

TRANSCRIPT: Jameel Jaffer
Rethinking the Intelligence Enterprise Series

Jameel Jaffer is the Deputy Legal Director of the American Civil Liberties Union and Director of its Center for Democracy, where he has litigated and managed cases involving government surveillance, targeted killings, and torture. He is the co-author of [*Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond*](#) (Columbia University Press, 2007).

Mike German, a fellow at the Brennan Center for Justice at NYU Law School, interviewed Jameel Jaffer on August 28, 2014. The following is a transcript of that interview.

Q: Hi. My name's Mike German. I'm a Fellow with the Brennan Center for Justice at NYU Law School. And today I'm with Jameel Jaffer, who's Director of the Center for Democracy at the American Civil Liberties Union. Thanks for being with me today.

JAFFER: Sure.

Q: President Obama recently made news this summer, when he commented about the CIA detention interrogation practices and said, [“We tortured some folks.”](#) But, the ACLU has actually made torture a priority since 2003 when they filed the first Freedom of Information Act, looking for information about government interrogation practices. Why does the ACLU see torture as a civil liberties priority?

JAFFER: . In some ways I think the answer is obvious. It's a complete denial of human dignity. And if there is — we think that human beings have a right to some basic dignity, and bodily integrity, and psychological integrity — and torture is a denial of all of that. You know, we didn't expect to be litigating or working on this set of issues. This is something that we got involved in, as you said, in 2003. There were a couple of news articles that suggested that maybe something was going wrong in the detention centers, in the military detention centers and the CIA detention centers. And we filed Freedom of Information Act requests trying to fish for information. And we didn't expect at that time — I don't think anybody did — to find this entire system of torture authorized at the highest levels, and ultimately resulting in the cruel treatment, or torture of thousands of prisoners. That's not something we expected. But, I don't think anybody has any doubt now that it's something that the ACLU should care about, and that it was the right decision to start asking questions a decade ago.

Q: In his comments where he admitted the government had engaged in torture, President Obama said that we shouldn't be sanctimonious in looking back at the action of the government officials who put the torture policy in motion. But that neglects to recognize that there was actually significant dissent within these agencies about whether to adopt a torture policy. Why is it important to acknowledge that dissent?

JAFFER: Well, you're right. In every agency, in every part of the military, there were people who risked their careers, in some cases risked their safety, to expose torture, to end the torture policies. In some cases, at Guantanamo, there were military prosecutors who refused to prosecute prisoners on the basis of evidence that had been derived through torture. So there were a lot of people who took these risks in order to resist or dissent from the torture policies. And I think we owe them something. Those people did what they were supposed to do. And if we don't honor those people then there's the danger that the next time these policies are proposed, the people who would dissent will look back and they'll say, 'Well look what happened to those people who dissented last time. They faded into obscurity or even worse, they've been penalized for the dissent that they engaged in.' And people won't dissent. And that would be a dangerous thing.

Q: And the way that this idea goes forward suggests that the events that we're going through now, where other governments are criticizing our policies, where there's a lot of internal criticism within the United States — all the problems that have resulted from torture, those were actually foreseeable. And an intelligence agency is supposed to be looking forward.

JAFFER: Right. Not just foreseeable but foreseen, right? Yeah. It is, I think, a very good question is why the intelligence agencies seem so caught off-guard, six or eight years later, when people started saying, "What are these policies about? What were you thinking when you adopted these policies? Did you not think through the cost? Did you not think through the implications for our moral stature as a country or our diplomatic power? Did you not think through the implications of having people in our prison against whom the only evidence we could point to is evidence that had been beaten out of somebody else? Did you not think all that through?" And the truth is that they didn't think it through. It was a very short-sighted decision to adopt this set of policies.

Q: And it was actually some of the people with the most experience in interrogations who were opposed to these programs.

