

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Jameel Jaffer

Columbia Center for Oral History

Columbia University

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PREFACE

The following oral history is the result of a recorded interview with Jameel Jaffer conducted by Ronald J. Grele on April 27, May 2, and June 4, 2012. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose.

VJD

Session One

Interviewee: Jameel Jaffer

Location: New York, NY

Interviewer: Ronald J. Grele

Date: April 27, 2012

Q: This is an interview with Jameel Jaffer. Today's date is April 27, 2012. The interview is being conducted in New York City. The interviewer is Ronald Grele. Now, if you'll just talk for a couple of minutes and I'll just—

Jaffer: Sure. I'm Jameel Jaffer. I'm a deputy legal director here at the ACLU [American Civil Liberties Union]. We work on national security issues.

Q: Terrific. I wonder if we can start with a little bit of your biography. You were born in Canada?

Jaffer: I was, yes.

Q: In Toronto?

Jaffer: In London, Ontario, although I spent very little time in London—I think about eight months. Then my parents moved to Kingston, Ontario, which is halfway between Toronto and Montreal, right on Lake Ontario. I grew up there. I spent three years at boarding school in Toronto, then came down to the U.S. [United States of America] and more or less stayed here.

Q: Just three years of boarding school?

Jaffer: Yes. I started high school in Kingston. Then after two years, I moved to Toronto.

Q: What was your family like?

Jaffer: Well, my parents are from Tanzania, so we've had several generations in Tanzania. Before that, Gujarat, in India—before there was Pakistan. Before partition. So on one side my grandfather left India and on the other side, my great-grandparents—they all came, or went, to Tanzania—what was then Tanganyika—in the early twentieth century. My mother's family is from Dar es Salaam, which was the capital of Tanganyika and my father's family is from Zanzibar. Both my parents moved to England for school—for university.

Q: Were they part of that migration after independence?

Jaffer: What happened was, Idi Amin had come to power in Uganda and—in Tanzania was actually never political upheaval on that scale. The prime minister was Julius [K.] Nyerere, who did many great things for the country but was a socialist and was nationalizing the property of Asians. My mother's family had some property and they were worried about where all this was headed. So they, like many other people who had property, sent their kids out of the country. My mom went to England for that reason. My father's family had no money but he got a scholarship to study pharmacy, so he went to London to do that.

They met at a party in London. My mother was then working for the BBC [British Broadcasting Corporation]. She had sort of a backroom job at the BBC. She had been working for Radio Tanzania when she was in Tanzania. But they met in London, and then eventually decided to do what many Tanzanians with some degree of either wealth or education were doing at the time, which was to apply for visas to Canada, the U.S. and Australia. At the time, Canada was the easiest place to get into and they got into Canada on the condition that they live in a rural town. They initially started off in Barrie, Ontario, which is quite far north. For people who had grown up in Tanzania, to be deposited in northern Canada must have been a shock. But they lived in Barrie for a little while, then moved to London, Ontario, which is where I was born.

Q: But you grew up in Canada.

Jaffer: I was born there and I grew up there. Yes.

Q: Were you religious?

Jaffer: I'm not religious but my family is Muslim, Ismaili Muslim, which means that they are part of a Shia sect that follows the Aga Khan. My mother's extended family is quite religious but what it means to be quite religious in Ismaili is quite different from what it means to be quite religious as any other kind of Muslim, really. The Ismailis are a relatively liberal sect of Islam. At least the ones in Canada, the United States, and England tend to be relatively well-educated, assimilated or integrated and also quite successful in business. That's the community.

Q: When called upon, how do you describe growing up in Canada?

Jaffer: Well, I think I was very lucky to have grown up in Canada. It was a very tolerant place and my parents were always very grateful to the liberal party, especially to Pierre [E.] Trudeau for having opened the doors to Canada at a time when many other countries were not that excited about accepting immigrants, especially Muslim immigrants from East Africa. Not everybody was opening their doors.

I remember when Pierre Trudeau died, I was actually clerking. After I moved to the U.S., I worked here for a while, I went to law school and I actually moved back to Canada for a year to clerk for a judge on the Canadian Supreme Court in Ottawa. While I was there, Pierre Trudeau died and my parents were very upset about his death. In fact, much more upset about his death than they were about the death of some of our relatives. [Laughs] There were these long lines outside Parliament. Everybody wanted to pay their respects to Trudeau. I remember my parents calling me and asking me if I had yet waited in line. It hadn't occurred to me to wait in that line until they called.

But yes, I always felt very lucky to have grown up there. I never intended, actually, to stay in the U.S. It just sort of happened, as I think it does to many people. You move somewhere for a little while, then you build a lot of—you develop social and professional relationships there and it just becomes more and more difficult to leave.

Q: When you were still in Canada, prior to going to college, what did you think your world would be? Who were you going to be?

Jaffer: I had always had a very strong interest in business and finance. My father is a pharmacist but he bought his pharmacy. Then my parents bought the commercial plaza in which the pharmacy is located and they became small time real estate investors and commercial landlords. It's a very typical story.

Q: It's not an unusual story.

Jaffer: No, not at all. Especially for Ismailis who came from East Africa. It's a relatively large community in Canada. I think at this point there are probably two hundred thousand Ismailis in Canada. But this story is sort of the prototypical one. There's nothing at all surprising about it. I think most first-generation Canadians with that kind of background saw business and finance as the obvious route. I certainly thought that, at least through most of college. Not because I'd decided on that but just because it was the obvious thing. That said, when I went to college I was not an economics major or anything like that. I studied math and English but I did that not because I thought I was going to be a mathematician or an English professor something like that but because I enjoyed those things. I still thought I would one day eventually end up at an investment bank or something like that, which I did, briefly.

Q: As you were talking, I thought it would be logical to go to Williams [College], because they have such a sterling economics department.

Jaffer: They do have a good economics department and I did take a few economics classes, but I ended up being more interested in—

Q: They have more economics majors than any other major.

Jaffer: Is that right?

Q: Yes.

Jaffer: Well, they also have a very strong math department. They don't have a research program because it's a college, not a university, but they have a very strong teaching staff in the math department. I don't know what the numbers are but they have a lot of math majors. More than most other liberal arts colleges. People told me that if one day you want to be an economist, it's not going to hurt you to have studied math. I enjoyed doing the math more. Not that economics wasn't challenging but I found the math more challenging and more interesting. I ended up spending more time doing that. But it wasn't with the thought that I would one day be a mathematician. I never had that kind of talent.

Q: A friend of mine once described it as one of the best-kept secrets of the American upper class. Williams.

Jaffer: Williams. It's not as snooty an establishment now as it used to be. When I went there it was still during the transition from real snootiness into kind of a more open educational establishment. But now when I look at all the materials, even the changes since I went there seem pretty significant. But in many ways it's a great place. It's a very isolated college.

Q: Oh, it's beautiful.

Jaffer: It's beautiful. It becomes less beautiful once you've spent a couple years there consecutively. It can feel a bit claustrophobic. That's one of the reasons I think many people spend time abroad in their junior year. People do that at all liberal arts colleges but I think Williams probably has a larger percentage who spend time abroad. I think that's part of the reason why.

Q: You went to [University of] Cambridge before Harvard [University]? Or Harvard first?

Jaffer: In my year abroad I went to [University of] Oxford. This is Williams' program. I spent a year at Exeter College. After college I spent a year here in New York working for Lehman Brothers, which still existed at the time, as an investment banking analyst. I went to Cambridge. I spent a year there doing a development economics degree. Then I came back to go to law school.

Q: This is a little off the topic, but did you notice a difference in the way you were treated in England compared to the way you were treated in Canada?

Jaffer: You know, I have always been—for better or worse—in these protected bubbles. I'm sure I would have noticed differences had I lived in Manchester, but I didn't live in Manchester. I lived in Oxford and then Cambridge. One difference—I did find it difficult to get to know actual British students in Oxford and Cambridge. A lot of the foreign students ended up spending time together and it was very easy to make friends with people who were from Spain or from South America or from India or whatever. But making friends with British students was a little harder. I don't think that's because they were prejudiced in some way but just because it's a harder society to break into. It's easy to meet somebody on the subway in New York and end up having a drink with them a week later. I don't think that happens very often in the UK [United Kingdom].

Q: You studied economics.

Jaffer: Yes, I studied development economics. Honestly, I can't say I learned very much in that year—which is at least in part my fault—but I had a great time. I spent a lot of time rowing and playing tennis and a little bit of time in class and reading, but I don't think it was a great program. And even to the extent that it was a great program, I didn't exploit it. It was intellectually a lost opportunity, although, socially, a lot of fun.

Q: It taught you to be a gentleman?

Jaffer: I'm not sure I would be described that way by anyone. [Laughter] I would have been less of a gentleman had I not gone. How about that?

Q: That's my impression of some of those programs in England.

Jaffer: Right. I think some of them are very serious programs. People who do PhDs there—if you do a PhD in developmental economics at Cambridge, you have to actually learn something and know something when you get out. Well, that's not true of the master's programs now.

Q: Why law school? When did you begin to think about yourself as a lawyer?

Jaffer: A few weeks ago, really. [Laughs] No, people are always advised that they shouldn't go to law school simply because they can't think of anything else to do. I'm sure that that, for most people, is very good advice. I really went to law school for that reason. I went to law school because I hadn't figured out what I wanted to do. I had done this investment banking for a little while, which I found challenging and exhilarating in some ways but narrow in other ways. I wanted to think about bigger questions. I wanted to think about not just how are we going to make money for this particular client but what are the effects of these kinds of policies on the world? You don't have time to do that kind of thing when you're an analyst in an investment bank.

Then when I was at Cambridge, I started to apply for development economics jobs and I actually got a couple offers, which at the time seemed not that attractive to me. But, in retrospect, I wonder whether I should have taken one of them. One of them was in South Africa. That's the one I remember. There were a couple of them but the most appealing was this one in South Africa. It seemed like a risk at the time and it was a risk. It would have been a risk in some ways.

On the other hand, I'd applied—almost as a backup—to law schools and I had done relatively well in this law school application process. I got admitted to Harvard, which wasn't a risk at all. It didn't seem like a risk. In some ways I'm a very conservative person and I thought, "Well, I should go to law school and if I want to do development economics afterwards, nobody's going to say no because I've got a law degree." So I went to law school. I didn't actually like law school very much.

Q: What years are we talking about?

Jaffer: 1996 to 1999, I was in law school. I didn't like it very much. I liked aspects of it. I liked the writing. I liked arguing with people, which I liked doing even before I went to law school. I got interested in some—I didn't think of them this way at the time but now I realize that they were—some libertarian ideas. I ended up writing about the privilege against self-incrimination from a kind of libertarian perspective. Also, the Takings Clause—again from a kind of libertarian perspective.

Q: Were you doing any reading in libertarian philosophy or argumentation?

Jaffer: Well, libertarian philosophy not really but I was doing a lot of reading in American jurisprudence from people like Richard [A.] Epstein and [Richard A.] Posner, who are a kind of libertarian. I was gravitating toward those arguments and I wrote these pieces which—especially the self-incrimination one—I stand behind even now. I think it was a good piece. The other one I have some reservations about.

I wrote about those things. Then, because I ended up liking the writing and, again, not having figured out what I wanted to do, I applied to a bunch of clerkships, both in the U.S. and Canada.

Q: I assume that while you were at Harvard, you took the regular courses on contracts and procedures, etc.

Jaffer: I did. If you look at my transcript now, it's not the transcript you would expect for somebody who ended up doing what I'm doing now. It's sort of weighted toward—there are two things. First there are the law and philosophy classes, like jurisprudence classes and law and philosophy. Then there are a whole slew of corporate classes—corporate tax, securities regulation—and on both sides these are optional classes. Nobody's forced to take these things. This is just an indication, I guess, of how indecisive I am. That sort of focus on these two extremes. In the end, my best grades—

Q: Well, there's a negotiation between the two of them, right?

Jaffer: Maybe. I don't know. My best grades were in the corporate classes. My worst grade was in constitutional law, which is what I do day-to-day now.

Q: Were there any professors at Harvard who were particularly close to you or with whom you were particularly close? Any mentors or anything at all?

Jaffer: Not at all. I don't know if I ever went to office hours. I rarely spoke in class. If I could avoid it, I didn't. Most of the time, in classes that were Socratic—I had Arthur [R.] Miller as my civil procedure professor and he is notoriously Socratic in his method and quite ruthless in his questioning of first-year students. I spent that class mainly terrified of the possibility that I would be called on, so I didn't talk very much in class. I did apply to the [*Harvard*] *Law Review* and ended up getting on the *Law Review*. I spent a lot of time at the *Law Review*, either editing or writing, which I enjoyed.

Q: Mostly this is commentary?

Jaffer: Yes. Well, a lot of it is just cite-checking the articles of professors. It's not particularly engaging work. You do end up reading a lot of *Law Review* articles and talking about them and you get to know—you get a sense of where legal scholarship is. I enjoyed that. But that's really the only part of law school that I was really immersed in. The rest of it, I just did what I had to do and got out.

Q: This, again, is totally off—but you said you enjoyed the arguing.

Jaffer: Yes.

Q: I have a son who's a lawyer and who's very argumentative. Were you an argumentative junkie?

Jaffer: I was. Yes, I was.

Q: It comes with the territory.

Jaffer: And I still am argumentative and contrarian.

Q: From Harvard, where did you think you would go?

Jaffer: I didn't have any idea. I feel like at this point in my career I should be able to articulate a clear narrative and there's nothing. It's just one somewhat arbitrary decision after another. That's really what it is—until more recently. Actually, when I graduated from law school I applied not just to clerkships but also to development economics jobs. I didn't actually get, at that point, anything particularly exciting in the development economics sphere. When I was clerking I got more and more interested in civil liberties issues.

Q: You were clerking where?

Jaffer: Here on the Second Circuit for one year, for Amalya [L.] Kearse, and then in Canada for a year. I got a little bit lucky here in New York because there aren't a lot of civil liberties cases that end up before the Second Circuit but I ended up getting to work on some of them. Then in Canada—you know, the Canadian Supreme Court is different from the American Supreme Court in that the Canadian constitution is relatively new. It was written in the 1980s—in 1982—so there is very little law, comparatively, on even the most major constitutional issues. So questions

like free speech and freedom of association are, in Canada, up for grabs in a way that they're not in the United States. That gives the Canadian Supreme Court—for better or worse—much more power. That power is accepted—largely accepted—in Canadian society. Not by everybody but in general.

So as a clerk in Canada, I think you end up with a quite different job than you would have as a clerk, certainly as a clerk on an appeals court in the United States. It feels like a policy job because you're making policy arguments to your judge about what the law should be and you are relatively unconstrained by precedent. Therefore, one consequence of that is that the Canadian Supreme Court is much more open to the international conversation about these issues. Because the Canadian Supreme Court—not having any guidance of its own from its own jurisprudence about how to decide these complicated civil liberties cases—looks abroad. They want to know, how did the U.S. deal with it? How did the UK deal with it? How did South Africa deal with it? I thought that was a fascinating job.

While I was at the court, the court heard argument in one case involving possession of child pornography—a very important First Amendment, free speech issue. Another case involving refoulement to torture. So somebody from Sri Lanka who was slated to be sent back to Sri Lanka but who would have been tortured had he been sent back. There was this question of what is Canada's obligation? There was another case about a religious school's obligation to admit gay students. There were these very fascinating civil liberties cases and I just happened to be there at a time when the court was hearing those cases.

So that was exciting and these were issues that I had already been introduced to at law school and issues that I'd been interested in at law school. Some of them I had written about in law school and I just became more and more interested. It was still an academic interest. This was before 9/11. It was purely, almost a scholarly interest. I didn't really think I would end up working on these issues day-to-day. But then after 9/11, I started thinking about trying to actually work on them.

Q: Let's stick with the clerkships for a while. It's interesting to me that both of the judges were women.

Jaffer: Right.

Q: Which would be a unique experience.

Jaffer: Well, it's unusual. There aren't that many women—

Q: Maybe not unique but unusual.

Jaffer: Then when I came to the ACLU my boss was a woman—Ann Beeson—for five or six years. So I spent, I think, most of my post-law school career working for women. It wasn't by design. The two judges I clerked for were very different from one another. The judge I clerked for here in New York, Judge Kearse, they were similar in—

Q: Who is in a way unique because she was African-American.

Jaffer: Yes. I think she was the first African-American woman appointed to the appeals court—not just in New York but across the country. I never got the sense that she thought of herself as an activist at all. Certainly her jurisprudence does not suggest that she thinks of herself as an activist. I think she got where she is because she works very, very hard. She's very smart. But even after having spent—I don't know how long she'd been on the bench. Probably twenty years by the time I clerked for her. But she was still working fourteen-hour days regularly. I worked very hard that year and she was a very close editor. The clerks would write drafts of opinions but nothing that we would write would survive into the final opinion. She would rewrite every single thing—not just the structure but words, every word. If you got three or four words in a row into a final opinion, that was a remarkable thing. So yes, it was a great experience. It was hard work. Her goal every day was to produce. She would come in in the morning, she would produce herself and she would make sure that her clerks were producing too. It was a good experience to work in chambers like that.

When I clerked in Canada, I was clerking for Beverly McLachlin, who became the chief justice the year I got my clerkship. She was the first female chief justice of Canada. As the chief justice, she had all these obligations beyond writing opinions—delivering speeches, showing up at events, kind of a formal role as the head of the judiciary in Canada. She was just figuring that out when I got there. She had only been chief justice for a few months. It was, I think, a very tough time for her and, therefore, a tough time for her clerks because we were scrambling around to get a million things done very, very quickly.

And, often, she didn't know that she had to get these things done until three days before they had to be done. Suddenly, she would realize that she had to deliver remarks for something and we had to scramble around to help her prepare. She is very different from Judge Kearse but similar in that she works extremely hard. You couldn't have a job like that without being a person who works extremely hard. Even in comparison to the other justices on the court. I think everybody would agree that she's probably the hardest working judge in the Canadian judiciary.

One nice thing—or one thing that I liked about working with her—is that she had a special affection for the freedom of speech and the freedom of association. Those are called Section 2-B rights in Canada. First Amendment rights in the U.S. She thought that they were especially important—that they were matrix rights. These are the rights from which all the other rights spring. She ended up writing a bunch of opinions, including some while I was there, that really expanded the protection for freedoms of speech, association, and religion in Canada.

Q: A personal interest. When you were clerking in Canada, did you have anything to do with the indigenous people's rights, which is a major issue?

Jaffer: Well, the court heard a whole bunch of cases relating to—in Canada—called the First Nation's Peoples. I bet that, as a proportion of the docket, that issue is a much higher proportion of the docket in Canada than it is on the U.S. Supreme Court's docket here. But, really, a lot of that litigation has taken place since I left the court. There has been this long list of Supreme Court cases relating to First Nation's rights and many of my co-clerks—many of the people I

clerked with in Canada—went on to litigate those cases either for the government or for First Nations. I think of my co-clerks, probably at least half a dozen—so six out of thirty—went on to do that kind of work. Probably more. Maybe eight out of thirty went on to that kind of work. I think it would be a very unusual thing for a clerk on the American Supreme Court to go do this kind of work. It's just not the kind of work that they do.

Q: I asked the question because part of the debate is the admissibility of oral evidence for property rights.

Jaffer: Right. Right. That's interesting. It's not an issue I ended up thinking about.

Q: What was it like to live in New York? When you first came to New York?

Jaffer: I loved it and I still love New York. Everybody says this after they've lived here for a few years but this is where I feel at home. I always like flying into Toronto when I go visit family there but I feel more at home in New York than I do anywhere else. I've lived in the West Village. When I was an investment banker, I lived there for a year with two roommates from college on Tenth Street and Hudson. Then when I moved back here after law school, I worked for a private firm here for a year before I came to the ACLU. I lived, again, in the West Village, on Perry Street—Perry and Bleecker. I loved living in the West Village. I loved being in New York. Back when I first moved here, I used to actually take advantage of the city in a way that I don't now. I spent a lot of time at the opera and a lot of time just going out. It is— as you know—an amazingly vibrant city. That was true in the 1990s and it's still true now.

