took them 25 to 30 years to do to the Communist Party and the Socialist Workers Party. But almost every dirty trick in the book was pulled: agents, wiretaps, false information, indictments, whatever.

So when this indictment came, there was no doubt in our mind that it was politically motivated. And indeed I believe that it was. But I do not believe that it was politically motivated by the local U.S. Attorney's Office, which I believe was in the dark. I'm interested in what Judge Guy knew and when he knew it in terms of what was being done to us. But we did in fact find out years after the case was over through a Freedom of Information Act request that we had been tapped during the very time that we were challenging the wiretaps. The FBI, if they ever told then U.S. Attorney Ralph Guy, never told the Sixth Circuit and they never told the Supreme Court.

This case went to the Supreme Court on an entirely different intercept, which I believe was a National Security Agency intercept from when Pun Plamondon was in Algeria with Eldridge Cleaver, who was also on the run. They were calling Huey Newton at the Black Panther Party headquarters in Oakland. And you're right, Judge Guy, if we'd have had a taint hearing, I think we would have lost. But so what?

It did not go that far because for some reason (and Judges Keith and Guy have some understanding of how it worked), Mitchell decided that this was the case. They had it by way of mandamus because Judge

Keith was demanding that the taps be disclosed. I recall Judge Guy having to stand up and say to Judge Keith, on orders from Washington, "You don't understand, Judge Keith, we're not going to let you disclose these taps before or after the trial", at which point Judge Keith dismissed the case and held the tapes.

The Government went up by way of mandamus. Naturally, they have a little bit more of the Sixth Circuit's ear and the Supreme Court's ear than we might have and therefore they got it. Within a year we were in the Supreme Court.

The NSA at that time had not been revealed to be in existence to the United States public. That was one of the reasons we believe that they would not ever allow those tapes to be heard, because to have done so would have been to reveal the existence of an entire security agency which is basically involved in international communications monitoring, which did not appear on the budget, on the books, in the Congressional Budget Office. They were completely off the books until the appearance sometime in the 1970s of a book called "*The Puzzle Palace*."

Now, the secondary importance of the case, the First Amendment aspects of it, the Fourth Amendment aspects of it, and its importance in constitutional jurisprudence, is so momentous that people write about it and talk about it. We are here to talk about it. When the Supreme Court ruled against Nixon, Mitchell and Hoover on this issue, upholding Judge Keith, what people do not understand is that all of the anti-war, anti-civil rights, Weather Underground, Black Panther conspiracy indictments that were pending around the country were dropped because every one of them rested on illegal wiretaps.

This decision, no kidding for those of us that are on the progressive, left, radical or dissident side of the ledger, gave us somewhere between five to fifteen years of breathing room before the forces of reaction began to gather again and we were plunged into the period of history in which we now find ourselves.

I am suggesting to you that we now find ourselves back there. Those historic and heroic gains that just happened to flow through the crucible of the White Panther Party, and just happened to flow through the court of Judge Keith and up (to almost everybody's surprise in terms of what we thought about the Supreme Court and the votes that we were counting), the 8-0 victory was pretty stunning under concerted attack.

By the way, I think I am one of three people in the room that was at the Supreme Court argument that day. Whether or not you remember it, Erwin Griswold, who was the Solicitor General, found the government's position to be so unpalatable, that he declined to argue the case for the United States, and Robert Mardian, one of the first guys gone in Watergate, argued for the government. A remarkable moment occurred while Mardian was arguing. He was holding up these tapes and he was inviting the Supreme Court to make an *in camera* inspection. He said, "If you could just hear what they're saying, you would understand how dangerous these people are and why we have to wiretap." One of the justices asked Mardian, "Well, would you allow the attorneys to listen to it?"

Now, remember, because it was a mandamus, Judge Keith was represented by Bill Gossett, former president of the ABA, because he was a party, and we were there representing the real parties in interest, the defendants, and therefore there were two lawyers on our side.

Mardian said, "We would allow Mr. Gossett to listen to the tapes, but not Professor Kinoy." Thurgood Marshall, who had worked on *Brown v. Board of Education*, and had argued that with Kinoy in the Supreme Court, turned his chair around and never again looked at the government's lawyer during the entire argument. It was a stunning and telling moment.

