

## TRANSCRIPT

# "LITIGATING THE DRONE PROGRAM IN AMERICAN COURTS"

*Interview with Jameel Jaffer*

*Moderator: Jonathan Horowitz*

### **FEMALE VOICE:**

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### **FEMALE VOICE #2:**

Jonathan Horowitz of Justice Initiative will be moderating Jameel Jaffer, the Open Society Fellows'-- presentation today on litigating drone strikes.

### **JONATHAN HOROWITZ:**

Great. Well-- thank you and welcome everyone. It's a pleasure to introduce Jameel-- who's exceptionally (NOISE) well-placed to talk to us today about the U.S. government's secret drone program or campaign. Drones code word or-- or the-- the common phrase for unmanned aerial vehicles seems to be in the U.S. media almost daily.

They've been the topic of recent hot political debate in this U.S. at least when it comes to the issue of targeting U.S. citizens. And they have been the tool that operationalizes and perhaps makes possible the U.S. government's increased willingness and appetite for using lethal force abroad especially in places where it doesn't want to put its troops on the ground.

Jameel will talk to about the drone program in more-- more detail and discuss the ACLU litigation map for (COUGH) lack of a better term has targeted the program. (LAUGHTER) Jameel will also delve into questions about the lawfulness of the

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program and-- whether its secrecy is justified. Most impressively, he'll do all of that in about-- 30 minutes or (LAUGHTER) so. By way of background, Jameel directs the American Civil Liberty Union Center for Democracy which houses the ACLU's work on human rights, national security and speech, privacy and technology.

And currently Jameel is an Open Society Fellow working on a book about issues relating to offi-- official secrecy and individual privacy in the United States se-- since September 11th, 2001. His book draws on-- his experiences litigating cases concerning the Bush administration's infamous torture memos, the (UNINTEL) torture photos, the U.S. Patriot Act, our s-- warrant list wiretapping and other issues included-- including targeted killings which he'll be discussing today. So let's get started. We'll keep this pretty informal. And-- when Jameel is-- finished (BACKGROUND TALKING) we'll open things up for questions and discussions. So over to you.

## JONATHAN HOROWITZ:

Okay, thanks, Jonathan. So-- I have about five hours of material. And-- I'm gonna try to keep it to 20 minutes so we have time, you know, to have-- a discussion. I thought I would start by trying to identify some of the answered questions-- or incompletely answered questions about the drone program.

And I'm gonna use that phrase-- the drone program-- because everybody uses it. But what I'm really talking about-- is targeted killing. I'm not talking about drones. Drones are used for many different things, some of them good, some of them bad. (COUGH)

I'm really talking about targeted killing. When I use the phrase drone program I'm talking about the targeted killing program. As everybody knows-- since 2001, the U.S. government has killed-- hundreds, thousands of people-- using armed drones mainly-- in places far removed from actual battlefields. That is something that we know to be true. But there're many things that are murkier. First-- first it's not entirely clear who it is that the government is killing.

That's a difficult question for a number of different reasons. It's difficult because the government doesn't acknowledge specific strikes. It doesn't release the names of the people who have been killed to the extent it knows those names.

It doesn't release aggregate causality number. You may remember General Tommy Franks' phrase from the Iraq war, "We don't do body counts," that's still true. Or it's certainly true that they don't release body counts. And for those reasons it's difficult to say who precisely it is that the government is killing. That said, there've been-- a number of claims made by various national security officials about civilian casualties. In June of 2011-- John Brennan who was then the president's chief counter terrorism advisor said that there had been zero civilian casualties. Senator Feingold who chairs the Senate Intelligence Committee said at-- at Brennan's confirmation hearing-- in February-- she said that the number of civilian casualties has been in the single digits. Those claims are pretty-- pretty clearly false. There was once strike in December of

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2009 in Al Mogela (PH)-- in Yemen-- that killed 41 people including 21 children and 14 women. The journalist, Jersey Scahill, has video footage of the aftermath.