Q: Very different from the life in Canada, though.

Jaffer: Well, absolutely. But I wasn't an adult when I lived in Canada. I don't know what it would be like to live in—maybe Toronto would be very similar to living in New York. I have no idea. But, certainly, living in New York is very different from living in Kingston, Ontario, as a sixteen-year-old. The place where I grew up in Canada—Kingston—is very small. It's a city of about one hundred thousand people, but by the time—my parents have now lived there for forty years. So now, when I go home and I go out downtown with my parents, it would be odd if they don't run into five or six people they know on the street. It's a very small place and when you've been there as long as my parents have, you're part of the fabric of the place in a way that is very difficult to do in a place like New York. Again, my father was a pharmacist and my mother was trained as a librarian but they're on the symphony board. They're on the board of the tennis club that they play at. It's a life that would be very difficult to lead in New York unless you were [Michael R.] Bloomberg. [Laughs]

Q: I asked the question because at that point where you're leaving the clerkship, you must have been making a decision to go to the States, stay in Canada, do this, do that.

Jaffer: By the time I got halfway through my clerkships, I had decided that I wanted to litigate and that I wanted to do this kind of litigation. I was thinking at the time of free-speech litigation. I really didn't have any direction until about then. Until about the year 2000. But then I started applying to jobs at the ACLU and I got rejected for many jobs.

Q: Did you go to Davis Polk [& Wardwell LLP]?

Jaffer: I did, for two reasons. First, I had been rejected for many jobs at the ACLU.

Q: Oh, really. Tell me that story.

Jaffer: Well, I had applied to the [Marvin M.] Karpatkin Fellowship, which is a fellowship in the racial justice program. I had applied to the Brennan Fellowship, which is a fellowship in the First Amendment project and got rejected from both of those.

Q: Any reasons given?

Jaffer: No reasons given. I'm not even sure I got an acknowledgment. I later learned that both Steve [Steven R.] Shapiro, who's the legal director, and Anthony [D.] Romero, who's the executive director, also got rejected from the Karpatkin Fellowship. So I felt a little better.

I got rejected from those and the law firms at the time were providing very generous bonuses to people who had clerked—who were joining after a clerkship. So there was an attraction to going to a law firm and collecting a little bit of money. I had been clerking for two years, so I was getting a salary but not a very generous one. There was some attraction to going to a law firm for that reason. But the real reason was that I didn't have any other option. I didn't have an offer

from a place like the ACLU, which is where I really wanted to work. So I went to Davis Polk and I started doing pro bono work for the ACLU almost immediately.

Q: Did you know anything about Davis Polk before you went there?

Jaffer: Well, I knew a little about it. I had gone through the interview process at law school and I had spent half of a summer at Cleary Gottlieb [Steen & Hamilton LLP], which is often described as a place that people go to instead of Davis Polk—or vice versa. Then I had many friends who had gone to Davis Polk instead of Cleary. I actually ended up spending half a summer at Davis Polk when I was studying for the bar. I guess between my New York clerkship and my Canadian clerkship. So I knew a little bit about it.

Q: But most of your day-to-day work would have been working with a partner.

Jaffer: I said I had direction in the year 2000 and that's giving myself too much credit. The reason I went to Davis Polk is that when I was in law school I had taken these corporate classes. The ones I enjoyed most were the ones that were math-heavy classes. I felt like I had kind of an advantage in that area. In the world of math I was a nobody. But in the world of finance and economics, any marginal knowledge about math is something that gives you a huge advantage over everybody else. I had done well in those classes, I had enjoyed them and when I went to Cleary for half of my summer, I spent some time working on equity derivatives, which is sort of math-heavy. Part of the reason I ended up going to Davis Polk is that many people told me that Davis Polk has the preeminent derivatives program.

Q: That's why I asked the question.

Jaffer: So when I went to Davis Polk, my day job was working on these derivatives issues.

Q: You become a quant [quantitative analyst].

Jaffer: Yes. The closest thing to a quant that there is in the legal world. On one level, it's fascinating stuff. The people who do it are very smart. At Davis Polk, that's especially true. There's a kind of creativity that goes into it. But, ultimately, at the end of the day, you're trying to make rich banks even richer. I didn't find it that rewarding in any sense other than the literal sense. So I was doing that in my day job but Davis Polk was good enough to let me do pro bono work as well.

Q: What kind of pro bono work did they do?

Jaffer: Immediately I started working on asylum cases. Asylum cases are—for law firms—that's easy pro bono work to do. It's easy because the cases are relatively discreet. You don't really need a partner to do much supervision over the associates. The associates can do it on their own. And asylum work is not politically sensitive, usually. You're not going to have a client call up to say, "Why are you representing this Syrian dissident?" The law firms don't have to worry about losing business over doing asylum work, most of the time.

I was doing that. But then—I joined Davis Polk right after 9/11. It was October of 2001.

Q: I was going to ask where were you on 9/11.

Jaffer: Well, I'll come back to that. I joined Davis Polk in October—two months after my clerkship—and did it in Canada. There was a lawyer from the ACLU, Lee Gelernt, who was a lawyer in the immigrants' rights project. He did an event at Skadden [Arps Slate Meagher & Flom LLP]. It was an evening event and one of my friends said, "The ACLU is doing this event at Skadden, talking about the work they're doing now on 9/11 issues. I'm going to go. Do you want to come with me?" And I went.

Lee Gelernt was speaking there and Lee is an extremely compelling speaker. He talked about the ACLU's efforts to try to connect with some of the people who had been rounded up after 9/11 and were being held in detention centers in New Jersey and New York. These were immigration raids in the Afghan community and the South Asian communities. These people were sort of picked up in the middle of the night. Their families didn't know where they had been taken. The government wasn't releasing the names. Nobody knew at which facility any particular person was held and in many cases didn't even know—we didn't even know whether they were held by the U.S. or they'd just sort of disappeared.

Lee gave that talk and he explained that ACLU just didn't have the resources to go to all these detention centers and meet with all these people. And there's a lot of negotiation to try to get into the detention centers because at each one you had to negotiate with a different warden. The

warden had the INS [Immigration and Naturalization Service] behind him. Sometimes you were negotiating with the warden, sometimes with the INS. The INS had the FBI [Federal Bureau of Investigations] behind it, so sometimes you had to negotiate with the FBI, too. It was a very time-intensive process, a labor-intensive process and the ACLU had half a dozen immigrants' rights lawyers, most of whom had dockets that preexisted 9/11. They couldn't just drop everything. So Lee was saying, "We need help."

I went to Davis Polk with a couple other Davis Polk associates and said, "We want to do this work." I know that many people who were at that same talk went to their law firms and said the same thing and their law firms said no. So right after 9/11—these are people who were rounded up as special-interest detainees because they allegedly had some connection to the 9/11 attacks and this is not work we want to do at this firm.

Davis Polk, to its credit—I was annoyed at Davis Polk because of what they said. Davis Polk said to us, "You can do this work but you cannot use your Davis Polk business cards. You cannot sign your name to any document. You certainly cannot sign the firm's name to any document. But we will count the time you spend on this as pro bono time and if you need resources—for example, if you need a car to take you out to the detention center, that's fine. If you need printing or you need phone calls, FedEx, that's fine. You just cannot sign anything and Davis Polk is not associated with this. It's your work." I was annoyed at Davis Polk. I thought, "Why are you putting these limits on us?" In retrospect, I realized that Davis Polk was actually quite courageous to give us that chance. Many other law firms didn't do it.

Q: Was there a particular partner at Davis Polk?

Jaffer: There probably was. I am embarrassed to say, I don't remember who it was. Somebody there deserves credit, though.

Q: I just wanted to get that on the record.

Jaffer: You know, in general, Davis Polk is not a particularly courageous firm on this kind of stuff. To the contrary. They have been on the wrong side of many important civil liberties cases. So I'm not sure that it would be fair to say that Davis Polk deserves credit more generally for the work they've done on civil liberties and human rights issues. I think in this particular instance Davis Polk was courageous and I was wrong not to realize it at the time.

Anyway, I started going out to the detention centers with these two other Davis Polk associates—neither of whom is at the firm anymore—but they stayed there longer than I did. One is now in-house at an investment bank and another one is a lawyer and I think she's in Chicago now. But the three of us, along with translators paid for by Davis Polk, would go out to detention centers in New Jersey—Elizabeth, Passaic, New Brunswick—and first try to negotiate our way in, which was not an easy thing. Then once we were in, try to negotiate our way—. So sometimes what the warden would say was, "If you can identify the person you are going to meet with and can get a letter from that person saying that that person wants to meet with you, then absolutely, you can come in." But they wouldn't tell you who was being held at the facility. So you couldn't contact the detainees. You couldn't contact their families.

So what would happen is that through some chance we would find out that a particular person was held at a particular detention facility—

Q: How would you do that?

Jaffer: It was different every time. Sometimes one of the detainees would manage to get in touch with an immigration lawyer and the immigration lawyer would call us. Sometimes Lee from the ACLU would find out—either through his immigration lawyer connections or through some connection at the INS—that a particular person was being held in a particular place. Or a family member would somehow have figured it out that this person was being held at Elizabeth [Detention Center]. Then once we had one person in there, we got that person to go around to all the other prisoners and get them to invite us to talk to them.

But even then in the detention centers, some of the wardens were more cooperative than others. Some of the wardens were intentionally obstructing our visits. They would tell us, “You can come in between 2:00 and 4:00 on Saturday afternoon.” We would arrive at 1:30 and they would say, “We only do this during the week, not on the weekends.” Issues like that. One of my colleagues had passed the bar exam but hadn’t been admitted and they gave her a hassle about, “You’re not a lawyer yet. You can’t come in.” At one point they told us our translator had failed the security check, which was ridiculous. Our translator was actually a UN [United Nations] translator of unimpeachable integrity.

But we had issues like that. Once we got in, talking to each detainee was—it's kind of like the interview you're doing now. In order to get anywhere, you need to have two or three hours with somebody. At each facility there were one hundred detainees and we didn't have the time. But we would write up the notes. We'd come back to the office, write up our notes and we'd send them to the ACLU and the ACLU would sometimes put the detainee in touch with a lawyer who could file a habeas petition.

Sometimes we would do some advocacy on behalf of the detainee. For example, detainees who aren't allowed to make phone calls, we would do some advocacy to try to get them to get the authorities to agree to let them make phone calls. Or, some detainees were being housed with the criminal population and were being mistreated—because this was right after 9/11 and you put some guy whom you label a special interest detainee connected to 9/11 into the criminal population and it's quite predictable what's going to happen to that person. So we would do some advocacy to try to get them out of the criminal population and into an immigrant population instead.

So that was the work. I felt like I was doing a huge amount of work and I think that I was very productive in the time I spent on it. But we made only the smallest dent.

Q: When you describe all that, the hassle you were going through—do you think that was policy on the INS part or the FBI part or just idiosyncratic of the wardens?

Jaffer: Both. The FBI had a policy called “hold until cleared.” Ordinarily, somebody is detained because there is some reason to detain them. But in this case, that wasn’t true. The reason was that these were people who were rounded up in an immigration raid. They had over-stayed visas in some cases or their papers weren’t in order. Usually, there was some immigration justification for rounding them up in the first place. Although the justification for selecting these people as opposed to the ten million other people who are in the country without papers was that these people are Muslim.

So they rounded up all these Muslims—or people they thought to be Muslims. In some cases they weren’t Muslims. But they stick them in immigration detention. Normally, what happens when you’re in immigration detention is that you get deported. Either your papers are not in order, in which case you’re deported, or you manage to convince someone that you are, in fact, entitled to be in the U.S. and you’re released. But here, after a few weeks—initially, these people said, “Why are you deporting me? It’s true that I overstayed my visa but I’m no different from anyone else.” But after a few weeks they said, “All right, fine. Deport me.”

Weeks would go by and they wouldn’t be deported. They’d just be held in these prisons—again, some of them in criminal populations. In some cases, months would go by. By the time we got to them, probably at least three months had gone by—by the time we got a hold of them and there was no end in sight because they hadn’t been offered any chance to explain themselves to a court. They hadn’t been offered, in many cases, any opportunity to even talk to a lawyer. We got into the detention centers and the FBI policy was “hold until cleared,” which essentially meant

that unless you can prove that you're innocent, we assume that you're guilty and you're just going to be detained indefinitely.

So that was the policy. Now when it came to access issues—who can make phone calls, who can visit the detainees and when—for the most part, those things were decided by the wardens. Some of the wardens were good and some of the wardens weren't. Some of the wardens who weren't good—sometimes weren't good for reasons related to incompetence—and other times they were not good because they were sort of maliciously trying to prevent these prisoners from having access to their families and having access to lawyers.

Q: We have a number of interviews in our 9/11 projects with men who were rounded up and some of them talk about being shackled. Were your clients shackled?

Jaffer: Yes, absolutely. I'm not sure all of them were shackled but certainly some of them were shackled. I remember meeting with some of them who were shackled and they were really in dire straits by the time we got to them. Because months had gone by. They hadn't been able to talk to their families. They hadn't had any chance to talk to a lawyer. Nobody had hauled them in front of a court and they'd just been told, "You're going to be held here indefinitely." And they had been told that they were being held because of their connection to the 9/11 investigation. They were terrified because they thought, "I had nothing to do with 9/11." They were just in this bureaucratic limbo and they were being treated as if they had planned the 9/11 attacks.

So yes. They were shackled. We had a lot of disputes with wardens over monitoring of our conversations, both physical monitoring—because they would sometimes want to put a guard in our room—and electronic monitoring, because they'd want to record the conversations. Yes, it was a pretty grim—

Q: Did you have any successes?

Jaffer: Yes. Success—we managed to get people deported more quickly than they would have otherwise. In a few cases—in a very small number of cases—we managed to get people released. Honestly, I think the most important thing we did was we just made a human connection with these people who felt like they'd been thrown into this faceless system—

Q: Were you able to put them in touch with their families?

Jaffer: Yes. Sometimes not immediately but we were able to at least serve as intermediaries between them and their families, which was a huge thing for them and a huge thing for their families. They had no idea where people were held or even whether they were held. But ultimately, we did manage to get some of them deported, which is ultimately what they wanted. Then we represented some of them before the UN.

Once I came to the ACLU, one of the first things we did was file a petition before the UN Working Group on Arbitrary Detention on behalf of thirteen of the people we had interviewed. We ultimately got an opinion from the UN Working Group, discussing the conditions under

which they were held and the process they were afforded. It was very critical of the INS. By this time, all these detainees—all but one—had been sent home. The UN Working Group has no enforcement power over the U.S. but I think they got a degree of satisfaction from having somebody independent say that they were treated unfairly. So success may be too grand a word for it but I feel like, at the margin, we did some good.

Q: Backtracking a little—where were you on 9/11? You were still in Canada?

Jaffer: No, I wasn't. After my clerkship in Canada, I took two trips, two long trips. One to Cuba, which I wanted to do while I was still a Canadian resident because Canadians can do it. Once you're a U.S. resident it becomes a problem. I wanted to do it while it was still lawful for me to do it. I went to Cuba for three weeks.

Q: What's that like?

Jaffer: It was amazing. We had a great time. I went with my girlfriend. We were in Havana for about a week. Then we were in Trinidad, which is on the south coast. It's a really beautiful country and if you're a photographer at all you couldn't ask for a better subject. It's beautiful light. The buildings are decrepit but beautiful.

Q: You're a photographer?

Jaffer: Only an amateur photographer. The people are very warm and welcoming and have sophisticated views about their government. Some of them were willing to talk to us about it, so that was interesting. But it was a great trip.

So that was the first trip. I think I got back at the end of August to Canada, and then I left a few days after that with two friends from Williams to the Middle East. The idea was to fly into Syria and then almost immediately go to Iran. Spend a couple weeks in Iran and then come back to Syria. Split three weeks between Syria and Iran. We got to Syria on September 9 and on September 10 we went out to buy our flight tickets. No, on September 11 we went out to buy our flight tickets to Iran and we booked the tickets but we didn't pay for them. We came back to our hotel and everybody was crowded around a TV screen in the lobby. I was in Damascus on 9/11.

Q: Wow. What was the general reaction in that particular audience?

Jaffer: I was in kind of a budget hotel. Everybody who was staying there was a foreigner and the people around the hotel were accustomed to dealing with foreigners. Nobody was sure whether it was serious or not. We were watching the TV and I remember the crawl at the bottom of the screen said, "First tower crumbles at—" whatever the time was. We couldn't even conceive of what they were describing. You're watching it on TV and it just doesn't seem possible that this could actually be going on but eventually it sunk in.

We all had a lot of friends and family in New York. So our first concern was trying to figure out whether people were okay. Unfortunately, there was no internet. The connections were all down.

I don't know why they were all down but they were all down and there were all these lineups at the phones. Nowadays you would probably have a BlackBerry with you or an iPhone but we didn't then. So for several days we couldn't get in touch with people. That was very difficult. In part because we knew people in New York and we were worried about them but also, in part, because we knew the people in our families and our friends would be worried about us. Initially, in the first few days—I don't know if you remember this but there was talk about bombing everybody. Nobody knew who the United States was going to bomb. Suddenly, the stress level in Damascus was palpably higher. We certainly didn't want to be in Damascus if Damascus was in the middle of a war. There were no flights going in and out but we were trying to plan an escape route on the train through Turkey. So the first few days were very difficult, both because we couldn't get in touch with anyone but also—

Q: And Iran was out of the question after that.

Jaffer: Yes. both because we couldn't get in touch with people and also because we didn't know what was going to happen next. But after a few days, we were able to get in touch with our families by email and our friends in New York. I think all of us knew people who had died in the attacks but only through a degree of separation. So we were—relieved is the wrong word—but things could have been worse for us, personally. Also, after a few days we felt safer in Damascus, first because the talk of bombing had shifted to Afghanistan and also because the reaction we were getting from most of the Syrians we were talking to was sympathy. People would always ask, "I hope your friends and family are okay," and they said, "Do you need to use a phone?" So we didn't feel unsafe there anymore.

We ended up spending the entire three weeks in Syria. We spent about a week in Damascus, then we went up to Aleppo, into Palmyra, which was actually an amazing trip but not one we had anticipated doing. Then we came back. I had leased an apartment before I left in New York.

Q: When you were in Syria, did any of the anti-Muslim rhetoric of the United States begin to penetrate into Syria?

Jaffer: I didn't see it. I'd say eighty percent of the people we talked to in Syria were sympathetic and wanted to be helpful. But even some of those people—and some of the people who weren't as sympathetic—had odd theories about why the 9/11 attack had happened. Some of them thought that the U.S. itself had done this in order to justify some war and some of them thought that the Mossad was behind it. There was a theory that no Jews had gone to work on the day of 9/11 and we heard that from more than one person. But that was still a small minority of the people we spoke to. Most of the people we spoke to thought, "This is an awful thing. It was done by people who justified their acts by reference to Islam," and they were offended by the fact that they had done that. They were very sympathetic to us personally and sympathetic to Americans more generally.

I don't know if you remember but in the days after the 9/11 attacks even Iran issued a statement of sympathy. So there was, for a very brief period, this almost universal sense that we are all Americans and that's what we felt. That's what we felt from most people that we spoke to.

Q: So you came back then?

Jaffer: Yes. I had leased this apartment in New York before I left, this apartment on Perry Street in the West Village. I'd been reading the news from Syria and they had initially closed everything south of 14th Street, then they moved that further south. I had no idea what this place would look like when I got back at the end of September. New York was obviously still devastated but my apartment was habitable. I moved in—I guess on October 1—and I started a week later at Davis Polk.

Q: How did you make the transition from Davis Polk to the ACLU?

Jaffer: When I got to Davis Polk I kept applying for jobs at the ACLU and eventually I got—I interviewed for the Brennan Fellowship again. The first time I hadn't been offered an interview. The second time I got offered an interview. Ann Beeson, who was one of the lawyers who interviewed me—and she later became the associate legal director here—she called me later and offered me the fellowship.

She said, "But you know, there is also this staff attorney position open in the technology project. Would you be interested in that?"