As it turns out, great and historic gains were made. I believe for those of you that are young and just starting, as I was, the lesson is, you do not know when the opportunity is going to come to make a difference. That is why you have to be prepared to extend yourself on behalf of political dissidents and political activists. Be prepared to take the chances, take the tough cases, and press those issues. Because when the stars come into alignment one way or another and the perfect legal storm is created, you will get a chance.

For those of us that were there then and here now, the time has come again. It is time for us to understand that the gains have to be defended again at a newer, higher and more subtle level.

LEONARD WEINGLASS³⁰, CIVIL RIGHTS ACTIVIST & COUNSEL FOR THE DEFENSE IN *SINCLAIR*:

I wanted to start where Buck left off. Actually Buck gave a very comprehensive overview of what this case was like, both here in Detroit before Judge Keith, and on its way up to the Supreme Court and the resulting argument in the Supreme Court. But I want to broaden it out a bit and talk to you about what has happened since the Supreme Court decided the case.

When we got to the Supreme Court, it was very clear what was at stake here: a claim by the Executive Branch that it needn't go to the federal judiciary under the Fourth Amendment in order to gain permission to wiretaps. What the government was seeking at that moment, and what it continues to seek, is to bypass the federal courts because they needlessly interfere with ongoing efforts by the government to gather information.

As Professor Sedler indicated at the outset, the Fourth Amendment is the guardian of the First Amendment. If they can breach the Fourth Amendment and enter our homes or our organizations, you've essentially lost rights under the First Amendment as well. In this political context, the government sought to deal with its opponents without an intervening court saying what may or may not be possible.

So Judge Keith and the United States Supreme Court temporarily stopped an aggressive move by the government to set the courts aside on the basis of alleged domestic security. But in so doing, the Supreme Court left open a small window, a very small window, in one sentence in this long opinion, and that small opening came in the following sentence: "We have not addressed and express no opinion as to the issues which may be involved with respect to activities of foreign

30. During the past four decades, Mr. Weinglass has been involved in some of our nation's most notorious civil rights cases. Among his most famous clients were: Abbie Hoffman, Tom Hayden, and Rennie Davis in the Chicago 8 Conspiracy Trial; Jane Fonda in her suit against Richard Nixon; Barry Commoner in his battle to enter a presidential primary; African American radical Angela Davis; Bill and Emily Harris, charged with kidnapping Patty Hearst; Amy Carter, daughter of former president Jimmy Carter, charged with seizure of a building at the University of Massachusetts; Mumia Abu Jamal, death row inmate; Kathy Boudin, former Weatherman; and five Cubans charged with espionage in Miami.

powers or agents.” In other words, what the Supreme Court said is the government cannot do warrantless searches for domestic security reasons, but they might be able to do it for reasons involving foreign powers and their agents.

And how did that create the opening for the mischief that was to follow? Six years later, in 1978, the United States Congress passed the Foreign Intelligence Surveillance Act, or FISA, which, drawing on this one sentence, allowed the United States government to engage in surveillance in the United States of people who were “so-called agents” of a foreign power, without the need to what: comply with the Fourth Amendment.

What the Foreign Intelligence Surveillance Act did, for the first time in our history, was set up an entire new court system outside the framework of the Constitution. It set up a seven-member court called the Foreign Intelligence Surveillance Court. Was it a court? No. It was one room. Where was it located? In the Justice Department on the fifth floor. A windowless room with locked doors and guards in front.

And who sat on this court? Seven judges. How did they get there? Appointed by the chief justice of the Supreme Court. And what did they do? Did they hear advocates, opposing parties? No. They only heard from one side, the government, which came in and asked for warrants to wiretap people who were “foreign agents” or associated with “foreign powers.” Who are foreign agents and people associated with foreign powers? Possibly those who oppose American foreign policy, for one, and who have developed friendly relations with foreign governments. So the door was opened for the government to go to this quasi-court that sits in the Justice Department and ask for warrants to overhear Americans who oppose U.S. foreign policy.

Who introduced this bill? It was introduced by Senator Kennedy of Massachusetts. And who endorsed the bill? The American Civil Liberties Union. And what did they say? If you read the congressional debates, they said this is a very narrow grant of power. It goes back to Franklin Delano Roosevelt and World War II, when the President authorized wiretaps on German embassy personnel and consular offices. That’s who was being talked about there.