There're wikileaks, cables discussing that particular strike-- the Yemeni government first took credit for it or responsibility for it. But then the wikileaks cables made clear that it was actually a U.S. strike. And that was just a single strike that caused dozens of civilian casualties. And there have been many, many other strikes that have been well-documented-- in Pakistan and Yemen especially-- resulting in civilian casualties. (COUGH) And then there are independent groups-- that are keeping track of-- of the U.S.' use of armed drones.

And those groups-- estimate that civilian casualty numbers are in the hundreds. The group that is probably tracking all of this most carefully is called the Bureau of Investigative Journalism. Some of you have worked with them. They're based in the U.K.

And they estimate that-- about 4,300 people have been killed-- by American armed drones. And of those, about 1,000-- were civilians. So there's, you know-- a chasm between the claims that national security officials are making publicly and the independent research that's out there. So how to explain that-- that difference? Well, one possible explanation for the difference is definitional because it matters obviously how you define-- you're distinguishing between civilians and militants, it depends-- it matters how you define militants.

And there have been a number of reports-- indicating that the C.I.A. at least defines-- uses a very broad definition of militant. There's a *New York Times* article-- from May of last year-- you probably all read it at the time-- that said that the C.I.A. was counting all men-- all military-- all military-age men in strike zones as combatants unless there was-- intelligence-- posthumously proving that they were innocent.

Now what-- what that means in practice I'm not entirely sure. But-- but-- one thing it means is that the C.I.A. is clearly counting some people who ought to be counted as civilians or bystanders as militants. And then just a few-- just a few weeks ago the former ambassador to Pakistan, Cameron Munter said that-- the-- the-- he was complaining that the C.I.A. in Pakistan had treated-- every military-aged man who was carrying a gun-- as a militant.

It's hard to know exactly how much weight to give claims like those. Former Obama administration officials have said to me and to some of you that those claims are not true. But-- there was clearly some sort of definitional gain going on that allows the government to say publicly-- that civilian casualty numbers are very low when-- when all of the evidence that's out there suggests just the opposite.

So one unanswered question is who is it (SNEEZE) that-- that the government is actually killing? A second unanswered question which I think is important is on whose orders are these strikes actually being carried out? President Obama said on Google Plus last year-- a Google Plus hangout last year-- he said that the program is on a very tight leash. (COUGH) That was his phrase. But it's not clear to me what that-- what that means. To the extent that the C.I.A. and JSOC are using-- kill lists--

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it's not clear who makes the decision to add a particular name to the kill list.  
(OVERTALK)

**JONATHAN HOROWITZ:**

Say JSOC.

**JAMEEL JAFFER:**

Oh JSOC. Sorry, what did I--  
(OVERTALK)

**JONATHAN HOROWITZ:**

Just the-- JSOC but just—

**JAMEEL JAFFER:**

--Joined Special Operations Command. It-- it's a component of the defense department-- special-- special-- special forces. It's a special forces. And they, along with the C.I.A.-- carry out these targeted killings. So there's a question about who adds the names to the kill list in the first place.

And then there's a quis-- question, once the names are added to the kill list, who is it that decides that a strike can be carried out at any particular point in time? And then there are many news reports that-- make clear that the government is relying not just on targeted killings (SIRENS) in the narrowest sense of that phrase but also on signature strikes.

The government is targeting groups of people-- because they exhibit certain behavioral-- signatures. You know, they-- it's-- it's a group of men-- carrying arms or it's somebody driving a flatbed-- bed truck that has a lot of-- men in the back. And based on certain signatures, the C.I.A. or JSOC will carry out a strike. So who is it that decides what signatures are sufficient to warrant the use of lethal force? So all of that is-- i-- is unclear. And so that's the second unanswered question.

The third un-- unanswered question is where are (COUGH) these killings being carried out? So we know that the government has used-- armed drones on actual battlefields, for example, in Afghanistan and Iraq. We also know that it's used armed drones and carried out targeted killings in Yemen, Somalia and Pakistan.

But we don't know whether the government has carried out targeted killings in other countries. There was-- an interview that-- that John Rizzo gave to *Newsweek*. John Rizzo's the former-- acting general counsel of the C.I.A.-- he gave this interview to

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*Newsweek* probably 18 months ago in which they asked him-- "Where are these drone strikes being carried out?"