Idiot that I am, I said, "No, I'm not interested in technology. I don't know anything about it. I'm interested in the First Amendment work. I want the fellowship."

Ann said okay but then she called me back a day or two later and she said, "Listen. Take the staff attorney job. Once you're at the ACLU, you can do whatever work you want to. It's very hard to get a staff attorney job at the ACLU. If you come as a Brennan fellow, within six months you're going to have to worry about what you're doing next. Come as a staff attorney and if you want to leave you can leave. But if you want to stay, you'll be able to stay."

So because of that I took the staff attorney job. When I came to the ACLU, I was a lawyer in the Technology and Liberty Project.

Q: That was a decrease in salary from Davis Polk.

Jaffer: I think I got about a quarter at the ACLU. Now that disparity, I think, is better now than it used to be, both because ACLU salaries are higher and because law firm salaries are lower. But when I was at a law firm, this was the height of the bubble. First-year lawyers with bonuses were making \$200,000. It was crazy. So it was a very big reduction in pay. Then I started working in Technology and Liberty, which at the time meant that when I got here the Patriot Act had just a few months earlier been enacted and nobody here had read it. It wasn't obvious who should read it. There was no National Security Project. There had been in the 1980s and early 1990s but they'd been shut down because history had ended, right?

So they had to sort out who was going to do it and everybody else had a docket. I was new, I didn't have a docket and they said, "You figure it out. Here's the act. You can take a month. Come back after a month and tell us which are the provisions that raise civil liberties issues and

what should we do about them.” It was actually a very luxurious thing to have that kind of time to think about those things and since then I’ve never had that kind of opportunity again. But it just happened that I arrived at the ACLU with no docket at a time when there was this project that had to be done and I was the only person who could spare the time to do it. So they gave it to me. Eventually, Ann and I brought several cases relating to the Patriot Act. That was the first set of national security cases that the ACLU did after 9/11.

Q: Now these were cases of Security Letters?

Jaffer: Yes, they were all about surveillance provisions. Section 215 is one of them. It was referred to as the library provision. Then the “national security letters.” The first case we filed—actually the first case that I filed as lead counsel—on most of these cases I filed as second chair. Ann was lead counsel. I was a new litigator. I didn’t know what I was doing. But the very first case I filed as lead counsel was a FOIA case—a Freedom of Information Act case—which we filed in June of 2002. It was a case seeking information about the implementation of the surveillance provisions—the Patriot Act surveillance provisions. After that, we filed a constitutional challenge to Section 215—the library provision—and then in 2004 we filed the first of several challenges to the national security letter provision. So there was this whole set of surveillance cases that we brought, beginning in 2002 but those cases became the basis for what later was the National Security Project.

Q: These were the secrecy cases under the name of Doe.

Jaffer: Yes, that's right. Some of these cases were brought on behalf of organizations or individuals who had been ordered to turn over information to the government. With that order was another order that prohibited them from telling anyone else that the government had asked them for information. So we brought a series of lawsuits challenging those gag orders. The first appellate case I argued was a challenge to the national security letter provision. We got that provision struck down in 2004. Congress amended it, then, in 2005 and we got it struck down again.

Q: Judge [Victor] Marrero.

Jaffer: Marrero. That's right. In the Southern District. The result is that now people who are served with these kinds of gag orders have a meaningful opportunity to challenge the constitutionality of those gag orders in court.

Now that said, very few people challenge these gag orders and when they're challenged they rarely get overturned. But, in theory, there is this opportunity now and that opportunity exists because of those cases.

Q: When you did this review of the Patriot Act, was it apparent to you at the time that it was so damaging? When you read through it? How did you read that at that time?

Jaffer: No, it wasn't until much later that we found out how aggressively they were using it. We didn't find out until 2006 that they had issued fifty thousand national security letters the previous

year. It was sort of an embarrassing story. That first Freedom of Information Act case that we filed—one of the documents we got in response was this four or five page list, heavily redacted. Almost entirely redacted. But at the top of the first page it says, “List of national security letters issued between this date and this date.” It was an eighteen-month period and at the bottom of the sixth page it says “Grand Total,” and then the number is redacted. So everything is redacted except the top line and the bottom line.

But we thought, “This is a six-page list. They must be issuing dozens, maybe even hundreds of these national security letters.” We went to the *Washington Post*—and you can probably find this even now. The *Post* quoted me probably in 2003 or 2004 saying exactly that—“The FBI is probably issuing dozens of these national security letters.” We had exposed some very significant fact about the degree to which the FBI was relying on the Patriot Act and we thought that the fact that they were issuing dozens of them was a sign that they were not focused solely on people who were actual terrorists or even suspected terrorists but that they were going a little bit beyond that. It turns out that they actually issued fifty thousand national security letters, not just a few dozen.

Q: How did you find that out?

Jaffer: We found that out—we can’t take credit for it. It was two things. First, Bart [Barton D.] Gellman, for the *Washington Post*, wrote an article saying that they had issued thirty thousand in a particular year. He quoted an anonymous official for that. Nobody was sure whether to take it seriously because he had only one source and it was an anonymous source. Then soon after the

inspector general for the Justice Department, Glenn [A.] Fine, wrote a series of reports about the use of national security letters. He disclosed, for the first time, that over a three-year period, I think between 2004 and 2006 or 2005 and 2007, they had issued about one hundred fifty thousand national security letters.

What has turned out to happen in a lot of the FOIA cases is that we will get a little detail, which a reporter will then pick on and then take back to the agency and get a little bit more. With that little bit more, we're able to file constitutional litigation and the constitutional litigation and the news reports provoke an inspector general to do a report and the report discloses a little bit more. At the end of the day—through all of these little mechanisms that would be insufficient in themselves to have any effect—[United States] Congress is compelled to make some small changes to the law. Or a court is convinced to strike down a provision that it wouldn't otherwise strike down. It's very rare that we can take full credit for anything but it's also very rare that anyone else can take full credit for anything. It's really a bigger machine in which the ACLU is a cog.

Q: I wonder if we can just go through your career at the ACLU to set the background for the next range of questions.

Jaffer: Sure.

Q: So you're working on this project as—?

Jaffer: —as a junior staff attorney. Our national security work was relatively narrow at the time. We were working almost entirely on Patriot Act issues. Other organizations had brought Guantánamo cases, which turned out to be very important cases. CCR [Center for Constitutional Rights] brought these cases. Our Patriot Act cases were important but at the end of the day, I don't think that the Patriot Act cases were of the same significance to the development of post-9/11 law and culture and politics that the Guantánamo cases were. In 2004, we were looking for ways to expand our national security work but we wanted to do it in a way that wasn't just—we didn't want to jump on the Guantánamo bandwagon. We felt like CCR was doing a good job with Guantánamo and we wanted to put our resources where they would make a difference and we didn't really feel like we could make a big difference on the Guantánamo habeas cases at that point. But one of the places that we thought we might be able to make a difference was interrogation and torture.

So in 2003—late 2002 and early 2003—there were a handful of articles in the *Post* and the [*New York Times*] about the treatment of detainees in U.S. custody—in CIA [Central Intelligence Agency] custody and DOD [Department of Defense] custody. There was a story in the *Post* in late 2002 by Dana [L.] Priest and Bart Gellman that said that the CIA was sending people to other countries to be tortured. The CIA was not ashamed of it at the time. They were bragging about it to the *Post*. Then there was a story in early 2003 by Carlotta Gall in the *New York Times* about the death of two prisoners in U.S. custody in Afghanistan. We thought that there might be more to these stories than had been disclosed, that these abuses might be more pervasive and that, to some extent, the abuses might be the result of policy. We were concerned that the CIA was not disowning the abuse but, instead, taking credit for it.

So in 2004 we ended up filing these Freedom of Information Act requests. It wasn't just me, it was a group of us. Amrit Singh probably did more work on it than anyone else. But we filed two requests, first in October of 2003 and then in June of 2004. We filed the first one in October of 2003. In April of 2004, the Abu Ghraib [prison] photographs were published by *60 Minutes* and the *New Yorker*. It suddenly became clear to everybody that there was, in fact, something more going on. So we updated our FOIA request in June of 2004 and we filed a lawsuit in June or July of 2004, seeking to enforce both the October 2003 FOIA request and the June 2004 FOIA request.

Q: Now you filed that in cooperation with CCR and the Physicians [for Human Rights] and Veterans [for Peace].

Jaffer: That's right. That's right.

Q: Did you mobilize them or who mobilized—? How did that work?

Jaffer: Yes. Well, we had been talking to them quite a bit about this interrogation issue. We had worked with them behind the scenes on the Maher Arar case. They had been doing some work on Arar and we'd been talking to them about that.

Q: This was CCR.

Jaffer: CCR, yes. Then we proposed doing this FOIA project on torture, which everybody at the time thought—nobody thought it would be a big project requiring tons of resources. CCR was very happy to be part of it.

Q: Who did you work with down there?

Jaffer: At the time it was Steven [M.] Watt, who is now a lawyer at the ACLU. So it was Steven and then, I think, Maria LaHood, who was doing the Arar case. I can't remember how we decided this but we collectively decided that it would be good to go in—not just on behalf of CCR and the ACLU but also on behalf of veterans' groups and other human rights groups. We actually invited many groups to join and some groups declined. One prominent human rights group declined on the theory that it would be more effective to lobby the [George W.] Bush administration behind the scenes about interrogation—which, to be fair, did not seem like a crazy thing to propose at the time, given that we didn't know very much about what had happened. In retrospect, it's just a ridiculous idea.

So we ended up going in on behalf of these five groups. When we ultimately decided to file a complaint, we decided that we wanted help from outside the ACLU. We recruited Gibbons Del Deo [Dolan Griffinger & Vecchione] in New Jersey—Larry [Lawrence S.] Lustberg at Gibbons—to help us with the complaint. We asked them to do that not really because we needed the help but because here at the ACLU this wasn't seen as a huge priority, in part because we had never done any work on this set of issues before. There was some resistance at the board level to our involvement in issues overseas. There was a sense that this was not an ACLU issue. There is

a war on terror—it's a war issue—and we were not a human rights organization; we're a civil liberties organization. Then nobody thought we would get anywhere with this request.

Q: That's an old tension in the ACLU, isn't it?

Jaffer: It is, although I'm not sure it exists anymore. We're certainly not an anti-war organization but I don't think anybody now would propose that the ACLU should ignore the U.S. government's activities overseas. I think the last ten years have changed that.

But for all of those reasons, we went to Larry and Larry agreed to work on the case with us. We filed a complaint in August.

Q: What did you think you would find out?

Jaffer: Very little. We did it in part because we wanted to just draw more attention to the fact that the administration had apparently endorsed—or at least tolerated—the abuse of prisoners, which is something that I think was obvious from the Abu Ghraib photographs. We thought that perhaps we could force them to say more about their policies publicly by bringing this kind of litigation in court. But, honestly, I don't think anyone expected that we would get very much. There were lawyers here who had a lot of fun with the lawyers working on the torture FOIA—just sort of suggesting that perhaps we should clear ourselves for all the documents that were going to come in. They had a lot of fun sort of mocking the lawyers working on the torture FOIA. But, honestly, no one expected that we would get anything very dramatic.

Q: Were you just kind of fishing around?

Jaffer: Fishing around, fishing around. But then, you know, for a number of different reasons, we started to get documents. One of the reasons was that some agencies decided that they wanted to distance themselves. They wanted to make clear to the public that they weren't responsible for this, so the FBI released all this information from Guantánamo, which essentially pointed the finger at the Defense Department.

Q: Let's get back to Judge [Alvin K.] Hellerstein. Did you more or less try to end up in his court, or was there a decision made which district—where to make the filing?

Jaffer: Yes. We had a choice between D.C. and the Southern District, and the D.C. Circuit hears many more FOIA cases than any other district but had not been sympathetic to—the D.C. Circuit had not been sympathetic to national security FOIA cases. There had been this case involving the names of detainees in immigration custody. We had won at the district court level in D.C. but lost it for the circuit in an opinion that was very unsympathetic. We didn't want to face that again, so we filed in New York. We didn't know we would get Judge Hellerstein and when we did get Judge Hellerstein, we didn't know what to think of it. He is not somebody who is thought of as a particularly left-leaning judge. He's not a particularly left-leaning judge and he had served in the JAG [Judge Advocate General] Corps during the Korean War. So we didn't know what his views would be about the subject matter.

Ultimately, we went in on this very narrow issue of whether the agency should have to process the request, not whether they had to release anything. Not whether torture was illegal. Not whether they were abusing prisoners. Just, can they ignore a request filed under the Freedom of Information Act? Judge Hellerstein—I think, on the law—really didn't have any other option but to issue the decision that he did, which was ordering the agencies to start processing.

Now the rhetoric in his opinion was not something that we expected. When he came out with that opinion, the first line of that opinion is something like, "No agency is above the law." When you start with a line like that, people pay attention. But he made it clear that he was going to enforce the FOIA. He was going to do what he thought the law required him to do.

Q: Did any of the agencies make an argument that these were classified and couldn't—?

Jaffer: Well, at that time they didn't have to because they hadn't even—. The way FOIA works, there are two different stages. The first stage is processing. The second stage is withholding. We were just processing. We were just—. Do they have to answer the request? Do they have to say, "Yes, we have records but we are withholding them for these reasons"? Or can they just ignore the request? Their argument, which really was astonishing at the time and even more astonishing now, was that the court didn't have jurisdiction to order them to process the request. You can imagine how different the course of the last ten years would have been had Judge Hellerstein adopted that argument. We wouldn't know anything about the torture of prisoners at Guantánamo. We wouldn't know that more than one hundred prisoners died in U.S. custody. We

would not have the Torture Memos. We wouldn't have the CIA's Inspector General Report. We probably wouldn't have the Detainee Treatment Act.

Q: We should probably interview him.

Jaffer: You absolutely should interview him. Absolutely, you should interview him. You should interview him and you should interview Sean [H.] Lane, who was the principal lawyer for the government, whom I like very much and who did his job with integrity. But doing that particular job was, in my view, a very morally complicated thing and I bet he would have interesting things to say.

Q: Is he still around?

Jaffer: He's now a bankruptcy judge just around the corner.

Q: Well, one of the interesting things about Judge Hellerstein's decision was that he wanted it completed so rapidly—that the ACLU and the government should get together by—

Jaffer: —by October, right? [Cross talk] He envisioned that the whole thing would be wrapped up in three months.

Q: So he must have shared your idea that there wasn't very much.

Jaffer: Yes. And, you know, it's now eight years later and we are still litigating that case. There's one branch of it still before Judge Hellerstein. Another branch is before the Second Circuit. We have an offshoot of it before the D.C. Circuit. My guess is that this case will outlast me at the ACLU. It's a big case.

Q: Which were the agencies that were cooperative to begin with?

Jaffer: The FBI [Federal Bureau of Investigation] was relatively cooperative because they wanted to distance themselves from what had happened at Guantánamo.

Q: Well, some of the stuff that they revealed was really outrageous.

Jaffer: Right. Right. Well, they revealed these emails written by FBI agents who had witnessed DOD interrogations at Guantánamo. They described prisoners being shackled in the fetal position; stripped naked; and very hot cells; or very cold cells; or doused with freezing cold water. In one case they described a detainee who'd been left shackled in the fetal position overnight. They came back the next morning and the detainee had pulled his own hair out. So they were really quite harrowing descriptions of those interrogations.

The other thing the FBI did was they made clear that the DOD interrogators who were doing these things were doing it because they believed that ACLU policy required it. ACLU. DOD policy required it. [Laughs] ACLU policy certainly does not require it. That DOD policy required it. So they released that. And the FBI having released that, it became more difficult for

other agencies to justify their withholding of information. So we gradually started to get information from the DOD.

Now the DOD had an interest in releasing some kinds of information. They were relatively eager to release criminal investigative files, in which they had investigated abuse that went beyond the lines that they, themselves, had articulated for the interrogators. There were some interrogators who did things like electrocute detainees or beat detainees to death. Those were things that the authorities in DOD had never authorized. [Donald H.] Rumsfeld authorized all sorts of awful things but he never authorized—explicitly—an interrogator to beat a prisoner to death. I imagine that if somebody had come to him and said, “I’m proposing beating this prisoner to death,” Rumsfeld would have said, “You’re an idiot and this is not what I’ve authorized.” So they were relatively eager to disclose the small number of criminal investigations that they had conducted into incidents that had gone far beyond what they had authorized.

But, in disclosing those files, they also managed to disclose the lines—because to investigate people who had gone beyond the lines, they had to articulate what the lines were. So these investigations ended up telling us quite a bit about what they had in fact authorized. Ultimately, there was a lot of pressure from the media—from the public more generally—on the administration to release more information. The administration ended up releasing the Rumsfeld interrogation directives from Guantánamo, in part because as bad as those interrogation directives were, the administration wanted to make clear that they had never authorized things like the electrocution of detainees. They ended up releasing the interrogation directives. I guess, on the one hand, it did make clear that Rumsfeld had never authorized those very extreme things.

On the other hand, those directives made clear that he had authorized stripping prisoners naked; threatening them with military dogs; keeping them in isolation for long periods of time; keeping them in easy environmental manipulation—extremely cold cells or extremely hot cells; shackling them in uncomfortable positions; holding them in stress positions. So in an effort to defend themselves, they managed to indict themselves as well. So we managed to get quite a bit of information from the DOD. The State Department had an interest in disclosing some of the legal materials because they had fought back against the legal interpretation of the Geneva Conventions.

The CIA disclosed almost nothing. Literally nothing, for many years. In fact, even in the middle of 2006, the CIA had invoked what's called the Glomar response to a request for some of the legal memos. They said, "We cannot confirm nor deny that these memos exist." They said the same thing about the directive that President Bush issued in September of 2001 authorizing the CIA to set up secret prisons overseas. They said, "We can't confirm or deny that that document exists," even though it had been recorded in many newspapers. Then after the Supreme Court issued its decision in—I guess it was *Hamdan [v. Rumsfeld, 2006]*, which declared that the Geneva Conventions apply to prisoners associated with Al Qaeda. The administration decided that it had no choice but to shut down its CIA interrogation probe, which is based on the theory that the detainees have no rights.

So they shut down the CIA black sites. President Bush gave a speech in November of 2006 in which he announced that the fourteen prisoners then being held in those black sites would be transferred to Guantánamo. Once he made that announcement, we went back to the CIA and we

said, “The president has now disclosed the existence of this program. You can no longer justify refusing to confirm or deny even the mere existence of these documents.” The CIA then, for the first time, started giving us extremely heavily-redacted documents. There’s one up on my board here, which is worth looking at.

Q: Right, I saw it.

Jaffer: The only words that are un-redacted are “the waterboard,” because President Bush acknowledged in that speech that they had waterboarded some prisoners. But we have hundreds of pages that are entirely black like that.

Q: When you sit down with them, do you agree to that or do they tell you that they can only give you this, that and the other thing? They have to redact it on these grounds and—.

Jaffer: Well, what happens is they release this. We go to them and we say, “You need to release more information, given that President Bush has given this speech.” They come back to us and they say, “Here’s what we’re giving you,” and they give us this stack of heavily redacted documents. Then we go to the court and we say, “The CIA has redacted more information than is justified and here are the reasons why we think more information should be released.” We ask Judge Hellerstein to order the CIA to release more information.

Judge Hellerstein, you know, has made very important procedural rulings in this case but he has almost never required an agency to disclose information that it doesn’t want to disclose. He has

ordered them to process our requests—in other words, to acknowledge the requests and to list the documents that are responsive to our requests and to justify their withholding. But, except in a couple of extremely narrow circumstances, never ordered an agency to disclose a piece of information that it wants to withhold.

Now there are two big exceptions to that—well, one big exception and one exception whose scope is still difficult to assess. The big exception is that he ordered the DOD to disclose the torture photos. So after the Abu Ghraib photos came out, we went back to the DOD and we said, “Do you have photos like this from other facilities?” And they said, “Yes, we do but we’re not giving them to you.” We went to Judge Hellerstein and we said, “There is no justification for them withholding these photos,” and he agreed with us. The DOD appealed it to the Second Circuit and the Second Circuit agreed with us and ordered the photos released.