But when you give the government this grant of power, that isn’t what it ends up being. Senator Kennedy said maybe 50 or 100 of these warrants would issue per year. Well, from 1978 to 2001, there were

11,900 warrants issued by this court. And how many applications did this court reject? Not one.

Those 11,900 warrants that were issued were more than all of the warrants under the Fourth Amendment issued by all the federal courts in the United States combined for that same period of time.

Well, there was some protection, and the protection was this: A kind of interesting myth that the Justice Department agents who did the wiretapping under this bill would erect a wall so that they won't share the information with other Justice Department agents who do regular criminal investigations. In that way, the Fourth Amendment requirement would not be violated. So a so-called wall was erected.

And what happened? About two years ago the seven judges who sat on that court ruled that they had been misled, even lied to, by agents of the government who didn't adhere to the rules respecting the wall. And information that they got without a Fourth Amendment warrant was fed into the investigation process, and became the basis for criminal cases against Americans without any Fourth Amendment protection. And so unanimously the Foreign Intelligence Surveillance court judges said, we've been misled in at least 75 cases, we've been lied to, we've been deceived, and we find that those 75 cases have to be reexamined.

The government immediately appealed. Now, there's a Foreign Intelligence Surveillance Court Appeals Court, which sits above the seven judges. They had never heard a single case, not one. But the government appealed this one. And what did they say? They said the lower judges are mistaken. There never was a wall. The 75 cases were allowed to stand.

And so what do we have now with the Patriot Act? The Patriot Act increases the number of judges from seven to nine. The Patriot Act says, well, this is reserved for foreign intelligence, but you know, foreign intelligence doesn't have to be its only purpose. It can be a multiple purpose. It can be a mix. It could be a criminal investigation that has foreign intelligence implications. Therefore we don't have to go to any Title III Judges. We can just go to the Foreign Intelligence Surveillance Court.

So in effect, the executive branch that was halted temporarily, I believe, in 1972, has now successfully worked its way around the Fourth Amendment. And when you have the current condition, a war on terrorism, which they tell us is a war at home and war abroad, it's

very hard to see what the difference will be between a regular Title III judge, where you must have probable cause to get a warrant, or simply walking into that fifth floor office in the Justice Department, a "court," where approval is guaranteed on the simple assertion that this is a foreign intelligence investigation. Americans who are opposing the foreign policy of the United States might be tenuously connected to a foreign power, and therefore not protected by the Fourth Amendment.

Is this power now limited to just wiretaps? No. In one case, I believe Aldridge Ames, the Attorney General Janet Reno authorized a break-in without getting a warrant. That was a little embarrassing. The government settled the Aldridge Ames case.

And then because foreign intelligence surveillance only permitted wiretaps, not a break in, Congress did what? They amended the Foreign Intelligence Service Act to authorize break-ins. So now we have authorized break-ins of our homes, not just electronic surveillance. And does it happen? Yes. I'm involved in a case right now where they broke into a house five times.

I'm involved in another appeal where not only did they break into the house, they put microphones in every room in the house, including the marital bedroom, and recorded for 500 days conversations between the husband and wife, even in the marital bedroom. And what did they do with the information they got? They called in psychologists to listen to the tapes and sat down with an undercover agent, advised the agent how to get the wife, who was in a somewhat weakened condition (her sister had committed suicide and she had a nervous breakdown) to get her into a compromised position. And yes, they entrapped her and her husband. And they're doing 21 years and 17 years, respectively.

When you're involved in these cases, it's no longer an academic exercise. Once the government gets the power, it uses it, even to invade the marital bedroom.

That's where we've come since U.S. District Court. We were all very pleased with that result, and we should be. Judge Keith and the Supreme Court forced the government to take a step back. But, history has taught we have to be, in the words of one of the founders, eternally vigilant.

HONORABLE JEFFREY COLLINS³¹, U.S. ATTORNEY FOR THE EASTERN DISTRICT OF MICHIGAN:

Good afternoon. First I'd like to thank Professor Sedler for the very nice and warm introduction. I thank Judge Cohn for his efforts in bringing this panel together. I'm honored to be among the other panel members: Mr. Davis, Mr. Weinglass, and by all means, the great Judge Damon Keith.