JAFFER: That's right. The policies were driven, essentially by people who were ideologically committed to the policies, not by people who had any experience to point to. In fact, very few of them — I'm not sure any of them — had been anywhere close to an interrogation room before. They were ideologically committed to the endorsement of torture. And the people who did have experience were the ones saying this is a bad idea. And so it's not like nobody figured it out until six or eight years had passed, that this was a bad idea. A lot of people knew it was a bad idea early on. And, there were many other models to look to, the experiences of many other countries could have guided us in 2001 and 2002. And our own laws could have guided us. Torture is something that is expressly prohibited under American law. It's expressly prohibited under international legal instruments that the United States is a party to. So it bothers me when people suggest that we were groping around in the dark after 9/11 and that we should be understanding of the officials who authorized torture. We have these laws for precisely those kinds of circumstances. This is why we decided a long time ago to outlaw torture, because we knew that at a time like that some officials would be tempted. I don't think it makes sense now to sort of neglect accountability and let people off the hook, or to pretend that the choice was a more difficult one than it actually was. The choice really should have been made for us by the laws that were already on the books. And it's a scandal that senior officials knowingly violated those laws and even now, have not been held to account for.

Q: And I know that [the ACLU has been on a campaign](#) to honor courage, honor the people who complained about these programs, raised concerns about them. Why do you think it's important to acknowledge that dissent?

JAFFER: Well, the part of it to me that seems morally outrageous is that we have honored all of these people who authorized torture. And yet all of these people who risked their careers and, in some cases, their safety in order to expose the torture policies — policies that most of us now recognize to have been misguided and unlawful — those people are slowly, at best, fading into obscurity and, in some cases, they've actually been penalized in some way for the resistance that they engaged in, the dissent that they engaged in. And it seems to me and to many of my colleagues here at the ACLU that we owe those people something, and that we need to, in some official way, demonstrate our gratitude as a society to those people for taking the risks and paying the cost that they did. But the other thing is, we're going to be in this kind of situation again. There will be at some point another crisis on the scale of, of 9/11. Nobody wants it to happen. But, it will at some point happen. And we need to think through how we want our public officials and soldiers to act when the same ideas or similar ideas are proposed then. And if we, haven't honored the people who dissented last time around if instead we have punished those people and written over their history, then I think it's less likely that people will say no next time around. I think people will look back and they'll say, look what happened to those people who said no last time. And they will be quiet. And I think that would be a very sad thing and a very dangerous thing.

Q: And of course, what we found after second Iraq war was that there was dissent within the intelligence community about the public statements being made. Yet, that wasn't made public until well after the invasion. What responsibility does the intelligence community have to respond to the public need for information rather than just policymakers?

JAFFER: A lot of this information is, in my view, needlessly secret. The public — there's no reason why ordinary citizens can't make their own judgments about the significance of the threat and the appropriateness of the policies we've adopted in response to the threat. Those kinds of things are the kinds of things that ordinary citizens should be able to grapple with. That is complicated by the secrecy surrounding — the secrecy, needless secrecy, around government intelligence and around our national security policies more generally. I think that most Americans don't understand — certainly don't fully understand — what our National Security policies are, and why they are what they are. And that's a huge problem.

Q: And four years ago, the ACLU put out a report: [“A Call to Courage: Reclaiming our Liberties a decade after 9/11”](#). That was four years ago. Obviously, the issue is still ongoing.

JAFFER: Mm-hm.

Q: One of the quotes I'll read from the report: “By defining the struggle against terrorism in existential terms, as a war without geographical or temporal limits, our leaders are asking us to accept a permanent state of emergency in which core values must be subordinated to ever-expanding demands for national security.” And, you've separately said that this is “an everywhere and forever” war...

JAFFER: Mm-hm.

Q: ...and that that's dangerous. Why is it dangerous?