The Obama administration, at a press conference, then said that they had concluded that appealing to the Supreme Court would be hopeless and that they intended to release the photos. But between that time and the date that they were going to release the photos, Senators [Joseph I.] Lieberman and [John S.] McCain [III] introduced legislation that retroactively would have exempted these photos from the Freedom of Information request. The Obama administration supported the legislation and the legislation was enacted. So we never got the photos, even though we won both in the district court and the appeals court and even though the administration itself acknowledged that we would have won in the Supreme Court. So that’s one exception.

Q: I interviewed Greg [Gregory B.] Craig.

Jaffer: Oh, you did. Well, that would be very interesting. I've spoken to Greg Craig about the photos. At least in one conversation I had with him he sort of agreed with us in principle but said—I think his phrase to me was that even for civil libertarians, there ought to be room for practical considerations or something like that.

You know, honestly, if I had been in Greg Craig's shoes—if I had been in the administration's shoes—I'm not sure I would have proceeded differently. But their job is different from our job and I think that, in the end, our view of this particular issue is a better one than theirs. I think it is a very dangerous thing to give the government the ability to withhold information on the grounds that it's so incendiary that it can be used as propaganda by the other side and it will incite violence on the other side. If you give the government that authority, you essentially give them—the greater the abuse, the greater their ability to withhold the information. I think it's a very dangerous principle.

Q: That's an argument that goes back to the Pentagon Papers in a way—that soldiers will be killed as a result of this, etc., etc.

Jaffer: Right. Honestly, it's very difficult to know. We don't know what would happen if the photos were released but the same is true of every single article that's on the front page of the *New York Times* or the *Washington Post* about national security issues. They disclosed things like the existence of the CIA black sites. They disclosed that the Korans were incinerated in

Afghanistan, right? They disclose information like that. You never know how people are going to react to it. But if, in the end, you withhold—or you allow the government to suppress information on the grounds that people might react badly—then you're going to end up suppressing a lot more than these photos.

I don't blame the administration—at one level—for the political decision it made but I think it was a failure of our broader democratic institutions that the administration's view of this was allowed to prevail. I'm not unsympathetic to the position Greg Craig was in but I think he was wrong in that his view—it's a dangerous thing that the administration's view was allowed to prevail.

Q: The stuff began to come to you? And what did you do with it when it began to arrive? I'm not imagining the side of it but when it began—

Jaffer: It came in spurts. We got a few thousand pages in December of 2004 from the FBI. And we didn't know then that we were going to get fifty thousand pages the next year and fifty thousand pages a year after that. So we built a system as we were going. Now we have a relatively sophisticated database that allows us to log the documents electronically.

Q: Did you have to hire staff?

Jaffer: Well, we pulled in people.

Q: I see two or three of you sitting around and this stuff begins to arrive. “What the hell are we going to do with it?”

Jaffer: Absolutely. Initially, it was three or four of us here who were working on it. I mentioned Amrit, but there were others too—Judy Rabinovitz and Omar [C.] Jadwat, among others. But when we started to get the DOD materials, which were voluminous, it happened to be the spring of 2005 and we have summer associates. We have thirty summer associates who come every year. So a large number of those people ended up going through the documents page by page, logging them, describing them, sticking them into an Excel file, which later became part of our electronic database. As quickly as possible, we would try to release—

Q: Did you have to work up a thesaurus all this kind of stuff about identifiers and—?

Jaffer: Yes, the acronyms. It was very complicated. We don't have a background in—now I know what the Army CID [Criminal Investigation Command] is. I know what ROE [Rules of Engagement] stands for. I have a sense of how the military is organized. But this is stuff that we learned as we went. And the press at the time—this was a good thing—was paying a lot of attention to these issues. But that made it difficult for us because they would always know that we had received information from the administration and we would get a lot of pressure to release the information immediately. And everybody wanted an exclusive on it. It was always a difficult thing to know how best to release the information.

The issue we had with releasing it immediately was that the administration would give it to us, intentionally, in a very disorganized way. Sometimes it wasn't clear where one document began and another one ended. Sometimes the documents were not in chronological order. You would have one investigative file that was divided into thirty documents and another investigative file that was in a single document. It was just very confusing. If we released the information—the thing I've learned is that if you release that kind of information to the press all at once, what happens is that each reporter thinks that everybody else has got this information. Each reporter thinks, "It's not worth my time to spend the next three days going through it carefully. I'm going to write an article right now about the thing that seems most sensational and then I'm going to move on to something else."

So we had this experience where we would release ten thousand pages to the press and everybody would write, immediately, one story about the thing that seemed most significant. But nobody would write anything in depth. Nobody would take the time to go through the documents carefully because everybody would assume that somebody else was doing it and that they, themselves, didn't have an exclusive on it. So it wasn't worth their time. Sometimes we ended up giving exclusives to reporters not because we wanted to favor one reporter over another but because we wanted to make sure that somebody went through it carefully. We would get all these angry calls from the reporters who weren't given the exclusives and they would say, "I would have gone through it carefully, had you given it to me."

So in the end what we ended up doing was we would hold onto the information for a short amount of time. We would work very, very hard—almost around the clock—for three days or a

week, trying to organize the information; to log it; to upload it into files that made sense with names that made sense. So when we released the information, we would release an Excel spreadsheet that had ten, twenty or thirty entries on it. Next to each entry there was a link to the file and a description of the file and then our three-line analysis of why the file was important or not important.

We got a lot of complaints from reporters who said, “You held onto this material for three days or a week,” even from reporters who routinely hold onto information for much longer than that. But I still think we did the right thing. That if we hadn’t done it that way, a lot of the information that people now understand to be part of the public narrative would not be part of the public narrative. Things that would have been missed weren’t missed and people ended up writing much more sophisticated stories about these materials because we took that time. We get some grief from the reporters but I think we did the right thing.

Q: Well, one of the things that is revealed is that it was policy—that there was coordination. That it wasn’t helter-skelter, here and there.

Jaffer: Right. There are a few things that I think we wouldn’t know but for these documents. We wouldn’t know the extent of the abuse—because people thought that what they saw in the Abu Ghraib photos was all there was to it. But we now know that more than one hundred prisoners died in Defense Department custody. We know that several prisoners died in CIA custody. We know that some of those prisoners were literally beaten to death. We know that there were these

death threats that the CIA used against some of their prisoners. So what you see in the Abu Ghraib photographs is awful and grotesque but many worse things happened.

So that's one thing. The other thing is, this was not a case of isolated incidents. This happened all over the place. It happened in Guantánamo. It happened in Afghanistan. It happened in Iraq. And it didn't happen just at one detention facility. It happened at almost every detention facility. The other thing is, it happened because of policies. It happened because people at the top authorized it, and in the case of the most egregious abuses, it happened because people at the top tolerated it. By tolerated it, I mean that they failed to seriously investigate it. Sometimes they would even obstruct the investigations. They would insure that investigators didn't have access to the witnesses. They made no effort—no serious effort—to insure that prisoners were treated humanely, until the Abu Ghraib photos were released. Then, as an effort at a kind of damage control, the DOD started to take efforts to make sure that the prisoners were treated more humanely. The CIA was still authorized—in this closely supervised program—to torture prisoners and subject them to cruel, inhuman and degrading treatment. That didn't end until later. But all of this happened because of policies.

Q: Did you see last night's television—the interview that Leslie [R.] Stahl did with the interrogator?

Jaffer: No. Is this the [Jose A.] Rodriguez [Jr.]? Last night I think was just the preview. I think the full interview is Sunday night.

Q: It's quite incredible. Quite incredible.

Jaffer: Well, you know, this guy, Jose Rodriguez, who was the CIA's chief spy at the time all this was happening—he's the guy who signed off on the destruction of the tapes, the waterboarding tapes.

Q: Right. He's quite proud of it.

Jaffer: That turned out to be part of the litigation, too, because nobody knew about the existence of these tapes until the *New York Times* was on the verge of reporting that the tapes had been destroyed. When they were about to report that, they went to the CIA and said, "We're going to report this," and the CIA then sent a memo, internally, saying, "The *New York Times* is going to report this. It's not a big deal. Here's why it's not a big deal." That memo got leaked and the *Times* published its story. Once we got that story, we went back to Judge Hellerstein and we said, "The CIA never identified these tapes in response to our request and now they've destroyed the tapes. We want you to hold them in contempt." So we had a sort of side litigation over whether the CIA should be held in contempt. Ultimately Judge Hellerstein didn't agree with us that the CIA should be held in contempt. I think he was wrong. But he did say that he would sanction the CIA and he ordered them to pay our legal fees. So we have just submitted an invoice for half a million dollars, which we'll be—I'm sure—be arguing with the CIA about.

Q: We're approaching two hours. We can go on but it's totally your schedule.

Jaffer: I'm happy, if you want to talk again, we can talk again.

[END OF SESSION]

VJD

Session Two

Interviewee: Jameel Jaffer

Location: New York, NY

Interviewer: Ronald J. Grele

Date: May 2, 2012

Q: This is an interview with Jameel Jaffer. The interview is being conducted in New York City. This is an interview for the Center for Oral History at Columbia University. Today's date is May 2, 2012. The interviewer is Ronald J. Grele.

When we left off at the point at which the materials had come in from the FOIA suit. We hadn't yet talked about the book [*Administration of Torture*]. But before we get onto that, I was wondering if we could back up a little to trace your career here at the ACLU. You were a staff attorney at that point.

Jaffer: Right. I joined the ACLU as a staff attorney in 2002. At the time, there was no National Security Project. There was something called the General Legal Department, which housed about a dozen lawyers who worked on racial justice issues, on First Amendment issues and national security issues. I worked in that group. Then in 2005 or so, we created something that was then called the National Security Working Group, which was just three of us at the time. It was Ann Beeson, who led it, then me and a fellow. Over time, that group grew and I can't remember the exact dates but in 2006 or so, it became a formal project. In 2007 or so—or maybe it was 2006—I became the deputy director of that project, which was then half a dozen people or something like that. Then when Ann left, in 2008—2007—I became the director of the project.

When I became the director, it was still relatively small. It was still maybe eight people. It continued to grow and by the time I had left as director it was, I think, fourteen people or something like that. I was director until 2010. Then in 2010 I became the deputy legal director with responsibility over three projects, including National Security, which now has a new director, the Human Rights Project, which has its own director, and the Speech, Privacy and Technology Project, which is something I created when I became the deputy legal director. We had lawyers who were working on First Amendment issues. We had lawyers who were working on technology issues and we united them in a single project that focuses on the First Amendment, privacy and new technology. And that's where I am now. That's still my role.

Q: Was that a regular career? A meteoric career or, a planned career? Or serendipitous?

Jaffer: Well, I came to the ACLU in 2002, right after the 9/11 attacks. The organization was changing very quickly. The organization had a lot of resources for people who thought the Bush administration was wrong or illegal or didn't make sense. There were a lot of opportunities at the ACLU that wouldn't have existed for me if I'd come five years earlier or probably if I had come five years later. In that sense, it was certainly a fortunate thing that I came when I did. And I came, in part, because of those opportunities and that work. I came to work on First Amendment issues but also on national security issues. I assumed, when I joined the ACLU, that I would be working at the intersection of those two things. I was very fortunate.

There are people who come to the ACLU—my administrative title has changed several times for the better—but here are many people who come to the ACLU and never take on those kinds of

responsibilities. They stay here for thirty years or longer and they just litigate. Their title never changes but they certainly become more and more knowledgeable and better and better litigators. So I don't think my administrative title is necessarily an indication of a meteoric career. It's just—I took a particular path with the ACLU that not everybody takes.

But that said, I'm proud of the work that the National Security Project did while I was a staff attorney and while I led it. I'm proud of the work it does now and I don't think that anyone could reasonably have taken it for granted that the ACLU's national security docket would end up looking like it does today. I think many people in 2002 thought that it didn't make sense for the ACLU to be involved in these issues at all—that the ACLU was a domestic organization, that national security should be left to the experts, to the military and to the CIA. Now, I think when people look at the ACLU, they often take for granted that the ACLU would be working on these issues and would be working on them in exactly the way that we are working on them. The fact that we are working on those issues and working on them in those ways is actually a reflection of many choices that were made by lawyers at the ACLU over a decade. I think those were, for the most part, the right choices and I'm glad that we made them.

Q: Well, from my perspective, over the years, I've noticed an incredible transformation at the ACLU from the 1950s on and this is one small part of that.

Jaffer: Right. Right.

Q: Tell me about the book. What was the impetus?

Jaffer: Well, by the time we decided to do the book, we had received sixty or seventy thousand pages from various government agencies about the interrogation program. In a way, the volume of the documents—the voluminousness of the documents—was a testament to the success of the litigation. But the voluminousness of the documents was also a barrier to public access and the public understanding. We felt like there were some very significant documents in that stack of sixty thousand or so that the press had highlighted and talked about and written about, but there were many other very significant documents in that stack that had largely been ignored. We thought we could provide something valuable by assembling the documents that we thought to be most significant in a kind of narrative structure. Not in purely chronological order but, instead, in a way that we thought they would be most understandable and accessible and just present that information to the public in a way that would be more accessible than sixty thousand pages on our website.

So Amrit and I—again, Amrit was one of the lawyers who had worked on the case from the beginning. We decided to assemble those documents and to put together the kind of narrative that connected the documents together.

Q: Now did she volunteer for that or did you search her out? How was that connection made?

Jaffer: Well, there were three of us at the beginning who had proposed filing this Freedom of Information Act request. It was Amrit, another lawyer in the Immigrants Rights Project—Omar Jadwat—and me. And then Steven Watt, who was at CCR, too. We had, together, taken it to our

superiors at the ACLU and said we wanted to do this project. Over time, for various reasons—mainly internal administrative reasons—it ended up being Amrit and me who spent most of our time on this project. So it was the natural thing that we work on the book together.

The book provides a pretty clear explanation of what happened in the Defense Department. It explains the beginnings—the origins of the interrogation program. The consequences of the adoption of these interrogation methods. It makes it pretty clear who was responsible for making these decisions—Secretary Rumsfeld, the lawyers in the Office of Legal Counsel. It makes it pretty clear what happened as a result of these decisions—the deaths in prisons in Iraq and Afghanistan. Testaments from detainees about the treatment they suffered in custody. We put the book out in 2007, when we knew relatively little about what had taken place in CIA custody. So the book is—in that sense—quite incomplete. It's really just one piece of the story. Thankfully, others have taken up the CIA story. We've continued to litigate it. In 2009, we got the Torture Memos—the memos of the OLC, that the Office of Legal Counsel had written for the CIA to justify—to authorize—the enhanced interrogation techniques. We got the CIA Inspector General's report that investigated the CIA's interrogation and detention program.

Q: These were the records of [Eric H.] Holder [Jr.].

Jaffer: That's right. Holder released them in 2009. We have also received from the CIA what are called Vaughn Declarations—declarations that explain and characterize the documents that have not been released. Sometimes the Vaughn Declarations are very valuable. It was named after a D.C. Circuit case, *Vaughn v. Rosen* [1973]. The government's explanation for its refusal to

release documents is often quite revealing. So those have been useful to us, too. We've continued to get information, including information about the CIA but others have done the storytelling. Others have pulled that information together into narratives. Jane Mayer wrote a great book about it [*The Dark Side*]. Larry Siems wrote something called *The Torture Report*—which is online—and which we sort of co-sponsored. It's superb. Those narratives, I think, have been very valuable.

Q: Did you have a scheme of selection, where you set out—or how did you do that selection?

Jaffer: We wanted to tell a story. We wanted somebody to be able to—I guess we wanted to do two things. One is we wanted the reader to be able to follow the development of the interrogation techniques, the implementation of the interrogation techniques, and then to see what had happened as a result. But we also wanted the reader to trust us. We thought one of the really valuable things about our narrative was that it was based entirely on the government's own documents. We didn't rely on interviews with officials, who might have various motives. We didn't rely on interviews with detainees who might have various motives.

Q: It's striking that there's nothing else except the documentation.

Jaffer: It's just the documentation and then the introduction, which tries to string it all together, with a footnote after every sentence to make clear that to the extent that we are drawing inferences, they're based on these specific documents and the reader can look at the document to see if the inferences are supported. It was an extremely careful introduction. Actually, looking

back on it now, it seems overly careful. Now, a lot of the things that we said—for example, we said that Rumsfeld approved the following methods and then we have a string of citations. Now that is sort of part of the accepted narrative and nobody has to support that proposition in that way. So our book is sort of bogged down with this infrastructure of evidentiary support. That seems unnecessary in retrospect but at the time these propositions were not widely accepted. To the contrary—they were largely denigrated. They were certainly denigrated by the administration and by many people who supported the administration. So we felt like we had to be meticulous in supporting every contention.

Again, the real value of a book like this was that it was based entirely on the government's own information and we didn't want to lose that by sort of speculating or drawing inferences on the basis of things we had read in the press but weren't supported by the documents. Not that our other projects at the ACLU aren't scholarly in a sense but this was a more scholarly project than many of the other things we've done at the ACLU.

Q: Scholarly in a law school kind of way. That intense footnoting.

Jaffer: Well, this is more of a historian's project in a way. Obviously, in our legal briefs, every proposition is accompanied by a citation to a precedent. But we're citing legal precedents and here what we were citing were facts as set out in government documents. So it was a different kind of project for us. I think for a historian—or maybe even for a journalist— this would have been more natural. It would have been more obvious how to go about doing this. For us, it was a new thing.

Q: In the acknowledgments, you thank fifty-five people.

Jaffer: We probably left many people out who ought to have been thanked. One of the things that is sort of embarrassing about this project is, many people really did work on it at the ACLU—and not just at the ACLU but at CCR, at Physicians for Human Rights, and Veterans for Common Sense, Veterans for Peace. These were all the plaintiffs. We worked with Gibbons Del Deo, which is a law firm in New Jersey. But, you know, everybody wants a simple story about it, so when journalists tell the story about this lawsuit, they always give full credit to me and Amrit. While I am very proud of this case—I'm proud of my own role in it and I'm proud of the project more generally—it is not accurate to say that this was entirely my work or entirely the work of me and Amrit. It really was a project that many other people put a lot time into. It wasn't just a pro forma thanks. Those people deserved it.

I guess I should say one more thing about that—that the public narrative now about this particular lawsuit is that two young lawyers at the ACLU fought back—inside the ACLU—against people who thought this was sort of a lost cause or a not-worthwhile project and managed to prevail upon them to let them file this case and litigate it. The result was the release of all this information. That is a gross over-simplification and the people who sort of mocked us for proposing the case also—in the end—authorized us to do it and don't often get credit for it. It required many people at the ACLU to take risks.

Q: And a certain allocation of resources as well.

Jaffer: Absolutely. It turned out to be far more resources than anyone expected. But even at the time we brought the suit it was not a trivial thing to draft the FOIA request, or recruit the plaintiffs, and to draft the complaint. Senior people at the ACLU deserve credit for having let us do it. Steve Shapiro, Lucas Guttentag and Anthony [D.] Romero—all of them—Ann Beeson—all these people had reservations about the project, as anyone in their position would have. But, in the end, they agreed it was worth doing.

Q: Why the Columbia University Press?

Jaffer: Largely because they would publish it. [Laughs]

Q: It was Peter Dimock.

Jaffer: It was Peter Dimock, who was great. Yes.

Q: An old friend.

Jaffer: We went to only a handful of presses. What happened in the end was that Amrit had a connection. Amrit knew Amartya Sen. They're family friends. Sen had published earlier with Columbia University Press and put us in touch with somebody there. We had a conversation with Peter and we felt that the conversation had gone well. He understood the project and we had the feeling that it would be a good working relationship. And it turned out to be.

Q: Did the book sell?

Jaffer: Not really, no. I think it sold as probably what Columbia University Press expected it to sell but it's an academic press, not a trade press. We never expected it to be a bestseller. It's largely government documents. But we weren't that disappointed by the sales because the people we thought really ought to read it did read it. The journalists who work on this particular issue would routinely call us about things they'd read in the book and want more clarification. Or they wanted to know if we got further documents to support something or whether something they had gotten—how it fit into the narrative. I think every journalist who worked on national security issues over the last decade has a copy of this book. Maybe that's just one hundred journalists but they're the people we thought—they're the people we most wanted to reach.