I cannot speak about the role of the Constitution and national security when John Mitchell was the Attorney General. However, I am glad and happy to speak about the role of the Department of Justice under the leadership of the Honorable John Ashcroft.

By all means, the top priority of the Department of Justice is to prevent a future terrorist attack, and these are not empty words. The

31. Jeffrey G. Collins was sworn in as United States Attorney for the Eastern District of Michigan on November 19, 2001. Collins was appointed to the post by President George W. Bush and confirmed by unanimous vote of the United States Senate. The United States Attorney serves as the chief federal law enforcement officer in the district. Mr. Collins was previously appointed by Governor John Engler to Detroit Recorder's Court and the Michigan Court of Appeals. He was also elected to both of these positions. In November 1998, he was named by the Michigan Supreme Court to be the presiding judge of the Criminal Division of Wayne County Circuit Court. Mr. Collins is a past president of the Association of Black Judges of Michigan. He has also served as a criminal law and trial advocacy instructor at Wayne State Law School.

Mr. Collins is a graduate of Northwestern University and a 1984 honor graduate of Howard University School of Law. Jeffrey Collins has received outstanding Alumnus Awards from Detroit Country Day and Howard University. He is also the 2003 recipient of the Damon J. Keith Community Spirit Award given by the Wolverine Bar Foundation. On May 4, 2003, he received a Community Vision Award by Neighborhood Services Organization. In November of 2003, he was recognized in Black Enterprise Magazine as one of America's Top Black Attorneys. Michigan Lawyers Weekly selected him as a "Michigan Lawyer of the Year" for 2003.

Mr. Collins is involved in many civic organizations. He is a mentor in the "Man to Man" program at Paul Robeson Academy. To encourage others to become mentors he founded the Wayne County Chapter of Michigan Association for Leadership Development. Jeffrey Collins, native Detroiter, is also a volunteer baseball and tennis coach. He is a lifelong member of Plymouth United Church of Christ. He is married to Lois Collins, a practicing attorney in Detroit. The couple have two children.

Justice Department has put their money where their mouth is in fulfilling our number one priority. Nationwide there have been approximately 250 Assistant U.S. Attorney positions that have been dedicated to terrorism cases and investigations. Nationwide there have been approximately 1,000 new or reassigned FBI agents that have been directed to handle activities of counter-terrorism.

In our office we have formed a counter-terrorism unit, which is made up of seven attorneys plus an intelligence analyst and paralegals, and we work very closely, hand-in-hand with the FBI. And I instruct our counter-terrorism unit attorneys, in combating terrorism, to be able to think outside the box, but to never think outside of the Constitution.

Traditionally, law enforcement is reactive. When a crime occurs, we react to it. If there's a bank robbery, we go to the scene, talk to witnesses, see if there's a surveillance tape, and you try to solve the crime that way. With regard to counter-terrorism, our number one priority is to prevent an attack from ever happening. We don't want to be in a position where we have to prosecute after the fact. So the focus in our office, out of counter-terrorism unit, you see an increased focus on prosecuting crimes that can facilitate terrorism. You see a dramatic increase in prosecuting cases such as passport fraud, such as visa fraud, such as identity theft cases as well. This strategy is similar to the strategy that was used by Attorney General Robert F. Kennedy when he was the Attorney General investigating the crimes of the mobsters and organized crime.

And if you recall, when Al Capone was convicted, it wasn't based on a mobster type of a case. It was based on tax evasion. And that is a similar strategy that's being employed as it relates to counter-terrorism. We will take full advantage of the arsenal of federal statutes to protect the homeland from any acts of terrorism.

Professor Sedler was correct when he indicated that there has been an increased emphasis on immigration offenses, and that is accurate. The case of Rabih Haddad is an example. Mr. Haddad, as you may be aware, was, I believe, living in the Ann Arbor area, and had gained a lot of community support, and was a religious leader. I have a whole drawer full of Free Rabih Haddad cards that people have sent to me in support of Rabih Haddad's release when he was being detained here.