And he didn't actually answer the question. But he said-- essentially-- "Don't be distracted by drones. The predator is the weapon of choice. But it could as easily be a bullet to your head." As the former-- general counsel of the C.I.A. And so that raises a question, you know, v-- both-- a question about methods, you know, is the-- is the C.I.A. using other methods, not just drones, to carry out these targeted killings?

But also raised for the first time the possibility that the C.I.A. was carrying out these killings in other places. And John Brennan at his confirmation hearing-- for C.I.A. director a couple months ago was asked directly by I think Senator Wyden-- "Where have you carried out-- where has the C.I.A. carried out these-- these targeted killings?"

And-- Brenna declined to answer the question. And he said, "If I am confirmed I will give you, the Senate Intelligence Committee, a list of those countries." So we don't know. We don't have a complete list of the countries in which the C.I.A. has carried out these-- these killings. So that's the third question. Fourth question-- this one has got a lot of-- a lot of press over the last few weeks-- what's the legal basis for these questions? The government has offered two different theories. One is that-- the authorization for use of military force that Congress passed in the weeks after 9/11-- authorizes-- it to use lethal force against Al Qaeda and affiliated forces.

The second theory is that the U.S. has authority to use military force (NOISE) in self-defense. And those two theories stated at that level of-- abstraction are not-- in my view, objectionable. I think that the government does have some authority under the AOF to use legal (?) force-- AUMF-- the Authorization for Use of Military Force.

And it does have authority in some stances to use military force in self-defense. But that's at a level of abstraction. Once you get to the details the government's-- the government's legal argument becomes I think a lot more problematic. For example, by its terms, the AUMF requires a link to 9/11. The AUMF was about-- was authorized the use of military force against the people who planned or authorized or aided the 9/11 attacks.

And the government is now using lethal force against many groups that had nothing to do with 9/11 and, in fact, didn't even exist when the 9/11 attacks were carried out. That's true of Al Qaeda in the Arabian Peninsula, it's true of the Shabaab in Somalia. Many of the people (NOISE) the government is targeting don't obviously fall within the scope of the AUMF.

A second problem is that while the government does have-- the authority to use military force in self-defense, ordinarily self-defense is limited to threats that are imminent. And the government is plainly using lethal force against people who present no imminent threat-- at all and sometimes who present no threat to the United States. They're actually engaged, not in some global conflict, but in local conflicts. And so it's not obvious how these two legal theories that the government has-- at least gestured towards-- it's not obvious how those legal theories actually

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justify the program as-- as it exists in practice.

There was a white paper that was leaked-- a justice (UNINTEL) white paper that was leaked to NBC News-- a couple of months ago. And that white paper sets out I think in more detail than it had been set out previously the government's two legal theories or its-- its legal theory based on these two different-- sources of authority.

One thing that's notable about-- the-- the-- the white paper is while alludes to this-- imminence requirement, it defines imminence very, very broadly. So imminence-- a person is deemed to be an imminent threat or can be deemed to be an imminent threat even if there's no reason to believe that the threat is immediate. And even if there's no-- reason to believe that the person is engaged in any specific plot.

And so the government uses the phrase-- the justice department uses the phrase continuing threat. The-- the-- the framework is imminence. But they define imminence by reference to the concept of a continuing threat. And so they accept imminence only really by gutting the-- the idea. So that's one-- in my view, one problem with the-- the white paper.

Another problem with the white paper-- is that the white paper is focused entirely on people who are-- thought to be senior leaders of Al Qaeda. The entire white paper is an argument that the government is justified in targeting people who are senior leaders. But the program as we know it does not target only senior leaders. You know, we have, again, killed 4,300 people-- Senator Lindsey Ga-- Graham said a few weeks ago it was 4,700 people-- killed-- killed some, you know, 4,000, 5,000 people. They can't all be senior leaders of Al Qaeda.