Q: It's more of a reference work.

Jaffer: Right. Right. You know, there is certainly a place for books on this topic that would sell—that would be more appealing to a mass audience. I think Jane Mayer's book is one of one of those. But that wasn't what we aspired to and it's not what we produced.

Q: You must have had a large team to go through all of those documents.

Jaffer: We did. There are probably—literally—one hundred people who have worked at the ACLU over the last decade who have spent time logging these documents; reading the

documents; explaining them; describing them on Excel spreadsheets; feeding them into our database. Some of those people were fellows with the National Security Project. Some of them are paralegals. Some of them are legal assistants. Some of them were summer interns from law schools. The first time we got a significant batch of documents from the Defense Department happened to be in April or May in—I guess—of 2005. We were just getting a dozen law students or a couple dozen law students for the summer and they ended up spending a lot of their time logging the documents. Some of those law students then applied for permanent jobs at the ACLU. One of our staff attorneys now, in the National Security Project—Alex Abdo—I guess he's been at the National Security Project for three or four years now but he was a summer for the ACLU in 2005. He was one of the law students who spent his summer reading through the torture documents. So there's a large community of people who have worked on this, and not just from the ACLU but also, again, from Gibbons Del Deo, the team of lawyers in New Jersey that have been involved in the case almost from the very beginning. They had Gibbons fellows—each of whom has spent a year or two years working on the case—and now we're onto our sixth or seventh Gibbons fellow.

Q: Nowadays, there would be a thesaurus and everything would be digitized and the selection would simply be editing the digital record. But then it was manual.

Jaffer: Well, we probably could have done it. I'm sure we could have done it much more efficiently even then. But this is a project that sort of grew organically and it wasn't obvious at the beginning that it was going to be of the scale it is now. We do now have this very sophisticated database that Alex Abdo has developed over the last eighteen months or so. It's

still in-house. We haven't released it publicly but we will release it publicly in the next couple months. That database is much more technologically advanced. It includes the documents scanned with readable text. The documents are digitally linked, so the OLC memo about waterboarding is linked to the memo that describes how waterboarding should be implemented and that is linked to the document in which a detainee describes having been waterboarded. So it's a relatively sophisticated database that is technologically advanced but even that database relies very heavily on the manual work that people have done over the last decade, because the metadata for each document has to be done manually. Somebody still has to read the document and explain in a few sentences what this document is. Otherwise, the user of a database like this just doesn't have the information he or she needs in order to make it work.

Q: Sometimes difficult to explain to sponsors if that has to happen first.

Jaffer: Yes.

Q: Back to the thing. You mentioned last time that the whole issue was continuing—that you had been back to Judge Hellerstein a number of times. You've gone to the D.C. District as well.

What is the status of the FOIA litigation now?

Jaffer: Well, it's become quite sprawling litigation. There are branches of it in multiple courts around the country now, not just before Judge Hellerstein. But before Judge Hellerstein we still have pending a motion against the CIA—a motion to hold the CIA in contempt for its destruction of the waterboarding videotapes. The motion isn't actually pending; Judge Hellerstein has

granted our motion for sanctions against the CIA but denied our motion for contempt. What's pending before him now is the extent of those sanctions—the question of to what extent the CIA should be required to pay us as a sanction for its destruction of the tapes.

There is also an issue before him relating to the photos. I can't remember if we spoke about this last time.

Q: Yes, we did.

Jaffer: So that issue went all the way up to the Supreme Court. Congress then enacted its legislation that, purportedly, retroactively carves these photos out from the scope of the Freedom of Information Act. We're now back before Judge Hellerstein, arguing over the meaning of that particular legislation. We think that we're still entitled to the photos, despite that legislation. So that's before him. In the Second Circuit there is an issue relating to the CIA's authority to withhold information relating to waterboarding that Alex Abdo argued just a few weeks ago. So we're waiting for a decision. Then there are sort of connected FOIA cases in D.C. For example, we filed a case seeking the information that the DOJ's [Department of Justice] inspector general relied on to write a particular report about the FBI's role in interrogations at Guantánamo. So that is still pending in D.C. The litigation has narrowed, in the sense that we are now fighting over specific documents. But the litigation has expanded in the sense that it is now pending before multiple courts.

Q: Do you think that the Jose Rodriguez interviews will open up an avenue to obtaining more documentation?

Jaffer: I don't know. We're thinking through that now. It certainly is an odd and disturbing thing that people like Jose Rodriguez are permitted to speak freely about the torture program when people like Ali [H.] Soufan—who is the FBI agent who participated in the same program—is prohibited by the CIA from revealing his views about the program. It's not a coincidence that Ali Soufan thinks the program was ineffective, whereas Jose Rodriguez thinks it's effective. So the people who support the program and are enthusiasts of it are allowed to speak freely, while the people who opposed the program and had reservations about it are censored.

So we're thinking through what the significance is of Rodriguez's statements.

Q: Judge [Rosemary M.] Collyer's denial of access to the CIA records—there was a legal argument that you were seeking documentation of intelligence gathering rather than targeted killing. I didn't quite understand that legal distinction.

Jaffer: The CIA has withheld information about the targeted killing program. What they have said is that the targeted killing program is a secret and it can't be confirmed or denied. They won't acknowledge its existence. That's what they've said in court. The problem with that argument is, then, that government officials routinely talk about this program publicly. They talk to the press about it. They make speeches about it. They give lectures in law schools about it. So we asked Judge Collyer—we said, "It's not acceptable that the CIA should be permitted to make

all these statements publicly, then come into court and pretend that this program is a secret. In addition, they're keeping it secret on the grounds that a program of this kind would constitute an intelligence method." That's language from the relevant executive order. We said, "Targeted killing isn't an intelligence method. It's not a method of gathering information. It's a method of killing people and killing people is—if anything—a way of eliminating information, not gathering it." I can't remember her exact phrase but Judge Collyer essentially said, "It has superficial appeal but only superficial appeal. In the end this kind of program relies on intelligence and, therefore, is an intelligence-gathering program," which is, in my view, kind of an odd inference or an odd logical leap.

But we have appealed Judge Collyer's decision to the D.C. Circuit and are hopeful that the D.C. Circuit will be more sympathetic. Now since we filed that appeal, the administration has actually filed a letter in another of our targeted killing cases in the Southern District, saying the administration is reevaluating its position with respect to the targeted killing program—about the secrecy concerning the targeted killing program. So we are hopeful that the administration will be willing to release more information than it has so far.

Q: Eventually, I want to come back to the targeted killing but I want to go on to Guantánamo. In 2004 you became a monitor of the Human Rights Watch for Guantánamo trials?

Jaffer: Not for Humans Rights Watch; for human rights.

Q: You, particularly.

Jaffer: Yes, I was one. This is what happened. After the Bush administration set up Guantánamo as a prison, a small number of human rights groups wrote to the administration asking to monitor the military commissions there. We actually asked for access to the prisoners and we were denied. But then once the military commissions were inaugurated, we said, “Well, at least let us come monitor the commissions. The ACLU and three or four other organizations—Amnesty [International], Human Rights Watch, Human Rights First—were given permission to travel to Guantánamo and monitor the military commissions. I was one of the monitors from the ACLU, so I went to Guantánamo several times to attend the military commissions proceeding and to comment publicly about what we saw there. This was 2004, so it was still the first iteration of the military commissions. These were commissions that were meant to allow the government to rely on evidence obtained through torture, while, at the same time, hiding from the public the fact that the detainees had been tortured.

Since 2004, there have been several legislative efforts to fix the military commissions and, overall, I think those changes have been positive. In our view, they don’t go nearly far enough. They still allow the government to rely on coerced evidence that comes in through hearsay and there is still—I think this is the most disturbing thing—this overarching censorship scheme under which everything the detainees say about their own treatment in CIA custody is redacted. It’s censored. There’s a Plexiglas shield between the monitors and the tribunal itself so that the CIA can censor anything that the detainees say about their own treatment. It’s hard to believe that anyone will trust the legitimacy—will see these tribunals as legitimate—when they are so plainly intended to hide what was done to these prisoners in government custody.

Q: What were your impressions of Guantánamo when you first went there? Obviously you'd seen the pictures, but what was the reality?

Jaffer: It's a very strange thing, because you arrive there and it's a beautiful place. I don't know if you've been to Cuba but it's Cuba. It's lush, it's tropical, the weather is beautiful and the disconnect between all of that and what you know to be happening behind the barbed wire is very hard to grapple with, mentally.

The other thing that became obvious the moment I arrived was that the administration had no intent of letting us see any of that ugliness. Providing access to human rights monitors was, in the administration's view—. The administration thought, I think, that it could use human rights monitors as a means of presenting Guantánamo as something other than what it actually was. They invited us to the base but they kept us relatively isolated. Everywhere we went, we were accompanied by guards. You literally could not leave your room without a guard walking with you. The guards were instructed to carefully circumscribe your wanderings on the base. Then, again, we weren't given access to the detainees. We weren't given access to the prisons. The only thing we really got to see were the military proceedings themselves—the tribunals themselves. And the tribunals were a kind of ugliness. They were a kind of legal ugliness but they were sterile.

Q: These are not the CSRTs [Combatant Status Review Tribunals].

Jaffer: Not the CSRTs. The CSRTs are tribunals that every prisoner goes through. Every prisoner who arrives at Guantánamo is given a CSRT—Combatant Status Review Tribunal—proceeding. Those aren't the ones that we monitored. What we monitored were the proceedings for the small handful of prisoners who were actually charged with crimes. This was a very carefully choreographed set of proceedings. Many people called them show trials, and I think that's a fair description of what they were at the time. The idea was to give Guantánamo a kind of veneer of legitimacy or a veneer of legal seriousness. But everybody knew that behind that very shallow veneer was something quite ugly. That the legal arguments the administration was making were completely without foundation and behind those legal arguments were hundreds of prisoners who were being held on the basis—in many cases—of evidence that had been tortured out of them or tortured out of somebody else.

Many of these prisoners had been handed over to the U.S. because of bounties or because of family grudges. While there was a small handful at Guantánamo who were believed to have committed the most serious crimes, the vast majority of the prisoners at Guantánamo were not people like that and the administration knew, almost from the very beginning, that they weren't people like that, though they said to the public that they were. They repeatedly said to the public that they were the worst of the worst; that these were people who would “chew through cables on a C-130.” The administration tried to convince the public that these people were really, really bad and uniformly so, when it knew that quite the opposite was true.

Q: How many times did you go down?

Jaffer: I think I went down three times. Mainly in 2004—entirely in 2004 and 2005. I was there for the 2004 election. Then I went back a couple times after that. But we still send people there all the time, now. We send monitors routinely now for military tribunal proceedings. One of my colleagues is going next week—I guess later this week—for the arraignment of the 9/11 defendants. I have not gone back since 2005.

Q: What's your impression of the military tribunal? Because at that time even some of the military were objecting to some of the procedures.

Jaffer: Right.

Q: [Peter E.] Brownback.

Jaffer: It didn't look like a real trial. It looked like a real trial in the sense that there was somebody dressed up like a judge at the front of the room and somebody dressed up like a prosecutor next to him. In that sense it looked real. And the tables were set up like it was a trial but the rules were completely different from the rules that apply in ordinary federal court—not just different but rules that had been sort of made up to allow the introduction of coerced evidence, evidence obtained through torture. That was something that became obvious to all the human rights monitors very quickly. It was one of the reasons why the tribunals were struck down by the Supreme Court and it's remained one of the flashpoints for the last decade, over the tribunals. This question of to what extent the tribunals can rely on coerced evidence and to what extent they can legitimately suppress evidence of the detainees' treatment in U.S. custody.

Q: You mentioned that over time the tribunal procedures have been refined, again and again. You talked about them as a positive step.

Jaffer: Yes, I think that's right.

Q: Do you still argue that it would be better to try them in court?

Jaffer: Absolutely. I think better in many different ways. Better—even leaving civil liberties considerations aside. These tribunals are not regarded to be legitimate by most of the world. They are also tribunals that have never been tested before. Why you would try the most complicated terrorism trials in the history of the world in tribunals that have never been used before—never been tested before—with participants who have never worked on these kinds of trials before, is beyond me. I just don't see how that serves any national security interest at all.

But then, from a kind of civil liberties perspective, this question—and this is connected to the legitimacy point—of torture is still something that taints the tribunals. Again, we have this censorship scheme under which every account from a prisoner of the prisoner's own treatment in CIA custody is censored. That's not a system that we would regard as legitimate if some other country adopted it. You can imagine if Iran were holding trials right now of people who had been tortured in custody and insisting that whatever the prisoner spoke about his treatment in custody, the government could legitimately flick a switch and turn the sound off in the courtroom.

Nobody would accept that. It's inconceivable that we would accept that if another country were proposing it. That still taints the tribunals now.

Just from the government's own perspective, if your goal is to reach a legal conclusion relatively quickly—and a legal conclusion that is seen as legitimate by most of the world—there's no question that the federal courts are a better place to hold these trials. You don't have to listen to the ACLU for that. You can listen to dozens of federal prosecutors, dozens of judges.

Q: One guy who went through a life sentence in a terrible, terrible place—three hundred and something charges—was found innocent on all but one and the judge said—

Jaffer: —and he still got a life sentence.

Q: Yes.

Jaffer: Right. Meanwhile—I'm not saying this is the way we should evaluate the effectiveness of the trial but it is something to note that the people who have been sentenced at Guantánamo have received relatively short sentences. So even if you're the kind of person who believes that the only measure of the effectiveness of these kinds of trials is the length of the sentences, there is still a very good argument for the federal courts. I don't represent detainees who have been charged with crimes at Guantánamo but if I did I might actually prefer the Guantánamo system to Article III courts. The Guantánamo system is a system that doesn't work—

Q: I've had that argued to me.

Jaffer: —and it's a system that, on the few occasions when it has, in some sense, worked, it has resulted in sentences that are relatively short. So in some ways, I think the 9/11 defendants have no better advocates than the Republicans in Congress who are arguing that the Guantánamo commissions are the place for these tribunals.

Q: Were you at all involved in the Omar [A.] Khadr case?

Jaffer: Only tangentially. We filed an amicus brief in Canada, in the Canadian Supreme Court.

Q: That's why I asked.

Jaffer: Right. That's the only involvement we've had. There's this question in Canada about whether the Canadian government could rely on the fruits of interrogations that were conducted by the U.S. We thought this was a very important question and filed an amicus brief in Canada, arguing that there should be some remedy recognized in Canada for the violation of Khadr's rights. That was the only direct connection we had to the Omar Khadr case.

Q: You didn't have any direct connections with the Canadian lawyers or judges?

Jaffer: We did talk, very often, to the Canadian lawyers who were working on that—not on that case but just informal strategizing. That’s all. He was very ably represented by Canadian lawyers.

Q: Is there any connection between what you were doing and the John Adams Project at all?

Jaffer: No, the John Adams Project was a separate entity within the ACLU and it was a separate entity by design. We wanted to be able to continue monitoring the commissions as neutrals, so we didn’t want to taint our monitoring by making ourselves representatives for the detainees. We didn’t feel like we could be legitimate monitors if we were the representatives of the detainees. At the same time, we thought it was important that the detainees have real representation and the government wasn’t willing to give it to them.

Q: And some very special category of detainees—the John Adams Project.

Jaffer: Right. It’s the 9/11 defendants. We felt that it was important—for many different reasons—that those defendants be tried in a system that was both fair and seen as fair. We didn’t think the military tribunals were that system, so we thought it was crucial that those detainees have representation that was competent representation.

We’re not criminal defense lawyers here at the ACLU. We do civil cases. So we created a separate entity—the John Adams Project. When I say we, it was largely Anthony [D. Romero]. Anthony spent a lot of energy setting this up. We created a separate entity called the John Adams

Project, which hired criminal defense lawyers from outside the ACLU to provide that representation. So the John Adams Project was housed at the ACLU but it was staffed by people who were not at the ACLU. Eventually, we hired a director at the ACLU for that project—Denny [Denise] Le Boeuf—but the project was really separate from the National Security Project.

Q: Where were you during the election of Obama—Obama's election? What did you hope for?

Jaffer: I was here in New York. I was at a friend's place in the West Village because we don't have a TV at home. I went somewhere. I have a friend who has a big-screen TV, in the West Village, so we went there to watch the election.

Q: When you say at home, you were married by that time.

Jaffer: I'm not married but I have a partner, a long-term partner, Alice Ristroph. We've been together for seventeen years now, so we're sort of post-marriage—even though we never got married.

Q: The world is so different. [Laughter]

Jaffer: Yes. But, yes, we lived in Brooklyn—without a TV—and we went to the West Village to watch the election there. The ACLU is a non-partisan organization and, obviously, we didn't endorse anyone for the presidency. But, speaking personally, I was very hopeful. President Obama had run on this campaign of essentially—his campaign included many promises to

change Bush administration national security policies. Some of those promises were explicit, some of them were implicit. Some of them were large-scale and some of them were smaller-scale but overall it was clear that he intended to change direction. In some ways, very early on, it seemed like he actually wanted to do that. In his first day in office, he issued the set of executive orders promising to close Guantánamo; shutting down the CIA's black sites; disavowing torture; reversing the presumption under the Freedom of Information Act that previously had allowed government officials to withhold, whenever possible and now allows government officials— instructs them to release, whenever possible.

So those were all very important and significant things that the president did early on. Then just a few months later, in response to our Freedom of Information Act litigation, the administration released the Torture Memos—released the CIA's Inspector General Report. So all that was hugely significant. The administration deserves credit for having made those decisions and we gave them lots of credit for having made those decisions. But the administration has, in my view—the administration we have now is very different from the administration we had in the first year.

Q: When did you first sense that change?

Jaffer: I think it was a gradual thing. It wasn't one specific decision. But there were two things that happened—I think late in 2009—that gave me the sense that the direction was changing. One was the reversal on the photos. The administration initially said they would release the photos. Then, after significant pressure from Senators McCain and Lieberman, the administration

reversed its position. The other was the invocation of the State Secrets Doctrine in the Jeppesen [Dataplan] case. We had filed this lawsuit against the CIA on behalf of people who had been rendered by the CIA to other countries for torture and the Bush administration had invoked the State Secrets privilege, saying that this case is too sensitive to be litigated. The Obama administration then had an opportunity to file a new declaration or to reverse its position on state secrets and actually asked for an extension in order to consider its position in that case. Then, ultimately, signed onto the same position that the Bush administration had taken. That, too, was another sign that maybe their willingness to pay political costs in order to keep campaign promises on national security and civil liberties—that that willingness had reached its limit.

Q: Early on, in September—I guess of 2009—it was clear that there was going to be permanent detention. People were just not going to be able to get out.

Jaffer: That's another thing. The president made a speech at the National Archives which, rhetorically, was an extremely impressive speech, but buried in that speech was a commitment to indefinite detention without charge or trial for some number of prisoners held at Guantánamo. There were others things, too. The attorney general announced that the 9/11 trials would be held in New York, then they reversed that decision, too. What we saw—I think, over and over—was the administration taking a position consistent with the positions that President Obama had taken during the campaign and then—after seeing that that decision would come with a political price—reversing course. The frustrating thing is that I think they paid an even higher political price for announcing the decision and then reversing course. They ended up annoying people on the left for reversing course and feeding the narrative on the right that the administration was sort

of indecisive and weak-kneed. So, in the end, they made no one happy. They ended up making decisions that were, I think, indefensible, for political reasons that turned out to be—in order to achieve a political gain that they never actually achieved.

Q: All the various kinds of backtracking—you seem to have zeroed in on the targeted killing.

Jaffer: Right. Well, targeted killing—backtracking is probably the wrong—[cross talk]

Q: —those issues seem to be on the back burner. Targeted killing seems to be—that's how I would read the record.