JAFFER: Well, previous wars have been limited geographically and they've been limited in time. And so, when the government said, “Well, during wartime” and “In the context of this particular conflict we need to limit civil liberties in one way or another,” or, “We need to limit the

amount of information that the government discloses,” that was often problematic. But it was problematic within the limits that were set by the scope of the war. Now, if you have a war that extends to every corner of the earth, and that almost by definition can't end because the enemy is so vaguely defined, every suspension or curtailment of civil liberties is a much more significant thing. Because it's not one that you can be sure will be limited. It's one that may last forever and that extends to everywhere. And I think that you've seen over the last decade or twelve, thirteen years now, the expansion of all these policies that were adopted in secret and expanded in secret and now operate, more or less, in secret. And I think that it's not an exaggeration to say, that ordinary citizens have sort of lost control over the policies that the government is implementing in those citizens' names, right? The most obvious example probably is the drone war. We don't know even in which countries the government is carrying out these killings. I mean, we can name some of them. We can't name all of them, because the government hasn't disclosed that list. We don't know who we are killing. We don't know which groups we are targeting, let alone which people said to be associated with those groups we're targeting. We don't know the extent of the civilian casualties, because the government doesn't release numbers. Everything we know is sort of pieced together by a handful of reporters who are, every day taking risks with their lives in order to gather that information. And so, the result is that people literally don't know what the government's policies are. We don't know who we're killing, why we're killing them. And it's not a surprise that these policies become deformed when secrecy is so pervasive.

Q: And obviously, Congress and the courts have a role in checking this type of executive abuse.

JAFFER: Yeah, you would think, yes.

Q: How would you rate the performance of Congress?

JAFFER: Well, I guess I just did, right? I think that both Congress and the courts have profoundly failed. I think that you have intelligence committees in Congress whose job it was to ensure that things like this torture program never took root. And obviously that didn't work out. The Snowden disclosures about out of control government surveillance — all of that is happening, either despite or with the approval of the intelligence committees. And I think that on the armed services side, I think that the record is a little bit better. But, the armed services committees too — a lot of the prisoner abuse could have been prevented had those committees been doing a better job earlier on. In the courts, there's been a lot of activity in the courts. There are thousands of briefs have been filed; hundreds of them by the ACLU, and hundreds of them by the government, about National Security policies since 9/11. But virtually every case has been litigated over a threshold issue. It's been that cases have been thrown out on state secrets grounds, on immunity grounds, on standing grounds, on political question grounds. These are all threshold doctrines. And when a case is thrown out on a threshold doctrine, it means that the court doesn't actually address the merits of the policy. And almost without exception, the courts have refused to engage with the merits of the policies. The courts have essentially left it to the political branches to decide what the policies should be. And that's part of the reason we had a rendition program, a torture program; we had warrantless wiretapping — all of these things, which not just implicate civil liberties and human rights, but implicate the most profound, the most fundamental civil liberties and human rights. All of these policies were allowed to be put in place, and allowed to flourish and expand by the courts.

Q: And how do we reassert democratic controls over the intelligence agencies when there is so much secrecy that blinds us to what's going on? And even with the torture program, there's now this conflict between the Senate Intelligence Committee and the CIA about what happened when,

and whether it was effective, that for the American public, how do we ever know what the truth is?

JAFFER: Right, right. I mean, if there's a silver bullet, I don't know it. But you, just then, I think identified one way that sometimes the system can be made to work. And the incident that you're talking about is an incident in which the interests of the intelligence agencies and the interests of the intelligence committees diverge. And there's a way that that's a very good thing. You know, to the extent that the two political branches believe that what they're fighting about is the relative power of — their own power vis-a-vis the other. Sometimes good things happen because of those kinds of fights, right? And the same thing happened in the Guantanamo cases where the Supreme Court, I think, was essentially just asserting its prerogatives. It was just saying, "You may be able to hold people indefinitely in Guantanamo, but you can't hold people indefinitely in Guantanamo without our involvement." Well, at first they said without the involvement of Congress, and then in the second Boumediene case they said, without the involvement of the courts. And that was really a separation of powers decision. It wasn't really about fundamentally human rights. But ultimately, it had implications for the rights of people at Guantanamo. So, sometimes institutional competition is the way that individual rights get preserved.

Q: That's the way it was set up to work.

JAFFER: Yeah, I mean, yeah, I guess that's not a surprise...

Q: Yeah, right.

JAFFER: But I also think that, on the surveillance side where you have a failure of all three branches, and all three branches in a sense have an interest in defending that failure, you need a force from the outside. And whistleblowers have been an extremely important force from the outside. I mean, Snowden has a huge effect on the surveillance debate. None of the reforms that we are now talking seriously about would have been possible but for the disclosures that Snowden made to *The Guardian* and *The Washington Post*. And while other whistleblowers haven't had that degree of influence, I think that many of these debates have been driven by whistleblowers since 9/11.