And-- there was a report out by Stanford Law School and-- and NYU Clinics-- came out maybe three or four weeks ago-- that estimated that only 2% of the people who have been killed in-- in Pakistan-- could fairly be described as high-profile targets. And so even if you accept everything that the while paper says as true-- the white paper is a defenses of a program quite different from the one that actually exists.

So that's-- that's the-- the-- the, you know, that's the white paper. That's the-- the issue of-- of legal authority. So-- so th-- those are my four unanswered questions. First one has to do with who it is that we're killing-- second has to do-- with where we are killing those people, the third is-- on whose orders-- are we killing people, and the fourth is on what legal authority? But that's just to say that there are a lot of unanswered questions about-- about the program and there's a lot of distance between the program that the government is defending and the program as it exists on the ground.

So I said I was gonna talk about-- litigation. In an effort to get more information about what is it that the government is doing, the ACLU has filed two different lawsuits under the freedom of information act. The one we filed-- back in 2010 in Washington-- in D.C.-- it's a relatively broad request. It includes a request for information about civilian casualties.

The other-- foyer (?) request we file-- we filed after a strike in Yemen or two strikes in Yemen killed three U.S. citizens in-- September and October of-- of 2011. So one of

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them was Anwar al-Awlaki who was actually targeted by the C.I.A. A second U.S. citizen was killed with him, Samir Khan. And two weeks later-- the C.I.A. killed Anwar al-Awlaki's 16-year-old son An-- Abdulrahman al-Awlaki in a separate strike 400 miles away from the earlier one. So those three U.S. citizens were killed in a matter of a month in-- in Yemen.

And after those strikes we filed a second freedom of information act request and eventually a lawsuit to enforce that request asking for, among other things, the legal-- the legal memos underlying the program including legal memos relating to the-- the government's authority to kill U.S. citizens.

So two separate-- requests-- two separate lawsuits-- the government's response-- to the extent we were asking for information about agencies other than the C.I.A. the government's response was, "This information is-- i-- is covered by-- is classified and can't be released without the jea-- without jeopardizing national security. And therefore, we are withholding it." That was the government's argument with respect to information, for example, from the defense department.

With respect to the C.I.A.-- the government's argument was a little bit different. The government said, "We can't even acknowledge-- that the C.I.A. has any role (BANGING) in-- in a targeted killing program. We can't confirm that the C.I.A. has any documents. We can't confirm that there is such a program."

It's called a Glomar response because-- 30 years ago there was a case in D.C. involving a ship called the Glomar Explorer that the C.I.A. didn't want to confirm was its ship. And the D.C. circuit upheld the C.I.A.'s non-response to a foyer request. The C.I.A. had said, "We can't confirm this is our ship. We can't confirm we have any documents about it." And the D.C. circuit said, "In these circumstances it's okay for the C.I.A. to give that kind of non-response." And so the C.I.A. gave us the same kind of non-response. They said, "We can't-- we can't acknowledge-- that there is such a targeted killing program. And we can't acknowledge that we have any documents relating to it."

That argument-- and the ar-- other argument from other agencies about national security-- preventing the disclosure (COUGH) of information about the program-- those arguments were accepted both by the district court in New York and by the district court in-- in D.C.

In New York the-- the district court was-- conflicted about-- accepting the government's argument but did ultimately accept it. There was a sentence from-- a couple sentences from the district court's opinion in New York that-- got picked up by a lot of the news stories and I'll read them for you. So the judge upholds the C.I.A.'s non-response and then says, "I can find no-- no way around the thicket of laws and precedents that effectively allow the executive branch of our government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our constitution while keeping the reasons for their conclusion a secret. The *Alice in Wonderland* nature of this pronouncement is not lost on me." So that's what she says. But she goes onto-- to affirm the C.I.A.'s-- non-response to the request.

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The-- the district court in D.C. also accepted-- the C.I.A.'s-- Glomar response. But just a couple of weeks ago the D.C. circuit-- the appeals court-- overturned that-- overturned that ruling. The key sentence from the D.C. circuit's ruling-- was this one-- "In this case, the C.I.A. asked the courts to stretch the Glomar doctrine too far. To give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible."