Jaffer: Well, that's true this week. I think you'll see over the next couple of weeks that the military commissions will be back in the news because of the arraignments. We still have cases where we're challenging the indefinite detention program. We represent a guy called Mohammed Ould Slahi who is held at Guantánamo and has never been charged with a crime. He's been held now for a decade. But on targeted killing, you know, in some ways, this is the most alarming of the national security policies that the Obama administration has adopted. It's not a policy that they have inherited from the Bush administration. It's true that the Bush administration engaged in targeted killing but the Obama administration has dramatically expanded that program. It was the Obama administration that made the decision to carry out the targeted killing of a U.S. citizen last year.

So this is not the Obama administration merely adopting Bush administration policies. It's the Obama administration going further than the Bush administration ever did. And the idea that the president has the authority to carry out the targeted killing or to order the targeted killing of any person—including any American citizen whom the executive branch concludes, without review, is an enemy of the state—the idea that that proposal would have been accepted under the last administration is crazy. Nobody would have accepted it, had the Bush administration proposed it.

All these Democrats, who are now enthusiastically endorsing the targeted killing program—none of them would have endorsed it under the last administration. They were all outraged that the Bush administration was wiretapping phones without warrants. How you can be outraged about that but complacent about the president's killing people without ever presenting evidence to a court is beyond me. It's not actually beyond me. I think it's just politics. If nothing else, it has underscored the importance of organizations like the ACLU that truly do aspire to be non-partisan.

Q: When you say it's just politics, do you think Obama really does believe this?

Jaffer: It's not about Obama; it's about the people who support the administration's decision to do this. I think very few of them will be as enthusiastic about this program when President [W. Mitt] Romney or President [Rick] Santorum or whoever it is relies on it four years or eight years from now. They are supporting it because it's President Obama. But it doesn't need to be said that this power that the president is carving out now will be available to every future president.

You have to evaluate the power through that lens. But, frustratingly, it seems that very few people and very few organizations are willing to look at it that way.

The other thing is that it's not conceivable that the founders would have accepted executive authority of this kind. The Constitution was, in large part, meant to cabin executive authority. If somebody had proposed to [James] Madison, say, that the president should have the power to kill any American he wants to without ever explaining to anyone why he's done it—or even acknowledging that he's done it—it's a laughable proposition. That that proposition has become so entrenched in our democracy, I think, is a sad and very dangerous thing.

Q: I had the cynical argument proposed to me that because it's been so difficult to try people, it's better to kill them rather than to arrest them.

Jaffer: Right. I don't have the facts to say whether that's true or false. I do think the administration has concluded that there is no political price to pay for these kinds of national security policies, even the ones that infringe on Americans' civil liberties and human rights. That at the end of the day very few people are going to vote based on the government's policy on targeted killing. Even the people who oppose the policy are going to vote on other issues. On the other hand, the administration probably feels like there would be a cost to shutting down some of these policies. You shut down the policy and if something happens the next day—even if it has no connection to your decision to shut down the policy—people are going to jump on it and say, “You left the country vulnerable to attack.” So from a purely political standpoint, I think it's understandable that the administration would be making some of these decisions. But I think it's

a failure of our other institutions—of Congress and the courts—to rein in the executive branch. The courts, especially, I think. It's predictable that the political branches will act this way in times of national security crises, real or perceived. What's more surprising is that the courts aren't drawing lines around it.

Q: You talked in some of your writings that I've read—the differences between the position on torture and the position on targeted killing, in that there is justification for extreme measures during a time of war. You made that distinction between the two areas.

Jaffer: Right. Torture is categorically prohibited—categorically prohibited under international law, categorically prohibited under domestic law and in my personal view, categorically prohibited morally. Targeted killing is more complicated. Everybody—well, I shouldn't say everybody—but most people recognize—and, certainly, anybody who's not a pacifist—recognizes that the government has the right and in some cases the obligation, the responsibility, to use lethal force in some contexts. So the hard question in the targeted killing debate is not does the government have that authority or not. The question is, how broad is that authority? What are the lines around that authority?

The position that we have taken is that the United States is engaged in an armed conflict in Afghanistan. It can rely on the laws of war in Afghanistan. The laws of war are relatively generous to countries that want to use military force. The laws are relatively lenient. But outside geographically cabined battlefields—outside places like Afghanistan—the government's authority to use lethal force is more narrowly circumscribed. It can use lethal force if lethal force

is the last resort and if it is using lethal force to address a threat that is concrete and specific—and imminent. That imminence requirement is a crucial one. Because if you get rid of the imminence requirement, there's really no limit to the circumstances in which governments will be able to justify the use of lethal force.

But the last administration's position and this administration's position is that there is no geographic boundary to the war. The war we're fighting now is a global one and that means we can rely on the law of armed conflict anywhere in the world. If we think there is a terrorist in Yemen, we can rely on the laws of armed conflict to use military force there. If we think there's a terrorist in Somalia, same thing. The last administration took the position that it could rely on the laws of armed conflict to detain people inside the United States. If you put that together with the targeted killing program, in theory, an administration could rely on the same argument to justify killing somebody inside the United States.

It becomes hard to explain why we were so upset when Chile killed [Marcus Orlando] Letelier in Washington, in—I can't remember the year—1980 or something like that. Or why we were so upset when the Russians killed the dissident in London by slipping radioactive material into his sushi.

Q: Or the Bulgarian with his umbrella.

Jaffer: How we distinguish our targeted killing program from all of that, I don't know. It looks more and more like that kind of thing.

All of that is to say that there are circumstances in which the government can use lethal force but the circumstances are narrow and we have an interest in keeping them narrow.

Q: Well, one of the government's arguments is that they've notified the proper committees. They've gone through the proper procedures of these secret committees.

Jaffer: Well, I think that on an issue of this kind—

Q: The memos aren't released.

Jaffer: They have not released the legal memos. They have not even acknowledged the existence of the CIA program. Their position is that they cannot acknowledge the existence of the CIA's targeted killing program, so all of that sort of hobbles public debate. It means that the public doesn't have access to all the information it needs in order to evaluate the lawfulness and the wisdom of the program. The other thing is that it means that the kind of political and moral responsibility for the program rests entirely with the executive branch. I think that's not a good thing in a democracy. A decision like this—a decision to engage in a worldwide war against people that includes U.S. citizens is a decision that ought to have broader public support.

Now, obviously, I oppose it. I think it's a bad idea. But if we're going to do it, I think we should do it after a real public debate in which everybody has a chance to meaningfully participate.

Q: You mentioned the support that the Democrats give to Obama. Has any of that redounded to waning support within the ACLU, where certain Democratic donors or certain institutions will back away from certain issues?

Jaffer: I'm sure it has, but thankfully the same concerns have led other people to be more generous in supporting the ACLU. So overall, our fundraising is still very strong. Our budget now is not what it was at the very peak but it's only probably ten percent below that. I think that the people who stay with the ACLU for many years stay with the ACLU because they believe there's a role for an organization that isn't a part of the Democratic party or part of the Republican party and that is committed not to short-term political winds but, instead, to principles. I can't claim that we always succeed in being consistent but we aspire to consistency and that aspiration alone is something that distinguishes us from many other groups out there.

Q: This is kind of a tender topic but did you see waning support within the Jewish community as it became more and more concerned about labeling Muslims as terrorists?

Jaffer: I don't think so. I'm not the right person to ask about that because most of the fundraising I do is with institutions, not with individuals. But many of our biggest supporters are from the Jewish community. That was true thirty years ago; it's still true today. It may be that some people who used to support the ACLU are no longer supporting it but it's also true that some people who didn't used to support the ACLU are now supporting it. I think that we still have very broad and deep support in the Jewish community. Actually, the more frustrating thing is that we've had a hard time getting support from younger people and from visible minorities,

including the Muslim community. What I just said—that's a very broad brush and it's not entirely true. We've had some very significant support from some members of the Muslim community but a lot of people out there who support our national security work are less enthusiastic about, say, our gay rights work or our women's rights work. It's also true that some people who are enthusiastic about our gay rights work and our women's rights work are less enthusiastic about the national security work.

But at the end of the day, there are very few people outside the ACLU or inside the ACLU who agree with everything the ACLU does. I haven't met anyone like that. Even the ACLU die-hards who have been at the ACLU for thirty and forty years have complaints about some of our policies and some of the cases we take on. But people support the ACLU in the end because they think that on the whole, the ACLU takes positions that are important and that are based on principle.

Q: Another aspect to that—the Democratic support for Obama and certain liberal support. What has happened to a number of lawyers who have entered into the Obama administration, who have become more or less spokesmen for some of these causes? I'm thinking about Harold [H.] Koh and Jeh [C.] Johnson, etc., who at one time had certain kinds of liberal bonafides—who seem to be spokesmen for these policies now.

Jaffer: Yes. It's a disappointing thing to see people who worked so closely with the human rights community and the civil liberties community become the face of things like the targeted killing program. On the other hand, I try to be realistic about it. If you make the decision to go into the

administration, you're making the decision to support a set of political positions that you have to recognize, going in, may not be consistent with all the principled views you took before you became a political person. There comes a point where the political positions are so distant from your principles that you ought to resign rather than defend the political positions but I don't think anyone can realistically expect to go into any administration and not end up defending things that they don't entirely believe in. That's one of the luxuries you have with working at a place like the ACLU. That at the end of the day you can argue what you believe and you don't have to defend some position that somebody has taken on the basis of short-term politics or because they need to appease a particular community. It's a luxury working at a place like the ACLU.

Q: I saw a piece you had written about "Honoring Those Who Said No."

Jaffer: Yes. That's actually something I feel very strongly about. When we were going through the documents—the torture documents—and Larry Siems, with whom I've worked very closely with on issues relating to accountability for torture—he's the one who's articulated this, I think, best. Through the documents there are at least three different sets of narrative. There is the narrative of the officials who authorize torture. That's one set of characters and one set of stories. Then there are the detainees who suffered through these interrogation sessions and the detainees' stories are another set of stories and the detainees themselves are another set of characters.

But then there is this third set of people—officials and soldiers—who, in one way or another, said no to torture. They exposed it. They fought back against it. If they were prosecutors, they resigned rather than prosecute people on the basis of evidence that had been tortured out of

somebody. Those people who took very significant personal and professional risks in order to do what they did—I think they ought to be honored and recognized in some way.

Instead, what we have done over the last decade is honor and recognize the people who authorize torture. All those people have gone on to bigger and better things. Jay [S.] Bybee is now a federal judge. John [C.] Yoo has this very prestigious position at Berkeley. Jose Rodriguez has now got this bestselling book out boasting about his role in authorizing torture and destroying evidence of torture. In the meantime, the people who said no are gradually fading into obscurity. I think that is an unfortunate and sad thing for many different reasons. One of them is I feel that, morally, we have a responsibility not to let those people fade into obscurity. They took these risks not for themselves but for the country more generally and I think we owe something to them.

But beyond that, I think the dangerous thing about what we've done is that twenty or fifty or one hundred years from now, when people look back on the official history of this period, the people that they will see we've honored were the people who said yes—the people who said yes to torture. I think that that's not the way we should want our generation or our time or our era to be remembered. That's not the story we want told about us. For that reason, Larry Siems and I wrote this piece for the *Times* last year arguing that the administration should honor the people who said no. Thus far, they haven't done anything about it and I don't think they will before the election. I think if President Obama is reelected, we will renew our effort to persuade the administration to honor these people. Because, again, some of them did take huge personal and professional risks to do what they did.

Q: Do you think anybody will ever be indicted?

Jaffer: I don't know. I don't know the answer to that question. I guess I take some degree of comfort from the fact that in other countries, reckoning with similar abuses has often taken a decade or even two decades. It's a long game and there is yet time for holding people to account for their decisions.

Q: That strikes me as one of the differences between the ACLU and the CCR. Because the CCR has initiated cases against Rumsfeld—

Jaffer: —and other countries.

Q: You wouldn't do that kind of study.

Jaffer: We haven't done it. We've focused more on the domestic front here, in part because we think it's principally the responsibility of the U.S. to deal with this problem. While, at the end of the day, if the U.S. doesn't deal with American torturers, there is a role for the international community to play. We would much prefer that this role be played by the U.S. itself. I think it would be a healthier thing for the U.S. to deal with these issues internally rather than have them dealt with externally. That's one reason we have been focusing on the cases we've been focusing on. The other thing is that we still think there is work to be done here. We've been putting a lot of resources into the Freedom of Information Act cases. We have this [José] Padilla case, which

is now before the Supreme Court. We just filed a cert [certiorari] petition in the Padilla case, which raises the question of the responsibility of U.S. officials for the torture of a U.S. citizen on U.S. soil. We have enough to do here that we don't have that much capacity to even think about what we could do abroad.

Q: I wonder if we could talk for a couple minutes about Tariq Ramadan.

Jaffer: I should have told you this at the beginning of our interview—I have to stop at 11:30 today.

Q: No problem. You've agreed to come to the Oral History Summer Institute?

Jaffer: I have, in principle. But you have to send me a date.

Q: It's between the fourth and the fifteenth. Mary Marshall [Clark] will get back to you about that. But what we can do there—you will get a transcript of these conversations. Then we can look it over and you can decide what you're going to talk about. So if we don't get to it today, we can do it there.

Jaffer: Okay. Yes. So the Tariq Ramadan case—a lot of the issues that we've worked on over the last ten years are issues that never came up at the ACLU before now. There was no Guantánamo before 2001. There was no targeted killing program. This idea of indefinite detention of enemy combatants. All of it is new, right? But one of the things that isn't new, that wasn't new, is that

after 9/11 the Bush administration began to deny visas to foreign writers and foreign scholars who had criticized U.S. foreign policy or criticized the foreign policy or the policies of U.S. allies. In some cases, denied visas to people simply because of their political views. This is something that happened during the fifties, sixties, and seventies as well. Back then it was people associated with the Communist party or people who were thought to harbor Communist sympathies. In retrospect, the list of people who were excluded during the Cold War on that basis is quite amazing. It includes Pablo Neruda, Gabriel García Márquez, Pierre [E.] Trudeau—not people we now could plausibly think of as threats to the country. And, the truth is, they probably weren't thought to be threats to the country back then either. They were excluded because excluding them was a way of tainting them and marginalizing their views. That's the same reason that the Bush administration started to exclude people after 9/11, too.

One of the people they excluded was Tariq Ramadan, who is a quite prominent Swiss scholar of Islam. He now teaches at the University of Oxford. In 2004, he was offered a job at the University of Notre Dame. It was a very prominent, prestigious position there that was sort of double tenured in two different departments and would have brought him from Europe to the United States. Ramadan is extremely charismatic, photogenic and has become a voice for young Muslims in Europe. He is also the grandson of Hassam al-Banna, who is the founder of the Muslim Brotherhood and in the world of political Islam, Tariq Ramadan has a lineage that matters.

For some combination of all those reasons, the Bush administration denied him a visa. They said, "We know you have this job offer at the University of Notre Dame but we're not going to give

you permission to teach in the United States.” We brought a lawsuit on behalf of three American academic organizations—the American Academy of Religion, the American Association of University Professors and the PEN American Center—to challenge, on First Amendment grounds, the Bush administration’s refusal to grant Ramadan a visa. The First Amendment rights we were asserting were the rights of people inside the United States; the people who had invited Ramadan to come speak here and teach here.

Q: Why not Notre Dame?

Jaffer: Notre Dame, at the time, was negotiating with the administration. I’m not sure I know the full story but I guess they thought they might be able to make progress through that channel. But we brought this suit in 2004 and eventually got a decision from—well, the Bush administration defended their decision. Initially, they said, “We revoked his visa because he had endorsed or espoused terrorism.” This was news to us and news to Professor Ramadan. We asked the administration, “Can you point us to the place where he did so?” and they couldn’t and wouldn’t do so. In court, once we brought the lawsuit, they dropped the allegation that he had endorsed terrorism and came up with a new explanation for the denial of the visa. They said that he had given money to a European charity, which in turn had given money—\$1,000—to a charity in the Middle East, which in turn had given money to Hamas—not to fund terrorism but, instead, to fund social programs. So there was a kind of six-degrees-of-separation theory, which at the end of the chain got to funding social programs in the Middle East. The truth is, if you applied that standard across the board, then virtually everybody would be excludable from the United States because everybody has given money to an organization that gave money to an organization that

eventually gave money to something in the Middle East. If you give money to the Red Cross, you're excludable under that theory.

Q: AIPAC [American Israel Public Affairs Committee] wanted it that way.

Jaffer: One of the theories was that it was Professor Ramadan's views on Israel that gotten him excluded, that Israel had asked—or some political organization associated with Israel—had asked the administration to deny him a visa. I don't know if that's true. It's interesting to note that he has actually been banned from Saudi Arabia and Tunisia and Egypt under [Muhammad Hosni El Sayed] Mubarak as well. So, basically, every dictatorial regime is opposed to having Tariq Ramadan visit. The United States was the first democracy to deny him access.

But the Bush administration, on various grounds, defended their decision. We eventually got a favorable ruling from the district court, requiring them to defend—to provide an explanation for their decision to exclude him—but then they provided this explanation, this six-degrees-of-separation explanation and Judge Paul [A.] Crotty in the Southern District—who had been [Rudolph W.L.] Giuliani's corporation counsel—upheld the government's decision to exclude.

We appealed it to the Second Circuit after the Obama administration took office—after President Obama took office. We asked the Obama administration to reconsider its position. It didn't immediately. It argued the case before the Second Circuit, defending the Bush administration's views. The Second Circuit then decided the case in our favor. After we got that ruling, we went

back to the Obama administration and we said, “Now will you consider reversing your position?” The administration—Secretary [of State] [Hillary R.] Clinton—agreed to do so.

So in 2009, many good things happened. In 2009, Secretary Clinton issued an order reversing the exclusion of Tariq Ramadan and also another scholar—a South African scholar—Adam Habib, whom we had represented—allowing them to come to the United States. Since then both of them have been to the United States many times to speak here and the sky has not fallen. No damage to national security has resulted. To the contrary, the only tangible change has been that Americans, who were previously denied the chance to talk to him and to meet with him and to debate him and to disagree with him, can now do that in the same way that Europeans have been able to for the last decade. So a small success but, nonetheless, an important one.

Q: Good. Good. Now until June. Thank you.

Jaffer: All right.

[END OF SESSION]

VJD

Session Three

Interviewee: Jameel Jaffer

Location: New York, NY

Interviewer: Ronald J. Grele

Date: June 4, 2012

Q: I'd like to begin with talking about the origins of the Freedom of Information Act requests and then we will get to the issue, but before we do that, could you tell us what your position at the ACLU was at that time?

Jaffer: Sure. Well, first, I think it's a great project and I'm very honored to be a small part of it. I joined the ACLU as a staff attorney in 2002 and I had been working for a few months when we started seeing stories in the press about the abuse of prisoners held in U.S. custody. There was a story in the *Washington Post* in December of 2002 and there were stories in the *New York Times* in early 2003 about prisoners killed in U.S. custody in Afghanistan. The story in the *Post* was not about any particular instances of abuse but instead interviews with CIA officials about the way they were treating the prisoners. The CIA officials were essentially bragging about the methods they were using and the methods they were using were the kinds of things that the United States had condemned when other countries had used them previously.

We started thinking about how we could get more information about the policies and how we could get more information about incidents of abuse. We wanted to know whether these incidents that the *New York Times* had alluded to were aberrational or whether there was some broader policy, and if there was a broader policy, who was responsible for it? Who was at fault?

Q: When you say "we," who is "we?"

Jaffer: Well, there was a group of junior lawyers at the ACLU and at CCR. There was Amrit Singh, Omar Jadwat, Steven Watt, who was then at CCR and who is now at ACLU. We actually were—or initially were thinking about how to bring suits related to Guantánamo. This issue of the treatment of prisoners was almost a side issue that we thought, well, we should figure this one out too at the same time. We weren't focused principally on abuse; we were focused on detention. Only over time did we become more focused on the treatment of the prisoners and less so on detention. It was a group of relatively junior lawyers who were thinking about these issues and we took it to people who knew more about all these things—Judy Rabinovitz, Ann Beeson, Lucas Guttentag and Steven Shapiro, who is the legal director of the ACLU—and was the legal director back then too—and we were very lucky that they supported us. They said, “Go for it. See what you can get.”

Q: What did you get?