Q: And one of the problems that we've seen, in particularly where you mentioned with the surveillance program in both Senate Intelligence Committees — House and Senate Intelligence Committees, and the Foreign Intelligence Surveillance Court were in on these decisions — is that what we found now through the leaks Edward Snowden provided, is that the intelligence agencies actually misled those entities at some points.

JAFFER: Mm-hm.

Q: How bad a problem is that, when it's not just the secrecy but actual...

JAFFER: Yeah, yeah...

Q: ...misinformation that's being provided?

JAFFER: Well, I mean it's a very significant problem. I mean, just thinking of some of these...some of these misleading statements went to the most important questions about these policies. This is a statement that was made by multiple intelligence officials, including by John Brennan, I think — [the statement that there were no civilian casualties because of the drone](#)

[program](#). You know, which is a ludicrous thing, right? But that certainly influenced public debate about the drone program. Or the statement by the Director of National Intelligence...

Q: James Clapper.

JAFFER: ...James Clapper, that the government wasn't collecting millions of records about Americans' communications. Also, now that we know what we know, you can see how absurd that statement was. Or maybe, somewhat less understood, but to me equally significant, the statement by the government in the Supreme Court case involving the, the FISA Amendments Act, in which the government said, you can throw this civil suit out, because we are providing notice for criminal defendants who have been surveilled under this particular statute, and they'll be able to challenge the law. And it turned out that the government actually had a policy of denying those criminal defendants notice. So essentially the government managed to insulate the Act, the FISA Amendments Act, from judicial review for six years, by playing this kind of shell game where they would tell one court that, don't worry, the other court's got it; and they'd tell the other court, don't worry, that court's got it. So those kinds of statements have been, I think, hugely problematic. Now that said, there is a danger that people latch onto those kinds of statement to justify their own — that one branch latches onto those kinds of statements by another branch to justify the first branch's failures, right? And I worry that, to some extent, that's what's going on now with the CIA. There's no question that the CIA misled both the intelligence committees, and the public more generally. No question that the CIA did that. But that shouldn't distract anyone from the failures of the intelligence committee to have overseen the CIA — that the intelligence committee was in on this program from very early on, certainly didn't do enough to stop it. It would be a shame if people reduced the narrative to one in which we essentially had a rogue agency. The torture program may have involved a rogue agency. But the story is much, much bigger than the CIA.

Q: Okay. If somebody wanted to learn more about these issues, what would you suggest they read?

JAFFER: Well, depends on the issue. I think that on the torture issue the first things to read are the governments' documents themselves. I mean, I think that reading the torture memos, it's always a shocking experience for me. And I've read them now, dozens of times. But just to think that those kinds of memos could be written by the senior most lawyers in the world's leading democracy, there's something shocking about it every time.

Q: And the ACLU has a website that...

JAFFER: Yes. We have a database that is a very sophisticated database and allows people to search all of those torture documents. It's just thetorturedatabase.org.

Q: And, for the people who like to read in book form, you have a lot of them published in a book?

JAFFER: Ah, yeah. Well, Amrit Singh and I [published some of those documents in a book](#). I think that a really good narrative about the torture program is [Jane Mayer's book](#), is in Jane Mayer's book. On the surveillance side, I think [Glenn Greenwald's book](#) is really good. I mean, there's a lot being written right now, on the surveillance side. I think in the next few months there'll be something out from Park Gelman too, which I'm sure will be very good. On secrecy more generally, I would say go back a little bit and read [Senator Moynihan's book](#), which I still think is the best thing to have been written on the implications of excessive government secrecy.

Q: And those recommendations are still sitting there.

JAFFER: Right, right...

Q: And could be implemented today...

JAFFER: That's right.

Q: ... to improve the situation, right?

JAFFER: That's right.

Q: Alright. Well, terrific. I really appreciate your help.

JAFFER: Thanks.

(END OF FILE) — 27 minutes