And when you compare his public persona with the evidence, the evidence that was presented at his removal hearing, which was held

here in Detroit, you will see a different picture of Mr. Haddad. When the immigration judge ruled in support of his deportation, or his removal, it was the immigration judge who said that there is a wealth of evidence connecting Mr. Haddad to terrorist elements. Those were not the words of the government; they were the words of the judge with regard to the deportation hearing.

Further, you will find in our efforts, with regard to counter-terrorism, that it will be the exception rather than the rule that we will prosecute cases of material support of terrorism, because, as I said, the goal is to prevent the acts from ever happening. But the exception has occurred. It has occurred twice in our district.

Just this summer we obtained the first jury conviction in the nation on material support of terrorism during a raid of a flat in Dearborn. This is all public record. The agents discovered a day-planner, and in the day-planner was a sketch of an air base in Turkey, and this sketch was so detailed that the officials in Turkey rerouted planes coming in as a result of that sketch. The search of that home also revealed certain surveillance tapes of different sites right here in the United States.

But the day-planner and tapes by themselves, you know, are not the basis for a conviction. There was also a witness who lived in the apartment, who had indicated to other people who resided in the apartment, had discussions about transporting weapons abroad for terrorist purposes, he talked about money going abroad for terrorist purposes, and his role—he was the expert in document and passport fraud—was to try to facilitate getting other people in this country illegally. The jury heard it, convicted two defendants of material support, a third defendant of document fraud, a fourth defendant was found not guilty.

Another part of the Department of Justice's focus is also to look for the money, the money that supports terrorism. And we try to choke-off the funding, or dismantle the financial network that supports terrorism. Case-in-point out of our district: out of Charlotte, North Carolina, there was a cigarette smuggling operation, and cigarettes, to avoid a sales tax, were going from Charlotte to the Eastern District of Michigan. A defendant a few months ago raised his right hand in court, and pled guilty that the proceeds of this operation were going to support Hezbollah, which has been designated as a foreign terrorist organization by the Secretary of State.

I just give those examples to you to let you know that this is not speculation, this is not a figment of the imagination, this is based on evidence, and convictions have been obtained across the country.

Another tool that has assisted law enforcement in addition to enhanced resources is also legislation. The Patriot Act, which was already alluded to. The Patriot Act promotes information sharing between federal and local law enforcement agencies that were not present prior to the act. Accurately stated, under the Patriot Act, it brings down the wall, the wall between the intelligence community and criminal investigators, between the CIA and the FBI, who prior to the act, if the CIA had information, hypothetically, that someone is going to blow up Joe Louis Arena, they could not share that information with the FBI, which really makes no sense. So with this wall being brought down, now there is the sharing of information. It helps law enforcement to what? Connect the dots.

Also, grand jury information that we obtain we can share, with court authorization, with local law enforcement. We can share information with the Detroit Police Department and other departments across this nation, because we're all in this together to protect the homeland.

Under this Patriot Act also, it brings law enforcement up to date with modern technology, so we're not fighting terrorism or terrorists with antique weapons. A couple quick examples: there's something called roving wiretaps, where, for instance a drug dealer or a terrorist might (we can do this in drug cases, under the act now we can do the same thing with terrorism investigations as well), to avoid detection, have a cell phone, get rid of the phone, use another cell phone, and a third cell phone, and how do you monitor activity. Well, with a roving wiretap, once there is probable cause and a federal judge authorizes it, then all you have to show is probable cause for the person, and that applies to all of their telephonic devices. It brings us up to date. The same tool that's available in going after dope dealers.

The same thing with what's called a "delayed notice" of a search warrant. Not "no-notice," but delayed notice. If a federal judge finds probable cause, then we can have delayed notice, and the judge authorizes or determines the length of the delay. If there's a concern that the target might flee, might destroy evidence, might harm witnesses, then there's a basis for delayed notice if there's judicial authorization.

So there are checks and balances built into the act which I submit strikes the right balance between national security and preserving civil liberties. Professor Sedler was also accurate in saying that there are things that we've done in our office to reach out, reach out to vulnerable communities post 9/11. It's no secret that we have the largest number of people of Middle Eastern descent in the nation right here in our district. So I take it as a part of my responsibility to protect this community from any acts of discriminatory backlash, from any hate crimes. In my opinion, the first three words of the Constitution are key: "We the people." That means all the people. And it's our responsibility to respect the rights of everybody. And when there are acts and crimes of hate, we don't look the other way; we hit them head on.