Jaffer: Well, initially, nothing. [Laughter] Initially, we got just silence from many of the agencies and some of the agencies—the Defense Department wrote to us saying that they would eventually process the request but there was no reason to process a request on the bigger schedule than we had asked before—that there were no humanitarian concerns involved, that there were no pressing issues relating to government integrity—therefore, they would process the request on an ordinary schedule. An ordinary schedule in this context is a very, very long time; we would still be waiting for documents had we just left it at that. But the Defense Department

actually, in giving us even that request, distinguished itself from many other agencies who gave us nothing at all. The State Department gave us a single document, which was a set of talking points that senior State Department officials had given to State Department employees who would be asked about Guantánamo. It was a bunch of bullet points saying, "Here's what you can say when you're asked about Guantánamo."

It wasn't a very revelatory document because we had, of course, seen State Department officials on television saying those things. Really, we got nothing, initially. Then, in April of 2004—we filed the first request in October 2003 and we waited and we got what I just told you. In April of 2004, the Abu Ghraib photographs were published. *60 Minutes* published some of them, the *New Yorker* published some of them—and suddenly it became obvious that what had—what might have been aberrational six months earlier was anything but and that there was a real problem. I think that the visual—the fact that it was visual evidence of abuse made people pay attention in a way that they wouldn't have otherwise.

After those photos were published we filed a lawsuit—another Freedom of Information Act request and we filed a lawsuit a month later that forced them to open the request we had in process. By that time, it wasn't just the ACLU. First of all, we had a set of clients, including Veterans for Peace, Veterans for Common Sense, Physicians for Human Rights, and then we had recruited a law firm in New Jersey called Gibbons—they used to be called Gibbons del Deo—to help us with the litigation. They have actually been working on the lawsuit with us for eight years now, so they had done a lot of work on it and many things that had been accomplished in this lawsuit would never have been accomplished without their help.

Q: You went to the Second Circuit?

Jaffer: Yes.

Q: Was that a choice?

Jaffer: Well, I guess I should—so we did go to the Second Circuit, but you had asked me, "What did you get?" So to understand why we went to the Second Circuit I should answer that question. After we filed the lawsuit, the judge—Judge Alvin [K.] Hellerstein, of the Southern District—he issued a ruling, a very powerful ruling, saying to the CIA and the Defense Department, "You guys are government agencies like any other and the Freedom of Information Act is a law like any other. You live in a democracy and that means that you have to obey the law. In this context it means that you have to produce the documents that the ACLU has requested or you have to explain why you're not producing them."

In some ways it was a very easy case for the judge on the law but a very difficult case politically because at the time—and I think still largely through now—many Americans are unsympathetic to efforts to obtain information about the abuse of prisoners and many Americans are unsympathetic to the prisoners. And the judge, in order to issue this relatively straightforward legal ruling, had to be willing to open himself up to all sorts of ridiculous criticism but he did, in fact, eventually concede.

But he issued an opinion and one consequence of his issuing that opinion is that slowly we started to get documents from various agencies. Initially, we got—the first significant set of documents we got was in late 2004—we got a stack of documents from the FBI. At the time we had an Australian lawyer, Bassina Farbenblum, who was working with us. She was looking through these documents—she was the first person to see them. She was flipping through them and she found a set of emails between FBI agents who were stationed at Guantánamo in 2002 and 2003. The FBI agents were discussing the interrogations that they had witnessed—in some cases participated—but largely witnessed. They had seen interrogations conducted by the Defense Department, by army interrogators and by military interrogators—and the FBI interrogators were shocked at what they saw. They saw prisoners being shackled in excruciating stress positions—with their wrists shackled, their ankles shackled—in some cases stripped naked, held in very cold cells or very cramped cells, for long periods of time. They were assaulted with very loud music or strobe lights. The FBI agents described what they were seeing and they said, "This cannot possibly be authorized." Eventually, in the emails the FBI agents realize that it had, in fact, been authorized by senior Defense Department officials. Bassina came running into my office at the time and said, "I think I've got something significant here." That was the first set of really important documents that we got.

Then, for a variety of reasons, once the FBI started releasing information, other agencies started releasing information as well, in part because they realized that it was futile to resist Judge Hellerstein's orders, especially given that the FBI was complying with it, and in part because the FBI's documents made other agencies look bad and those other agencies wanted to defend themselves against what the FBI had put out. We started getting documents from the Defense

Department as well. There were all sorts of internal political plights that we benefited from. For example—I can't remember when this happened. It must have been 2005 or so. There was a riot in Afghanistan that took place after Michael Isikoff, who is a reporter at *Newsweek*, published an article saying that U.S. troops had defaced the Koran at Guantánamo—that they had destroyed a Koran at Guantánamo. There was a riot in Afghanistan and people died in this riot. The Defense Department came out with a sort of indignant statement saying that Michael Isikoff had reported these scurrilous allegations and the result of his irresponsible reporting was the death of civilians in Afghanistan. The next day we received a stack of documents from the FBI documenting instances in which Korans had been defaced at Guantánamo—so supporting Michael Isikoff's reporting. That kind of thing happened all the time.

It wasn't always the FBI, in fact, that was helping us out; it was sometimes the Defense Department and the State Department and even now it's difficult for me to know how much of it was intentional on their part. I know that some of it was, and some of it may just have been coincidence—that the documents we were getting from the Defense Department put the CIA in an unfavorable light. But whatever the intention, I know that at least to some extent there were political disputes or political rivalries within and amongst the agencies and they were something that in the end was very good for transparency.

Q: When you started out, what did you think you would get?

Jaffer: I guess there are probably two answers to that question and they're both true. One is that we didn't know what we would get and the other is that we expected to get nothing. We filed the

request mainly because we thought if we filed the request it would allow us to draw more attention to the reports of abuse. We thought that maybe we could create some political pressure on the administration that would result in their releasing more information voluntarily, or we could create a climate in which other reporters would feel more interested in digging around. We thought maybe there were some limits to the documents we would be able to get, but we certainly did not anticipate that we would get the kinds of documents that we did eventually and we didn't anticipate that ten years after these politicians were put in place, we'd still be litigating the lawsuit, which is what we're doing.

We left that FBI set of documents, and then over the course of the next five or six years we realized that the interrogation directives that were issued at Guantánamo—the so-called Torture Memos that were written by the Office of Legal Counsel, the Bush administration's lawyers—created this legal framework that allowed torture to take place. A few months after that we were able to get the inspector general's report from the CIA that documented the abuse of prisoners by the CIA. That was one of the documents that led Attorney General Holder to launch a criminal investigation. We didn't anticipate any of this. We would love to be able to take credit for having believed at the time that we could get it but I don't think anybody had that thought.

Q: Are we talking about hundreds or thousands?

Jaffer: Well, now it's one hundred and thirty thousand pages, which is a lot of pages, but the truth is that the measure of the significance of—the number of pages is one measure of significance but I don't think it's the best one. The most significant documents are actually quite short; the

Office of Legal Counsel has a total of only about three hundred pages. The CIA, the inspector general report, is another one hundred pages. I think the most significant documents probably, in total, amount to less than five thousand pages. But, as I've said, there are relatively long, investigative files that tell you not that much about policy—they're not that much about policy in the sense of authorized interrogation but they do tell you about what was tolerated and what was investigated or not investigated. There's an investigative file that relates to the death of a prisoner in Iraq. This is a prisoner who was essentially beaten to death by Navy SEALs [Sea, Air, Land]. I don't think—I am quite confident that nobody higher-up authorized the Navy SEALs to beat this prisoner to death but they authorized certain abusive techniques and the people who received that authorization saw the green light for abuse more generally. The result was that, in many instances, prisoners were subjected to abusive methods that went beyond the specific abuse methods that were there.

Another question we gave was what happened once interrogators or soldiers used these methods—what was done to hold those people to account? What was done to insure that other incidents like that wouldn't take place? What was done to help or compensate that person who had been abused? That's a lot messier than years of interrogation directive that says you can waterboard prisoners. It's equally important to know what was tolerated and what was and wasn't investigated—and how these things are investigated. To understand those things, you have to go through not just the five thousand pages of technical report, you have to go through the other one hundred and twenty-five thousand pages—which we did, eventually. We weren't the only ones who did. Other human rights organizations—Human Rights First—did a lot of work going through that process relating to prisoners who died in custody. Those documents, I think in the

end, are significant in a different sense but that's that. You can really tell eighty percent of the story with probably five thousand pages.

Q: What was the effect within the ACLU with this enormous trove of documents? How did you manage it, manipulate, staff it?

Jaffer: Well, we're not that accustomed—we certainly weren't at the time—at the ACLU to dealing with large volumes of—large production volumes. When we tell law firms we're dealing with a hundred and thirty thousand pages, they think, "That's nothing. We deal with that kind of—that's a one-day job for us." That's not true for the ACLU and it certainly wasn't true at that time. And we didn't know—it wasn't like a big litigation between banks where you know at the outset that you're going to be dealing with large volumes of information. This was a situation where we didn't really expect to get anything, so we were always building a system for the information we already had, not expecting to have to expand—and then finally that we had to change the systems to accommodate more information and more documents. We had these systems built organically over time and it was a total mess.

There was a sense in which all the documents had been available on the ACLU website for many years now, but available is a complicated word. They're available in that we know where to look to find them but the database that they're housed in was not really searchable. To the extent that it was searchable, the text maybe hadn't been uploaded in a sophisticated way. Often you knew the documents had certain things, you were doing a word search for that thing and it wasn't coming up. We'd get a call from irate reporters all the time saying, "How can I get this document

that I know you have?" Eventually, we decided to put a lot of energy and resources into creating a more sophisticated database, which we have now launched internally, inside the ACLU—and it's a world different from what we were using before. I think we'll be able to launch it this month. On the one hand, I'm sorry it's taken so long to get here but on the other hand, I'm very excited about it. I think it's much, much better and more sophisticated and useful than any similar data that's out there right now. It'll allow people to search not only by word searches but to search by agency or by "To," or "From" or type of document or interrogation techniques. There is all of this metadata associated with each document because we had lawyers go through every single document, write a summary of the document and tag it onto everything. I think it will be a very useful database for anyone who is studying this era or writing about this subject.

Q: So that will be available to anyone?

Jaffer: Absolutely. That's the idea. We put a lot of energy into it, with the hope that people will use it.

Q: Let's talk for a minute about the book.

Jaffer: Part of the reason we put out the book was for the same reason we eventually started to put our energy into the database. On the one hand, all the information was publicly available but it's so voluminous that it was practically inaccessible to anyone who didn't know what they were looking for. We were worried that in some ways the success of the litigation was preventing people from understanding the core terror—that it was just so enormous that people couldn't

understand the basics about where the torture program came from, who was responsible for creating it, what it consisted of, what happened in the black sites—the CIA black sites—what happened at Guantánamo, what were the results of the program, and to what extent were senior officials responsible for these kinds of things? Again, those kinds of questions can be answered—most of them—by reference to a relatively small amount of documents. We thought maybe it would be valuable to try to tell the story through as few documents as possible and to let the documents speak for themselves. Amrit Singh and I collected a small number of documents from the thousands that we had at the time and wrote a short narrative—about fifty pages—generalized entirely of those documents. Every sentence that is followed by a footnote to a document is documented—almost every case is included in the book.

Then we thought—you know, at the time there was a lot of—the Bush administration was still saying that these are allegations of detainees, “You have to discount allegations from people like this; they're trained to make false claims about torture.” And so there was always, in the press, this—the foreground of news articles was “human rights organizations say this but the Bush administration says that.” People were allowed to make their own—draw their own conclusions on the basis of their assessment of the credibility of one side or the other. Many people thought that the Bush administration was more credible than the ACLU or Human Rights Watch or Human Rights First or Amnesty. The result was that we felt that whenever we were speaking publicly about these issues, we were always frustrated. We felt like we weren't just offering up opinions or allegations. We had documents. We had government documents that said Secretary Rumsfeld authorized all those things at Guantánamo. Then we had the Abu Ghraib photos which showed soldiers using exactly the same methods against prisoners at Abu Ghraib. We felt we had

a case; we didn't just have allegations, suspicions or speculations. We became more and more frustrated with all of this, and the book came out of a desire to give the people the goods—to say, "This is fact and we can show you that it's fact based on the government's own documents."

That's what it was about, and the extent to which it was successful, I don't know. I find even now that people—even people confronted with the documents—don't always accept the documents as—not that they think they were fabricated or anything like that. They just think that the documents don't penetrate the narrative that—that they don't shift the narrative that people have already adopted.

Q: I couldn't help but notice that you thanked fifty-five people in the acknowledgements.

Jaffer: Right. Well, you know, the truth is that we probably should have thanked more. There are a lot of people at the ACLU who worked on the litigation, who worked on the database. This was true when we put the book out and it's even more true now—getting the documents, running the litigation, writing the briefs, reviewing the documents, writing the metadata. It took so much time by so many people, not just lawyers but law students who need a workplace over the summer and people who came to work for the year, internships, paralegals, legal assistants, people who have been agents on our web teams. So many people put so much energy into it, so I always feel a little embarrassed about the way the story of the litigation is told, because sometimes the story is told that Amrit and I had a great idea, we knew what was going to come out of it and we spent all this energy getting the documents. And, of course, it's true we spent a lot of time getting the documents but there's no way it could have been done at an organization

other than the ACLU—which as far as public interest organizations go, has a lot of resources at its disposal.

The ACLU, too, had all of this help from outside. Gibbons, the law firm in New Jersey, has appeared in court probably one hundred times in litigation and have written probably two hundred briefs in this litigation. The lawyers at the Center for Constitutional Rights and, of course, at the plaintiff organization—the Veterans for Common Sense, Veterans for Peace, and Physicians for Human Rights—all of these people put so much time in. I think when people look back on this particular era in American history, they will, I think, I hope they feel that—their government disappointed us in many ways—but I hope that the response of civil society organizations, while I think in many ways they are inadequate to the task, provide some reason to believe that there's hope for American democracy in spite of what has happened over the last decade.

Q: You talked about the database and a little about the book. The other way to access some of this—do you want to talk for a few minutes about the *Reckoning With Torture* project?

Jaffer: Oh, yes.

Q: What was the avenue to it?

Jaffer: We always got this question, "What can I do about this? It's outrageous what went on. I think it is wrong and I want to distance myself from it. This was done by Americans—this was

done in my name and I want to do something to make clear that I don't endorse it." We got questions like that. Then we also had somewhat of a debate. After the Abu Ghraib photographs came out there was a nationwide debate but after that the debate became narrower and narrower and eventually became a debate amongst elites. It became a debate among policymakers, a handful of journalists and a handful of judges but most Americans—or many Americans, don't do those types of things. We wanted to find a way to let people who wanted to be engaged, be engaged and to reengage people who at one time were engaged but weren't any longer engaged—and to reach people who had never been engaged.

One thing we came up with—with PEN American Center, which is a writer's organization—is this, what was eventually a set of staged events where we would have people get up on stage and read from the documents. Some of the documents are very dry and they certainly don't make entertaining reading, but when you cobble some of the documents together, you can build a or a set of narratives. One narrative is about the torture program itself; the creation of the torture program and the arc of the torture program—but there are all these other sub-narratives within them. There are the stories of the prisoners themselves, the stories of the officials who authorized these things, and then the stories of people inside the administration—soldiers and civilians, who, at one point or another, decided they didn't agree with what was going on. In some cases they exposed what they had seen or witnessed. In some cases they fought back, internally, against policies that they disagreed with. In some cases, the misguidance of the prosecutors at Guantánamo—prosecutors who were ordered to prosecute prisoners on the basis of evidence that was obtained through torture, eventually refused to go through with those prosecutions. They stepped down. Like in one case, the prosecutor's name is Darrel [J.] Vandeveld. He was asked,

when prosecuting a kid called Mohamed Jawad who was an Afghan prisoner. He was picked up when he was fifteen years old in Afghanistan and brought to Guantánamo, held in Guantánamo for six or seven years and eventually charged. Then Darrel Vandeveld was supposed to prosecute him. Vandeveld had initially started out as the most zealous prosecutor you could find. Over time, as he became more and more familiar with the case, he decided he could not in good conscience, prosecute Mohammed Jawad, on the basis of this evidence. He stepped down and not only did he step down, he eventually filed an affidavit—a declaration in favor of Jawad saying that this kid should be let go.

We represented Jawad—the ACLU represented Jawad in a habeas proceeding and petition for habeas corpus. Eventually he won that petition, based, I think, in large part, on that declaration that his former prosecutor had filed. Vandeveld’s story is told in the documents. This *Reckoning With Torture* event is an event at which people sat up on stage, they read the documents and the documents tell these stories. I think that the event—if you talk to people who have seen it—most of the people talk about it as riveting and really effective.

We staged that event, initially, at the Cooper Union here in New York and at Georgetown Law School and it was very successful. Then we decided to do it again at the Sundance Film Festival and at Lincoln Center and were able to get well known people to do the reading —Robert Redford read and Art Spiegelman and Annie Proulx read—a lot of great writers—Rula Jebreal read. A lot of great people read. Then we found the events were successful and they were reaching, obviously, the people who were in the audience—which is a limited number of people. We started working with Doug [Douglas E.] Liman, the film director—he directed *The Bourne*

Identity and *Mr. and Mrs. Smith*. We started working with him to turn the events into a kind of film. He had this great idea of creating a crowd source film, where he would ask people to film themselves or film a friend reading one of the documents and then send in the clip—send in the footage to him—and he would splice it all together into a crowd source film that called for accountability. It would in a sense be a form of *Reckoning With Torture*—which is the name for it—but it would also be a call for accountability.

Q: Can any of us do that?

Jaffer: All of you should do it, yes. There's a website—*Reckoning With Torture*—that will explain to you exactly how to do it. It's very simple. It doesn't require any sophisticated technology. You can do it with an iPhone. You just choose a place that's meaningful to you, go with a friend and read. All the readings are up there on the website. Choose a reading and just read. Get your friend to film you or you film your friend. The website tells you how to set it up. I think you'll find that even just doing that is an affecting and moving experience in itself. Then, of course, you're part of a bigger project where people are coming together to recognize the gravity of the things that have happened over the last decade. It's a way to say that, "I, too, think that something ought to be done about it." We're hoping, then, that we'll be able to turn all this into something that makes sense and we're hoping that the film will be done at the end of this year.

Q: As you can see we can go on talking for hours. It's time to wind up, I suppose. The last question would be, where does the litigation stand today?

Jaffer: The ACLU has a lot of litigation on the Freedom of Information Act. The Freedom of Information Act cases are relatively narrow and discrete. They don't last for years, they last for fifteen months or something like that and this was a very unusual case. It started out as a lawsuit in the Southern District of New York and it eventually grew various branches as we learned about new documents being filed, new lawyer requests, eventually new lawsuits. The case went on a couple times in an appeals court. Once it went up because we were trying to get other photographs—we found out there were other photographs of facilities other than Abu Ghraib where detainees were depicted being abused. It's very important for the public to have access to visual evidence of the abuse, in part just because the visual evidence is often the best evidence of what happened, and in part because people respond more to visual evidence than they do to text. We thought that the way people might respond to more photos would be helpful for the accountability movement.

We tried to convince Judge Hellerstein—we convinced Judge Hellerstein to order the Defense Department to release the photographs. He did in 2005 and the Second Circuit ruled our way and said that it's true that these photos may result in people being very angry when they see these photos—that was essentially the Defense Department's argument. They said, "You can't release the photographs because then people will be angry and not only will they be angry but there might be violence. People who live in Iraq might act violently in response." We said, look, we're not going to into this game of how to predict how people will react to this kind of thing. We can't predict how people will react, but we're not going to let the value of transparency be held hostage to the possibility of violence. If you go down that road, then there's no telling what other information will be denied.