And that's obviously true. At this point it's-- it's not plausible that the C.I.A. doesn't have a role in the targeted killing program. So much has been said publically about it. Not only-- by third parties but by the government itself. And that was the argument we made to the court. And we were gratified-- when the D.C. circuit accepted it.

That said, the D.C. circuit's decision is very narrow. It-- it-- all it requires the-- the C.I.A. to do is acknowledge the existence of a program that everybody already knows exists. (LAUGHTER) And so the implications of the ruling-- may not be dramatic.

But-- but one thing that the C.I.A. now has to do is process the foyer request-- just like it would have had to process any other foyer requests. And that means explaining what information it has about the program and providing a justification for keeping it secret or releasing it. So that is a step forward. It's a small step forward but it's a step forward. As anyone who has litigated freedom of information (UNINTEL) knows sometimes the government's explanations for keeping things secret can themselves be valuable.

And-- when we litigated the torture cases a few years ago one of the most valuable things that we got from the C.I.A. was an index of the documents that it possessed about-- the destruction of videotapes. And from that index we were able to assemble a narrative about-- when the tapes were created, when they were destroyed, who authorized the destruction.

They didn't release any documents. But they released an index of the documents and the index itself was-- was useful. Whether we get a useful index in this case I, you know, we'll have to see. But-- but it's a possibility because of the D.C. circuit's decision. So-- I'm-- I'm-- I wanna stop very shortly. But-- but I wanna say one more thing-- concerns about the-- the lawfulness of the program have led a number of people now to-- ask whether the court should be playing more of a role in-- either assessing the lawfulness of the framework under which these strikes are being carried out, or assessing the lawfulness of individual strikes.

Responses to that proposal-- fall into three categories. John Yoo and the Obama administration have argued that the courts should play no role at all. The argument is that the-- the argument is that the court should not-- second-guess the executive-- the executive's targeting decisions during wartime and that, indeed, it would be unconstitutional for courts to do so.

Ironically, many of the Obama administration officials who are making this argument now were making exactly the opposite argument when the Bush administration was proposing that the courts had no role to play in second-guessing the government's



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detention decisions. But those-- officials have now switched sides and are arguing that the courts should stay out of it. The second-- possible response-- which comes from people like Senator Feinstein-- Jane Harman-- David Cole-- is that the court-- that Congress should establish-- specialized drone court-- to oversee the-- the-- the targeted killing program.

And I think that that proposal comes from a good place. I think that, you know, the-- it's-- it's an-- it-- it recognizes that the courts have-- have a role to play. The ACLU hasn't endorsed that proposal for a couple of reasons. First-- we're-- convinced that a court that is reviewing strikes before they take place-- is likely to play any-- is likely to be a significant check on executive action.

It's more likely just to as the FISA court does, rubber stamp things that the executive would've done on its own anyway. So that's one thing. We're just not confident that a court playing a role before a strike's occurring out-- w-- carried out w-- will actually-- serve as a meaningful check.

And the second thing is it only makes sense to proport-- to-- to propose before the fact judicial review if you think that there will be time for it. Right, and-- and-- and-- to propose that the court has that role to play is to accept that the government has the authority to use lethal force against people who don't pose imminent threats.

Because if you're talking only about people who propose imminent-- who pose imminent threats, by definition, prior judicial review is infeasible. So the drone court proposal is sort of-- the-- the implicit premise in the drone court proposal is that the government has authority to target people who don't present imminent threats. And that's not a premiss that we at the ACLU have accepted. The final-- possible response to this drone-- to-- to the judicial review proposal is the one that-- that we have been making at the ACLU-- and that's that the court should play a role after the fact.

That once a strike is carried out-- family members can go into court and challenge the lawfulness of the strike. Now there's something that is obviously unsatisfactory about that kind of judicial review because it's, by definition, too late. The person who is-- who's been targeted has been killed.

But-- it doesn't raise any of the operational powers concerns that-- that have been raised by people in the Obama administration. It doesn't raise the concern about a court overseeing the government's targeting decisions. And it's the way that the courts already deal with wrongful death suits inside the United States. If the police kill somebody in New York because they think he's waving a gun around-- the remedy is family members can go into court and challenge the-- the lawfulness of the-- the police's action.