We've prosecuted cases where people of Middle Eastern descent have received threatening messages on their answering machine. A case up in Flint: A guy got a name out of a phone book. He thought the name was of Middle Eastern descent, and placed a threatening phone call. He saved the tape. We prosecuted the guy, and he received the maximum sentence possible from Judge Gadola, here up in Flint.

We also had a case where we had a guy in front of a grand jury, where he listed or named seven people who were a part of a terrorist group right here in the Detroit metropolitan area. He gave us the names. We went out and interviewed all seven, and determined that he was basically lying. So what did we do? We prosecuted him for making false declarations before a federal grand jury. And he, too, got a hefty prison sentence.

We have federal agents who have executed search warrants and have written discriminatory language on different Islamic prayer calendars. When this happened, likewise, we had the officers punished, and punished severely.

The outreach in our district is such that I meet on a monthly basis with grassroots members and leaders of the Middle Eastern community, to talk about issues like profiling, officer sensitivity, and these meetings are ongoing. And we have formed a group, the only one of its kind in the nation. It's called BRIDGES. How appropriate. Because it brings federal law enforcement and the community together on a monthly basis to discuss these issues. And BRIDGES is an acronym for Building Respect in Diverse Groups to Enhance Sensitivity.

Just a few weeks ago, I was contacted by a professor at North-eastern University, doing a nationwide study of police and community relationships post 9/11. From her information, our district set the gold standard. The basis for her conclusion that we set the gold standard was the interview project, and we have continued that positive relationship as we speak today.

So as I take my seat, I'm proud of our efforts. I believe we are striking the right balance between national security and preserving civil liberties. We have a great challenge in front of us. A senior Department of Justice official was once quoted as saying that trying to identify a terrorist is like trying to discover a needle in a haystack, but the problem or the challenge here is that the needle is disguised as hay, because very often members of a terrorist cell can be sent to a location years in advance of an event, and will take advantage of the freedoms of our country, and will integrate and matriculate into society.

So therefore, it is the responsibility of the federal prosecutor to attempt to identify the "needle," or the terrorist, to strike hard blows, but never to strike foul blows. Thankfully, since 9/11 there have been no further terrorist attacks on U.S. soil, and we do our very best as we move to the future to continue to strike that right balance.

HONORABLE DAMON J. KEITH³², JUDGE FOR THE U.S. COURT OF APPEALS FOR THE 6TH CIRCUIT:

32. Damon J. Keith has served as a United States Court of Appeals Judge for the Sixth Circuit since 1977. Prior to his appointment to the Court of Appeals, Judge Keith served as Chief Judge of the United States District Court for the Eastern District of Michigan. Judge Keith is a graduate of West Virginia State College (B.A. 1943), Howard Law School (J.D. 1949), where he was elected Chief Justice of the Court of Peers, and Wayne State University Law School (LL.M. 1956).

As a member of the federal judiciary, Judge Keith has consistently been a courageous defender of the constitutional and civil rights of all people. Some of his most notable cases include: *Davis v. School District of City of Pontiac* (school desegregation); *Baker v. City of Detroit* (municipal affirmative action plan); *United States v. Blanton* (jury selection and pretrial publicity in a criminal case); *Rabidue v. Osceola Refining Co.* (sex discrimination); *United States v. Sinclair* (evidence obtained through warrantless electronic surveillance); and *Detroit Free Press v. Ashcroft* (national security in the wake of 9/11) ("Democracies die behind closed doors").

Thank you, Bob Sedler, the interim director of the Keith Collection. As I talked to Bob today, I told him that he is going to raise the level of the Keith Collection, with his commitment for the struggle. And Dean Lombard, I'm delighted that you asked Bob Sedler to be the interim director as we move forward.

It's a good thing we are in this law school here because these young lawyers who are present here will have a role to play as we go along.

I want to thank Leonard Weinglass, Buck Davis, and the late Bill Kuntsler for their courage and their commitment to the struggle for equality.

