THE DEMISE OF PRIVACY: MICHIGAN CASES POST 9/11

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Thank you so much for having me here today. As you know, Michigan is home to the largest Muslim population in the country and quickly became a place where some of the most important legal issues and cases emerged in response to the reaction to the horrific acts of terrorism on September 11, 2001.

The immediate response of the executive branch was to vastly expand its powers, and that played out across the country in a number of ways. The ACLU worked diligently to increase transparency of government actions on such topics as rendition, military tribunals, torture, warrantless wiretapping, national security letters, political surveillance, ideological exclusion, racial profiling, terrorist watch lists, and naturalization delays. We established the John Adams Project,[1] hiring some of the country's best criminal defense lawyers to represent people being held at Guantanamo Bay, and we filed a number of important legal challenges in dozens of states.

Here in Michigan, three very important cases developed. One of the first involved Rabih Haddad, from Ann Arbor, whose deportation hearing became a test case for the administration of then-Attorney General John Ashcroft.[2] Mr. Haddad, who lived in this country for over twenty years, was arrested by immigration officials just a few months after September 11th for overstaying his tourist visa.[3] He spent nineteen months in jail, primarily in solitary confinement, although the government never charged him with a criminal offense.[4] The Attorney General decided to test a new policy that would close all deportation hearings to the press and the public. We fortunately prevailed in the legal

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1. See *John Adams Project—American Values*, ACLU, http://www.aclu.org/national-security/john-adams-project-american-values (last visited Nov. 7, 2011), for more information.

2. Haddad v. Ashcroft, 221 F. Supp. 2d 799 (E.D. Mich. 2002), *vacated by* Haddad v. Ashcroft, 76 F. App'x 672 (6th Cir. Sept. 23, 2003).

3. *Id.* at 800.

4. Rita Boustany, *US Deports Lebanese Man After 19 Months in Prison, Wife and 3 of 4 Children Ordered to Leave*, LEBANONWIRE (July 17, 2003), *available at* http://www.lebanonwire.com/0307/03071712DS.asp.

challenge in the Sixth Circuit in a decision by Judge Keith that has been widely quoted: "Democracies die behind closed doors."[5]

A second case involved warrantless wiretapping by the National Security Agency (NSA), which the public learned about after the *New York Times* revealed in 2005 that the NSA had been intercepting the phone and email communications of thousands of law abiding Americans and data mining, sifting through millions of calls.[6] But for that revelation, the practice would have continued unchecked, pointing to the indispensable role that the press plays as a watchdog over our democracy. We represented a number of plaintiffs, including journalists, academics, attorneys, and national nonprofit organizations that had reasons to be having conversations with people who live in the Middle East. This case became one of the first venues in which the government tested an expanded use of the State Secrets Doctrine which eventually enabled the government to succeed in having the case dismissed.[7] This doctrine originated in 1953 in a case called *United States v Reynolds,*[8] in which the government asserted "state secrets" as a reason to not allow a court to evaluate records and documents associated with a military flight accident. Over the years it has slowly expanded and is now successfully used to urge courts to not hear a case at all.

Finally, we brought a challenge to Section 215 of the Patriot Act, which has been informally referred to as the 'library records' provision but actually applies to allow the government access to many kinds of information of ordinary citizens.[9]

What we see over the last ten years is an unprecedented effort by the government to, in the name of national security, accumulate vast and extensive powers which will profoundly impact how we, as a society, function in a democratic culture that has thrived on affording the individual a significant amount of privacy and autonomy from the government. The damage could last generations. With the advent of powerful new technologies that allow for surveillance of a kind never contemplated by the founders of this country, the tools at the government's disposal have far more powerful consequences and are much more far-reaching with respect to our privacy and liberties than anyone could ever have imagined.

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5. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

6. Am. Civil Liberties Union v. Nat'l Sec. Agency, 493 F.3d 644 (6th Cir. 2002).

7. *Id.* at 650.

8. 345 U.S. 1, 7 (1953).

9. Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft, 459 F. Supp. 2d 592 (E.D. Mich. 2006).

In many respects, we see a fundamental transformation of the protections afforded by the Fourth Amendment—a transformation supported by both Republican and Democrat Administrations—whose support of the State Secrets Doctrine and warrantless wiretapping have remained consistent. As in any difficult time in our country's history, fear often influences public policy much more than any other factor, and in such a way that it will have unintended consequences for freedom and liberty.

During the Vietnam War, our own Judge Damon Keith decided one of the most important cases ever to be heard in this country: *United States vs. U.S. District Court for the Eastern District of Michigan.*[10] This case stands for the principle that the Fourth Amendment does not permit warrantless surveillance in intelligence investigations of domestic security threats. It began after the CIA building in Ann Arbor was bombed and the government charged three people with conspiracy to destroy government property.[11] In response to the filing of a pre-trial motion by the defense for the disclosure of electronic surveillance information, President Nixon's Attorney General, John Mitchell, claimed that he was authorized to wiretap anybody pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and that he did not have to disclose the sources as an exception to the warrant requirement because the defendants were members of a domestic terrorist organization.[12] Judge Keith disagreed and ordered the government to disclose all of the illegally intercepted conversations.[13] The government appealed and lost in the 6th Circuit and in the Supreme Court. Justice Powell stated:

> 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,

10. 407 U.S. 297 (1972).
11. *Id.* at 299.
12. *Id.* at 300-03.
13. *Id.* at 301.

> the danger of abuse in acting to protect that interest becomes apparent.[14]

That decision contributed to President Carter signing the Foreign Intelligence Surveillance Act in 1978, which is one of the legal lynchpins against which all the government policies post 9/11 should be evaluated.

Although the courts have generally been protective of the delicate balance of power among the three branches of government, I foresee that the advent of new technologies which greatly enhance the capacity of the government to collect information will continue to test our nation's commitment to a democracy that is premised on the innocence of the accused and on the right of every person to autonomy and privacy. The law sorely lags behind the pace at which technology advances – whether we are dealing with the use by law enforcement to track an individual's cell phone location,[15] or the use of TSA scanners at airport screening locations,[16] or private companies who easily accede to the government's demands for private information,[17] we are increasingly living in a world in which the most basic expectations of our relationship to the government will be profoundly tested.

Nor should we underestimate the extent to which fear—fear of the economy or fear of terrorism—will drive public policy. It takes tremendous courage for elected officials to resist the temptation to succumb to measures that create an appearance, not necessarily a reality, of safety. It will be increasingly incumbent on the public to ask hard questions about the use and effectiveness of surveillance cameras, tracking devices, and databases, and the extent to which their liberal and unchecked use is worth the cost.

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14. *Id.* at 314.

15. *See Is Your Local Government Tracking Your Cell Phone's Location?*, ACLU, http://www.aclu.org/maps/your-local-law-enforcement-tracking-your-cell-phones-location (last visited Aug. 27, 2011).

16. *See* Jay Stanley, *TSA Scanners Start Moving From Naked Bodies to Stick Figure Outlines*, ACLU BLOG OF RIGHTS (July 20, 2011, 6:43 PM), http://www.aclu.org/blog/national-security-technology-and-liberty/tsa-scanners-start-moving-naked-bodies-stick-figure.

17. *See* Sandra Fulton, *Google's Transparency Tool Exposes Government Demands for Personal Information*, ACLU BLOG OF RIGHTS (June 29, 2011, 12:38 PM), http://www.aclu.org/blog/national-security-technology-and-liberty/googles-transparency-tool-exposes-government-demands.