And again, that is obviously unsatisfactory in a very obvious way. But it does create a legal framework that operates prospectively to cabin the government's authority and to create incentives and disincentives-- where they should be created. It's also the way that courts have been dealing with-- national security detention. In-- in D.C. there are district courts that routinely now review the-- the government's justification

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for detaining people who are detained at Guantanamo. They review the evidence. They ask whether the government has the legal authority to-- to-- to detain the person, they ask whether-- whether the government's evidence was sufficient.

That's exactly the same kind of task the courts would have to do-- in-- with respect to targeted killing. And there is, in fact, a lawsuit already pending. The ACLU and the C-- and CCR have brought a suit on behalf of the three U.S. citizens who were killed in Yemen. The case is pending in D.C. right now-- in a district court in D.C.

And it seeks exactly-- exactly that kind of after-the-fact judicial review. So those are s-- those are the three options that are out there right now. I think we'll see that judicial review question resolved over the next-- few months.

A final point I-- I-- I wanna make just very quickly is that-- you know, I've talked mainly about the law-- and the law is important here. But-- I also think that-- and Lisa and I were talking about this a few days ago, there's some danger in-- if you just have a legal argument-- there's some danger in losing the forest for the trees. You know, if you step back, what's going on here is we are-- we've killed hundreds of people who-- whose identities we don't know-- in countries we can't name on the basis of standards that are secret, on the basis of evidence that has never been presented to a court.

And I think you don't need to be a legal genius to understand that there's something wrong with that. It's inconceivable to me that people would be-- so complacent about this policy if this policy-- were being proposed by the Bush administration.

The reason it's being accepted is that people trust President Obama, they trust John Brennan-- they trust-- they trust Harold Koh. Whether that trust is well-placed or not is, you know, other people can decide. But those people are not going to be (UNINTEL) left, right? But-- but-- those people are not gonna be the ones with their fingers on the trigger-- forever. There'll be other people in their positions. And those people will have the same power that we have given to-- President Obama and John Brennan. And that power will be used not just with respect to Al Qaeda but with respect to the next-- the next group in the next war.

And it'll be used in other countries and with other methods, not just drones. And you have to ask whether this power that we are now investing in the executive branch is a c-- is actually caveatable (?). Once you give it to them-- you know, where-- where is the-- where is the stopping point?

And that power will be used by other countries as well. It's already being used-- or-- or-- China has already contemplated using it-- in one case. Although I think at the last minute it decided not to. And there were, as everybody knows, targeted killings in the 1980s and 1990s. In Washington D.C. there was a Chilean dissident who was killed by the Pinochet regime. We prosecuted the people-- who carried it out. When Alexander Litvinenko was killed in London in 2006-- we called it a crime. And it was a crime. What will we say the next time something like that-- like that happens? So I-- you-- you know, I think a legal argument is important. But the legal argument is only a small piece of this. I think I'll stop there and-- and hopefully I haven't used up

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all the time. Okay.

## JONATHAN HOROWITZ:

Well-disciplined. Thank you (LAUGHTER) that was-- that was a-- a great sort of drive through the various-- issues that-- the-- the drone program-- pose I would say to-- the American public, to the countries that-- they're used in as well-- (HONKING) abroad.

I will open up for questions. I just wanna mention your-- your four unanswered questions I think are a great template that President Obama should follow to fulfill what-- Attorney General Holder said a few weeks or months ago when he said that President Obama-- heard the calls for transparency about the drone program and will answer them. We don't know what that answer's gonna look like. (LAUGHTER) But if they could answer a good chunk of the questions you pose I think-- that would be a great contribution.

Wishful thinking, perhaps, but (LAUGHTER) we'll see-- we'll see-- what happens. I just have-- I had one question maybe to-- to-- to start things off from and then-- we'll get straight to questions from-- from all of you which is-- where do you see things going from here? From a litigation advocacy strategy, for a non-litigation advocacy strategy and just to sort of sweeten the pot-- 2014, U.S. troops supposedly a big bulk of them moving out-- out of Afghanistan, how does-- how does that affect the landscape-- of the discussion around this (COUGH) issue?