Before I get further into the substance of my remarks, I'd like to introduce my law clerks that are here. Al Kellman, who was the law clerk during the *Sinclair* case. And my present law clerks, Katrice Bridges, Sunita Kini, who is a Wayne State University Law School graduate, and Jerome Gorgon.

I also see Judge Ed Ewell, my former law clerk, who is a Wayne State University Law School graduate, and I just swore him in a few weeks ago as a judge appointed by the Honorable Jennifer Granholm to the Wayne County Circuit Court. In addition, I might say that I had the pleasure of administering the oath to Jeff Collins, the United States Attorney, when he took office a few years ago.

Judge Keith has received 38 honorary degrees from colleges and universities around the country. Judge Keith is also a recipient of numerous awards, most notably: The NAACP's highest award, the Spingarn Medal (past recipients include the Rev. Martin Luther King, Jr., Justice Thurgood Marshall, and General Colin Powell); and the Edward J. Devitt Award for Distinguished Service to Justice. The Devitt Award annually honors a federal judge who has achieved an exemplary career and has made significant contributions to the administration of justice, the advancement of the rule of law, and the improvement of society as a whole. Judge Keith was nominated for the Devitt Award by lawyers and judges throughout the country. Most recently, Harvard University's Department of Afro-American Studies informed Judge Keith of his inclusion in their African American National Biography, a database of the biographies of eminent African Americans. The Board of Editors selected Judge Keith as one of the 600 figures who have made the most outstanding contributions to African-American history and culture.

Judge Keith is married to Rachel Boone Keith, M.D. They have three daughters, Gilda Keith, Debbie Keith, and Cecile Keith-Brown. Cecile and her husband, Daryle Brown, are parents of Judge Keith's granddaughters, Nia and Camara.

These are very, very difficult times. Chief Justice Rehnquist appointed me the National Chairman of the Bicentennial of the U.S. Constitution years ago, and we have over 300 Bill of Rights plaques in almost every federal courthouse in the United States, the Thurgood Marshall Building in Washington, and the FBI headquarters in Washington. Some people might wonder why would a conservative chief justice of the United States Supreme Court appoint what some people might call an activist federal judge to be the National Chairman of the Bicentennial of the U.S. Constitution. I asked that question myself sometimes, but Chief Justice Rehnquist knows my commitment to equal justice under the law and the Bill of Rights.

We had on our Bicentennial Committee Chief Justice Warren E. Burger, Ken Starr, J. Harvey Wilkinson, and federal judges from all around the country. And Judge Ralph Guy was there, when we had the largest gathering of federal judges in America down at the College of William and Mary in Williamsburg.

On this Bill of Rights plaque that sits right here at Wayne's Law School and all of these law schools and federal courthouses around the country, they have the name of Damon J. Keith as the National Chairman of the Bicentennial. I want to explain how that happened.

Judge Frank Altamari, who was appointed by President Richard Nixon to the Court of Appeals for the Second Circuit, and a very close friend of mine, as I was chairing a meeting with all of these distinguished federal judges, said, "Damon, will you leave the room." And I said, "For what? Why do you want me to do that?" And he said, "Well, we want to do something." So I left the room, and when I came back, he accepted a motion that only one name be on this Bill of Rights plaque that will be in every federal courthouse in the country, and that will be our Chairman, Judge Damon J. Keith.

That was a high honor for me, but I give you that background to let you know my commitment to fairness and equality and to the rule of law.

I was at the 80th birthday party given for Justice Thurgood Marshall at Bill Coleman's house in Virginia, and Solicitor General Griswold was there, and he started talking about the Keith case. Buck, you referred to that. He said, "Judge, the reason I didn't want to argue that case was that I didn't believe that the government had this type of

authority.” He said, “I thought you were absolutely right.” This is Solicitor General Griswold.

So I am concerned, as a citizen and as a federal judge for 36 years, and as a lawyer who practiced law in this city for 17 years before going to the bench, about the awesome power of the government, the awesome power of the United States Government. Not one of us sitting here today is safe if the government wants to get you. Believe me. They have deep pockets, relentless opportunities to check you out, and in this climate that we have today, the federal judiciary has to stand up and be counted. We should not be intimidated as federal judges. We’re appointed for life.