The appeals court ruled in our favor, too. The Obama administration had just taken office and they said, "Well, we're going to release the photos. There is no point in our appealing to the Supreme Court. We think that there is no serious legal argument here. We are going to release the photos." As soon as they said that, there was this backlash in Congress. Senators Lieberman and McCain led a legislation movement to have the Freedom of Information Act retroactively changed—to carve out the votes from the scope of the act—and they were successful. Congress passed a law saying that photos that the Department of Defense designated as particularly inflammatory could be withheld by the military for a period of up to three years. At the end of the three year period the Defense Department would have to recertify that the photos couldn't be released but if they were recertified, they could be withheld again for another period of three years and so on. Then the Department of Defense certified them and the photos were never released. The certification actually expires in November—just in time for the election—so we'll see what happens.

We went up once on that issue and we went up again on an issue relating to the CIA black sites. This was in 2006. We asked for documents relating to the CIA black sites and the Bush administration took the position that the very existence of the black sites was a state secret; that nothing could be acknowledged—nothing could be released about the black sites. In fact, the black sites could not even be officially acknowledged. Therefore, our FOIA request had to be dismissed. We argued to the district court that that was a ridiculous argument and that the black sites were well known and that, in any event, the government didn't have a legitimate interest in

denying the public information about the black sites—and certainly no legitimate interest in refusing to acknowledge the existence of the black sites that everybody already knew about.

We went up to the Second Circuit again on that issue and while that case was pending before the Second Circuit—after it had been argued but before that court had issued a decision—President Bush went on national TV and acknowledged the existence of the black sites. The reason he did that was—there are a variety of reasons why he decided to do it but the bottom line is he did it and the result was the Second Circuit never had to decide the issue and it got sent back to the district court. Then we got to proceed to the second set of the FOIA process, which is not about the existence of a torture program but rather of the CIA's obligations to identify records relating to the torture program. We are still actually fighting over records relating to the torture program.

Q: Before I open it up to any questions you all might have—when you're interviewing on issues like this where you get to the legal cases, the complications are kind of endless in a way. There is a way in which you have to travel that special kind of legal narrative that emerges. Any questions?

Q-2: Earlier on you mentioned you worked with people who were in detention centers here in the U.S. Could you talk about some of those people?

Jaffer: Sure. Before I actually became a staff attorney at the ACLU, I was working at a law firm here in New York—one of the big law firms—and I was doing some pro bono work for the ACLU. This was soon after that 9/11—it was in the fall of 2001 and early 2002—and I went to

hear an ACLU lawyer talk at another law firm. He gave a talk about the detention centers in New Jersey where the immigration service was holding hundreds of men who had been rounded up in the days and weeks after 9/11. He said there were all these men being held in these detention centers. “We don't know who these men are and we don't know all the detention centers that are holding them. Their families can't get in touch with them and most of them don't have access to counsel. We believe that many of them are being held unlawfully and we're totally overwhelmed at the ACLU. We just don't have enough people to figure out what's going on and to try to get into the detention centers and meet with the detainees.” He was essentially just making a plea for help. I went up with a few other associates from my law firm after the talk and I said I'd like to help. I was lucky my law firm said that I could do it.

So a few of us started going out to these detention centers in New Jersey and talking to the detainees who were held there. They were almost all Muslim men of Arab descent or South Asian descent. Some of them were people who had been mistaken for Muslim men—they were Hindu or Sikh or whatever but somebody had—usually a neighbor or a coworker or somebody had labeled them as someone that the INS ought to be concerned about. The INS at the time—any tip—no matter how far-fetched or implausible or ungrounded—the INS would follow up on it. Essentially, if you said anything about your Muslim looking neighbor, you could get that Muslim looking neighbor into detention pretty quickly, especially if that person was not a citizen.

There were all these people who had been rounded up—some of them had been in the United States past the time their visas had expired. That was a very common story. Some of them had

overstayed visas, others had documents that weren't in order in some other sense and some of them were totally legitimate in the United States but had been rounded up nonetheless on the theory that it's better to be safe than sorry when somebody had picked them out of a crowd and given the INS reason to detain.

Now all of that could have been sorted out relatively quickly, but the FBI had a policy that was called "Hold until cleared," which was essentially a reversal of the presumption of innocence. Normally the government doesn't detain you unless they have reason to believe that you've done something wrong, but in this case the FBI was telling the INS, "Don't let anyone go until we tell you they're innocent." Proving innocence is a difficult if not impossible task and the result was that all these people were rounded up just got stuck there. They became increasingly desperate. Some of them got moved around a lot, in part because the INS was a mess at the time but also in part because the INS wanted to avoid the oversight of lawyers. We would find out that a particular person was being held at a particular detention center—in New Brunswick or Elizabeth or Suffolk or anywhere in Jersey—then we would go out to the detention center and tell the warden that we wanted to meet with that person. The warden would say, "Oh well you have to send us a fax the day before if you want to come and visit with any particular detainee." We would go all the way back to New York, we would send a fax to the facility and we would go out there the next day and the warden would say, "Well, unfortunately, that prisoner has been moved to another facility." "Well, which facility?" The warden would say, "I'm not given that information, it's really the INS."

There was this sort of bureaucratic maze which was in part the result of ineptitude of various agencies but largely the result of a kind of malicious desire to keep human rights lawyers out of the system. There was a feeling inside the system that all the people who were being held had been labeled “special interest detainees.” It was a label for the people who were believed to be connected to the 9/11 investigation—the phrase that they used was “connected to the 9/11 investigation.” When you first hear it, it sounds pretty bad, right? Because you hear "9/11." But "connected to the investigation" just means that they're being—it's just a meaningless label that the INS or the FBI just sort of attaches to anybody that they decide they want to detain, *in connection* with the investigation—it doesn't mean that they have any evidence to link that person. In none of these cases, in fact, did the INS or the FBI have any evidence at all that the person was actually connected to the 9/11 attacks. Then, eventually, it became clear that none of them would even be charged with terrorism related offenses. A few of them were charged with visa fraud and things like that, which are routine immigration related crimes—but nothing related to terrorism.

At the time they were suspects and all the guards assumed that these were the people responsible for the 9/11 attacks—out of all the other prisoners these were the people responsible for the 9/11 attacks. You can imagine how these kinds of detainees were being treated in the weeks and months after 9/11. You can imagine the way that the wardens of these facilities would have reacted to human rights lawyers who wanted to help these people out.

It was a very difficult thing for the ACLU and other human rights organizations to deal with. At the time I was doing some completely unrelated work at this law firm—I was actually working

on equity derivatives. [Laughter] You know, I didn't hate what I was doing in my day job; I just increasingly felt that is was just irrelevant compared to what was going on in these detention centers. I saw this handful of lawyers at the ACLU trying to get into this system and I thought if there was anything, even on a margin, that I could do to help those lawyers out then I should do it. There were a lot of lawyers around the city who felt the same way, thankfully. That's actually how I started working at the ACLU—eventually jobs came up at the ACLU and the people I had been working with as a cooperating lawyer helped me get in the door.

Q-3: A few weeks ago all I heard about was the misbehavior of the defendants at Guantánamo. I haven't heard anything recently. What is happening now of that?

Jaffer: Well, that was the last proceeding at—that was the most recent proceeding at Guantánamo. It's true, a lot of the stories were about the misbehavior of the defendants—which is too bad, because the misbehavior of the system, I think, is a much more troubling thing than the entirely predictable misbehavior of the people who have been held in this kind of detention for ten years without having the opportunity to appear before a judge. There will be another proceeding in July relating to [Abd al-Rahim] al Nashiri, who was one of the prisoners who had been charged with involvement in the [USS] *Cole* attack in Yemen. Another proceeding in August is scheduled for the 9/11 defendants.

There is this sideshow which, in my view, is at least as important as the criminal proceedings—and the sideshow relates to the transparency around the criminal proceeding. Because one of the hallmarks and disturbing things about the military commissions is that they are closed to the

public when any of the participants talks about the torture of the prisoners in CIA custody. So if a prisoner mentions his treatment in CIA custody or a lawyer mentions the CIA's interrogation program, they're censored. They flip a switch so that the observers in the military proceeding—they are behind a glass, a Plexiglas screen—the censor flips a switch so that the observers can't hear what is being said on the other side of the screen. There are five places inside the United States where people can go and watch the proceedings by closed caption. One of them is at Fort Meade. If you go to these places and watch the proceedings by closed caption, you will see that occasionally the sound will drop out. And the reason that the sound drops out is that there is a censor—a government censor—who is flipping a switch to ensure that the public doesn't hear anything about the CIA's interrogation program. It is an astounding thing. Can you imagine the way we would react if another country —imagine that Syria was trying a prisoner who had been held for ten years in Syrian custody and Syria was doing this in a courtroom that had a Plexiglas screen—and Syria was taking the position that these people who were being tried were the "worst of the worst," the people responsible for the most heinous crimes in history—and every time those prisoners talked about what had happened to them while in the custody of the Syrian intelligence service, a censor would flip a switch and the public wouldn't be able to hear what was going on. Imagine how we would react to that kind of thing.

It is astounding to me that this is still going on at Guantánamo. Even now, after all the exposure that the CIA's torture program has received—even now, these censors are allowed to sort of carry on with immunity. I think it's an awful and totally indefensible thing. We at the ACLU filed a motion challenging that secrecy regime. A whole slew of media organizations—including the *New York Times*, the *Washington Post*, the AP [Associated Press]—filed similar motions,

making a similar challenge. I think that ultimately, if we succeed in that everything is going to be with Guantánamo. I think there are many other problems with the military commission system there and many other problems with the detention of people who have never been charged with a crime—which is most of the prisoners at Guantánamo. But the secrecy around the treatment of the prisoners seems to be one of the most egregious things, which is something that perhaps we can correct.

Q-3: What do we know about the origins of the torture system at Guantánamo? I just recently read an article by Stephen Soldz called “CIA on Campus,” talking about the—I don’t know how to describe evidence but some suggestion that there was a systematic system of torture that was classified [INAUDIBLE].

Jaffer: I haven't seen that article but I know Stephen Soldz's work more generally and think he's very impressive. The earlier question of the origins—I have a few things. One is that it's clear that the program was designed and choreographed by a very small number of agents in Washington. We know that because of the memos that were written by the Justice Department, which are from senior Office of Legal Counsel lawyers to—for example, John [A.] Rizzo, who was the general counsel of the CIA at the time—or with George [J.] Tenet. We know that the interrogation directors at Guantánamo, in particular, were assigned by Donald Rumsfeld. You can see them when you go to the ACLU's website. Even now, they're building files of those interrogation directors and in three weeks you'll be able to research and find them. But the most senior officials signed documents saying, essentially, "You can torture these prisoners." Not just that but, "You can torture the prisoners in the following ways." And then laying out in granular

detail the kinds of methods that could be used. Then there are all sorts of documents showing that certain relatively high-level people fought back against the adoption of these policies and that the people who had authorized the policies in the first place—rather than reconsider the decisions they made—did everything they could to marginalize, penalize, exclude and destroy the people who were complaining, rather than change the policies.

The other things that we are looking at are the various reports that have come out—the official government reports. You know, often the bottom line of the military reports is, "Things are not as bad as the ACLU says they are." But if you actually read what precedes that bottom line, you'll see that things *are* as bad as the ACLU says they are. It's just that they describe the same abuses that we describe and they say, "This may be inhumane and degrading, but it's not cruel, inhumane and degrading." Things like that. Or they draw legal conclusions and they'll say, "Well, this is cruel, inhumane and degrading but it's not torture." So legal conclusion—but you can read everything. You can see that legal conclusion and you can draw your own conclusion whether it's torture or not. Or, if you look at the CIA inspector general's report—which in some ways I think is perhaps the most remarkable document out there—that report describes what took place at the CIA's detention centers and why it took place. It explains that *these* officials authorized the program. *These* officials sought legal guidance from the OLC.

The OLC, the Office of Legal Counsel, provided the following legal items and on the basis of that guidance, the following things were done. In these instances, interrogation went beyond what the Office of Legal Counsel said they could do. The result of their going beyond what the Office of Legal Counsel said they could do was the following. For example, "This prisoner was

waterboarded 183 times over the course of one month. This prisoner was waterboarded eighty-three times. This prisoner had an electric power drill held to his head. This prisoner was threatened with rendition to Egypt. This prisoner was threatened with being buried alive. This prisoner was put in a close confining box with insects for this amount of time.” It's really unbelievable stuff but it's all laid out by government officials, in official government documents—which, again, are worth reading.

Q-2: You mentioned earlier the case of Mohamed Jawad. As a Canadian citizen I am very concerned about him and Omar Khadr. Can you see also a difference between those two cases and maybe why they have gone so differently?

Jaffer: I am also very concerned about that case. There are lots of reasons to be—there are lots of off the wall things that the U.S. is responsible for in that case. He was a kid when he was picked up. You can see some of the video—it was leaked—of his interrogation. It is online. You can see the way they treat this fifteen-year-old kid. He was fifteen or sixteen when he was picked up and they treat him as if he was a forty-year-old terrorist who had orchestrated 9/11, and he was nothing of the kind. There are all sorts of reasons why the United States should be ashamed of itself in the treatment of Omar Khadr. At this point it's the Canadian government, I think, that is more embarrassing. My impression is that the U.S. government genuinely wants to send Omar Khadr home and that it's the Canadian government that has been putting up all these obstacles. I've lost track of where the negotiation is. My understanding is that he was supposed to be sent home. I hope that happens but if he gets sent home he's probably going to be incarcerated in Canada.

We used to say—and we still say, of other countries—that you have an obligation to rehabilitate and reintegrate child soldiers. That is not the approach we took to Omar Khadr or Mohamed Jawad—the child soldiers that *we* detain we treat as adults. Not just as adults but as adult terrorists. It's hard to understand how we can expect to have any credibility when we tell other countries that children have to be treated—that child soldiers—that we have a responsibility to child soldiers. That's an especially troubling case.

Q-4: [INAUDIBLE]

Jaffer: I do know this concept of the individual who's brought outside—who's exorcised from a community, who is denied recognition as a human being and also this concept of the exception, in which it was stressed also. I do think those things are relevant to the way that we have dealt with some of these security issues. It's something to look at. We do have these laws that prohibit, for example, torture. The United States has signed and ratified the Convention against Torture. We have domestic law that reflects the same norms. We have a War Crimes Act. We also have the Constitution and the Fifth Amendment, which is supposed to prohibit cruel treatment, including torture. We have the Eighth Amendment which protects against cruel and unusual punishment, including torture. We've got this whole system of laws that collectively prohibit torture, but if you're somebody who's been tortured and you go to court and say, "I was tortured by the U.S. Government. The CIA authorized my torture. I was held at a black site and I was tortured for five years or three years or three months," you are not going to be able to avail yourself of that system of laws because the government has at its disposal a whole set of

procedural doctrines that allow it to separate you from the law. One of them is the immunity doctrine, which holds that government officials can't be held liable for violating the Constitution if the constitutional norm that is being invoked was not clearly established at a time. The way the court has interpreted this clearly established precedent—they held that the fact that there was disagreement within the executive branch about the meaning of the torture prohibition means that the norm against torture wasn't fairly exacted at the time.

The same people who do the torture unsettle the law. They unsettle the law and that means that later on, when they're held to account or tried to be held to account for what's going on, they can rely on the fact that the law was unsettled at the time. The immunity doctrine is one. Another is the state secret stuff. The government can say to you, "Well, we understand that you *allege* that you were tortured in CIA custody, that you *allege* that you were held at a CIA black site overseas, you *allege* that we sent you to Morocco to be tortured or to Egypt to be tortured—but we cannot confirm or deny that any of that took place without disclosing information that we have a right to protect." The consequence of that is that your case will have to be dismissed.

We represented a guy, Khaled el Masri, who is a German national who was picked up by the CIA in Macedonia and sent to Afghanistan where he was tortured by the United States for several months. Then, when they realized they had the wrong guy, they released him again in Europe. He was completely traumatized, as you can imagine, by this experience. He eventually brought—with our help—legal action against the United States. They responded with the State Secrets Doctrine. They said, "This program, if it exists, is a state secret. Accordingly, this lawsuit must be dismissed." They won. In court, the judge said, "We agree that that the lawsuit has to be

dismissed.” We have this body of law there that says torture is prohibited. In the same way, you have a body of law there that says murder is prohibited. If you go into court and say, "My client was tortured in that city," or you say, "My client was killed by a CIA drone," the answer isn't going to be a trial in which the facts alleged are actually evaluated by a court or a jury. The answer is going to be, "All the things you're talking about are state secrets and your case, whatever the merits, must be dismissed."

There is a sense in which we have this frozen body of law, this law that is on a pedestal or this law that exists in some abstract way, but that's different from saying that we have a body of law that can be called upon by ordinary citizens. It can't be. It's even worse than nonexistent because there is the appearance of law. In this context, the implication of security is all that matters. Once the government invokes security, the game is over. Guantánamo is actually—detentions are the only exception to that. Detention is the only place where the American courts have been willing to say that the mere indication of security is not enough. We are willing to look at the facts. We are willing to examine the basis for the detention and actually ask whether security justifies the detention of the person. Even in the detention context, the deference that the courts have awarded to the executive branch is overwhelming. It's very, very difficult for a prisoner to convince a court to order the prisoner's release over the objections of the executive branch. In fact, there is no case at Guantánamo in which a prisoner has been released over the objection of the executive branch. The executive branch has always decided to release the prisoner.

Q-4: [INAUDIBLE]

Jaffer: This is actually something that you don't often think about. There is a check that exists for every other country; for every other country, there is always the possibility that the international community or somebody reflecting the international community will serve as check on the abuse of the government. You have somebody like Mubarak or you have [Bashar al] Assad or you have Charles [M.G.] Taylor—and I think it's even probably true for Stephen [J.] Harper in Canada. At some level they know that the buck doesn't stop in their country, that there is always somebody outside who has the power to hold them to account. I think that, practically speaking, is not true in the United States. It makes the domestic checks and balances all that more important because it means that if the domestic checks and balances aren't working, there is nothing else out there. There is no other checklist; there is no other way that people who—officials, American officials—will be held to account.

Q-5: [INAUDABLE]

Jaffer: You know, that's a good question and I probably don't have a good answer to it. I think the ticking bomb hypothetical is very interesting, theoretically. It's also surprising to me that people spend so much time thinking about it that it is used as a teaching tool in law school. I think it's interesting and it provokes all sorts of counterintuitive thoughts about things that we take for granted. In my experience, there has always been a real breakdown between the theoretical construct and the application of that concept in the real world. You know you've got the right guy. You know that that guy is the one who probably planted the bomb. You know that the bomb will go off in ten seconds or ten minutes or ten hours. You know that if the bomb goes off, millions of people will be killed. All these assumptions, which once you make the

assumptions you have this really interesting set of questions. But in the real world, you never know whether any of those things are true. Once you accept the possibility that in the real world somebody could be tortured, in some limited circumstances, you also have to worry about containing that possibility.

In the experience, I think, of every country that has gone down this road is that that possibility is important to take. That was certainly true of the UK in dealing with the IRA [Irish Republican Army]. It's certainly true in Israel and it's certainly true in the United States. If you look at the justifications that were given by the people who engaged in this kind of torture in Iraq and Afghanistan and Guantánamo, it's not at all atypical to point to something like the ticking bomb justification, but I don't know of any instance in which it turned out that they had the right person and that person had, in fact, planted the bomb—and, in fact, the bomb was going to go off imminently. I don't know of any instance that remotely resembles that and yet thousands of people were tortured in Iraq and Afghanistan and in Guantánamo.

Now that saying, that hypothetical, is the principle basis for the target killing program. That's where it came from. They said, “Well, it may be true that it's better to detain people than to kill them, but there are sometimes instances in which a person you want to detain can't be detained right away. That person, if allowed to do something really, really awful, is going to cause all sorts of damage to innocent people.” On some theoretical level, I understand that that may be true. There may be instances like that. This construct is now justifying the killing of hundreds of people—and not just people who are thought to be the ticking bomb, but the people around them. If you read the article in the *New York Times* a few days ago, we're now assuming that people

around people who are thought to be ticking bombs are also themselves ticking bombs warranting the use of military force.

That's a very long answer to a simple question. The simple answer is I think it's interesting but I don't think it has any implications.

Q: Any more questions? Do you want to wrap up? Okay, thank you very much.

Q-3: How does it feel to be interviewed by a group?

Jaffer: It's a lot of talking. [Laughter]

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