## JAMEEL JAFFER:

Well-- I-- I think to answer the last part of your question, I-- I mean, I think that there is this question of what the connection is between the drawdown of troops in Afghanistan and the government's authority to rely on the AUMF.

And I think that there are many people in the Obama administration who are rightfully anxious about their-- to use legal force-- in some sense, running out-- because of the draw-- drawdown of-- of troops in Afghanistan. You know, the truth is that-- whether that connection actually holds-- whether-- whether the-- the withdrawal of troops from Afghanistan means that the government can-- no longer rely on the AUMF or decides no longer to rely on the AUMF is more of a political question than a legal question.

I don't think that there is-- a strong legal argument. I don't think that it-- it dramatically changes the government's legal arguments. I think the legal arguments that they've been making to the extent that they are persuasive-- and again, you know, I-- not one who's been persuaded by them. But to the extent they're persuasive I think they'll continue to be persuasive after the drawdown.

I think the question is whether we can-- whether human rights groups and anti-war groups can use the-- the end of the war in Afghanistan as an opportunity to--

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persuade the administration that it's time to declare an end to the broader war and to rely-- you know, to the extent there are imminent threats the government will continue (SNEEZE) to have self-defense authority to address them. It's not gonna leave the government without any power. But it will mean-- declaring an end to a (TRUCK) war that the government is has not yet been willing to declare an end to.

## JONATHAN HOROWITZ:

Who would like to begin? Please go ahead.

## FEMALE VOICE #3:

So I mentioned that I was probably going to ask but there's been recently a publicized-- so it might have been from prior time-- but there's a publicized push apparently to move the targeted killings drone program completely out of the realm with C.I.-- of C.I.A. jurisdiction into DOD jurisdiction.

And I'm wondering what that means in practical aspects for those of us who do work on human rights issues in terms of transparency and later down the road in terms of accountability. Is retroactive transparency a possibility? Is this in actuality actually going to change anything? Are we still not going to know as much in terms of the arguments? What legally does that change from a government standpoint to those of us working on these issues?

## JAMEEL JAFFER:

I-- I think those are good questions. (LAUGHTER) I-- I don't-- I don't know the answer. I mean, it might-- my colleague, Chris Anders, who's our lobbyist on these-- the-- these issues at the ACLU (NOISE) he-- he has a piece in *The Guardian* and I think it went up yesterday about-- about precisely those questions, about what-- what significance there is in the possibility that the-- the-- the program will be moved from the C.I.A. to-- to DOD.

I think that it creates the possibility of more transparency. It doesn't guarantee that there'll be more transparency. It creates the possibility of a narrower program. Doesn't guarantee that there'll be a narrower program. You know, we did advocate-- one-- one, you know, one thing that many people say is that part of the reason the program expanded so dramatically is that there was a kind of competition between the two-- the two (NOISE) agencies-- to be the one carrying out strikes in any particular place or against any particular group.

I don't know if that's true or not. But-- if it is true, then moving it to a single agency will-- resolve that problem. You know, at the end of the day, you know, what matters most is not whose finger is on the trigger but, you know, under what circumstances they're actually pulling the trigger.

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And-- I don't think that moving-- simply moving the program is going to guarantee that the program is-- is-- (NOISE) is narrower. It's possible that moving the program is-- an indication that the administration is committed to-- to narrowing the program and to more transparency around it. But that remains to be-- remains to be seen.

## **MALE VOICE #2:**

I've got two questions.

## **JAMEEL JAFFER:**

Yeah, please.

## **MALE VOICE #2:**

I'll be succinct. My first one is what kind of consequences (COUGH) would you expect-- slash-- desire from these-- post-targeted killing hearings. I mean, as you (HONKING) said it would be too late to, I mean, morally. But, like, what-- what would you hope would come out of a wrongful targeted killing?

And my second question would be, I mean, just to play a little devil's advocate, what kind of information in a classified project would you be expecting-- slash-- want before it happens or even after it happens? And I guess because of the nature of it being classified-- because of the nature of these targeted killings, like, have to be approved by someone, there's already I'm asking a chain of command when they make these decisions, what kind of information would you want from that system?