When we talk about a defendant and the trial judge giving the charge, as this defendant sits here now, ladies and gentlemen of the jury, he is presumed innocent as he sits here. This indictment is only a charge. The government has to prove its case. The defendant doesn’t have to take the stand or do anything. He doesn’t have to present any witnesses. He’s presumed innocent as he sits in that chair, and the government has to prove him guilty beyond a reasonable doubt. He’s entitled to that. We all are.

And all of us know as lawyers and judges about prosecutorial misconduct. Judge Guy and I have sat on panels. Sometimes I dissented; sometimes he’d write the majority opinion. But where a prosecutor would get up and say I represent the United States and I know that this man is guilty. Hold it. Hold it. Who are you to say he’s guilty? Are you usurping the authority of the jury? What about the facts in this case? Don’t overreach. That is prosecutorial misconduct.

So in this climate that we’re living in now, after 9/11, I caution all of us to be careful, especially the judges and lawyers, not to get caught up in any hysteria. I was glad to hear what U.S. Attorney Jeff Collins said in terms of what he is doing in reaching out.

Lawyers should show courage and the federal judges should show courage without anyone saying or labeling you as unpatriotic. Dissent is an act of faith that our country can do better than we’re doing. You can dissent, and it’s unfair and undemocratic and un-American to label a dissenter unpatriotic. It’s just not right.

Martin Luther King once said, “Cowards ask the question ‘is it safe?’ Expediency asks the question ‘is it popular?’ Vanity asks the question ‘is it right?’ But there comes a time in all of our lives when we

do not do what is safe, what is popular or what is expedient, but we must do it because it's right." And that's what we are in right now. As lawyers, judges, and as advocates protecting the Constitution and the Declaration of Independence, we must do what is right.

In this law school, as you young lawyers come out, you have to exercise some courage. Like Bill Kuntsler, Leonard Weinglass, and Buck Davis. They're not radical lawyers. They're not radical lawyers at all. They are trying to make America stand up for the Declaration of Independence and the Constitution. And what they're doing, they're protecting all of our rights, all of our rights.

Now, when Bill Kuntsler and Leonard Weinglass came into my chambers years ago, they had just left Chicago. They came in with long hair, raising hell, and wondering what type of guy I was. So I called them into my chambers. We had some coffee and doughnuts, and we sat down and talked. They had just come from Judge Julius Hoffman over in Chicago, where they'd all been sent to jail and held in contempt.

I said, "Now, gentlemen, this is what we're going to do. You're going to get a fair trial. There will be no howling and there will be no screaming. Mr. Kuntsler, when you address the court, I want you to stand up, state your position, and then sit down. We'll hear from the government. They'll state their position and then sit down. If you have any rebuttal, the court will hear it, and then the court will make a decision." That's it. They're entitled to that, as representing strongly as advocates of their clients. We did not have one bit of trouble.

I've said this many times. I've been on the bench now for 36 years as a federal judge. I've tried all sorts of cases as a federal judge. I tried Tony Giaccalone for eight months on a net worth case. The government wanted to discuss Jimmy Hoffa's disappearance as it related to Giaccalone. The government also wanted to discuss allegations that connected Giaccalone to the Mafia. I said to the government, "You will not do that. This indictment charges Anthony Giaccalone with spending more money than he has admitted to. That's all before this court. Nothing else. You're not going to bring any of that other stuff in. As he sits there he's presumed innocent, and we're not going to talk about the Mafia, we're not going to talk about anything else, but whether or not he has disclosed to the government and the IRS the proper amount of money he has allegedly made."

We tried that case eight months. The jury brought back a verdict, but prior to going out, and you can check the records in the *Detroit News*, Anthony Giacalone and his lawyers said, "Before the jury reaches a verdict, we want to let you know, Judge Keith, we got a fair trial. We got a fair trial."

After the jury came back and rendered its verdict, the papers asked some of the jurors, "This must have been very difficult for you to make this decision as it relates to Anthony Giacalone." And check the records in the *Detroit News*. The jurors said, "It wasn't difficult at all. We tried to be as fair to Anthony Giacalone as Judge Keith was during the course of this eight-month trial."

That's all we as citizens ask for, that our government be fair to all of us, regardless of our circumstances, regardless of our color, regardless of our religion, regardless of whatever we are.

Thank you very much.