## **JAMEEL JAFFER:**

Uh-huh (AFFIRM). Well, so on the-- the-- the first question is a question about-- you know, what we're asking for in the-- after-- after the fact suits. There-- just because of the way American constitutional law works they're-- they're damages-- they're damages suits against-- government officials who are alleged to have violated the constitution.

The chances of actually getting damages from senior officials who-- who-- who authorized these strikes-- the chances are pretty slim. The-- the suit though is meant to-- it-- it-- in order to reach that point though a court is going to have to analyze the-- scope of the government's legal authority.

And if a court does that then it has created rules that will apply to the government going forward. (BEEPING) And if the court finds that-- the government violated the constitution as we alleged in this particular case-- it also creates-- something that many victims of these policies care a lot about which is an acknowledgement of

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wrongdoing. And-- you know, it's a small thing c-- you know, again-- you know, a judge can't resurrect people who've been killed unlawfully. But-- you know, having talked to many people who are affected by the program-- and-- and also talk to many people who are affected by the C.I.A.'s torture program-- a lot of 'em care deeply about-- an-- an official acknowledgment of wrongdoing. And-- that-- it would mean something to them.

So-- so, you know, there are-- there are those possibilities. There-- there is-- a legislative proposal that has been floated by some law professors that would-- essentially move the damages obligation from individual officials to the government itself.

We haven't said anything. The ACLU hasn't said anything publicly about that proposal but I personally think it's a good idea. I think that it's-- you know, ultimately these are decisions that are being made by the government, not by individuals. And-- it seems-- it seems fairer and-- well, it seems fairer to make the government-- be on the hook for it rather than make senior officials be on the-- be on the hook for it.

So it's possible that kind of legislation will-- will actually get introduced and maybe it'll go somewhere I think is a good idea. The same legislation would make it-- would preempt the state (UNINTEL) privilege which is something that the government has relied on cases li-- in cases like this.

And it would prevent the government from re-- relying on that doctrine to quash these kinds of cases. And this sort of goes to your-- your question about classification. It's true a lot of the information here is classified. We don't think it should it be classified. You know, to the extent that the government is classifying-- information about intelligence sources and methods, that's open thing. But what the government is classifying here is not just that. It's classifying legal arguments-- even after strikes are carrying out-- carried out, it's classifying-- factual information that it would have had to introduce in court had it charged any of these people with crimes.

And i-- i-- in a way, it creates a kind of perverse incentive for the government to kill people rather than-- try them because-- if they try them, they have to introduce this evidence. You can't try somebody on the basis of evidence that's never introduced in court. But if you kill somebody the government says-- "We don't have to introduce that evidence in court." I'm not saying that the government is choosing to kill people rather than try them-- although this does create this kind of incentive structure.

### **MALE VOICE #3:**

Very well said, national security (UNINTEL) campaign. In your opinion, do you think if there's a new (BEEPING) AUMF-- so, let's say Congress passes a new AUMF saying president can target anyone who's a terrorist based on some criteria or no criteria at all anywhere in the world-- is that fundamentally change, like, the litigation and the advocacy just in general requirement? Or does it kind of, you know-- doesn't really

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change anything at all or for-- for the ACLU's work or for the kind of (UNINTEL) general?

## **JAMEEL JAFFER:**

Well-- I mean, I think it would-- it-- it would change the arguments-- you know, part of our argument right now is that the AUMF doesn't extend to some of the strikes that the government is ca-- is carrying out. And Congress could make that argument go away by-- by enacting a new AUMF.

You know, my impression is that there aren't many people in the Obama administration who are actually that keen on a new AUMF. And the call is coming from-- you know, Ben Wittes and Bobby Chesney and Jack Goldsmith, people who are supportive of many of the administration's national security policies but have a different agenda.

And I think that there are people in the Obama administration who-- do want this program to be subject to some kinds of-- s-- to some real limits. And-- they said this I think pretty forthrightly that they're concerned about what another administration might do with the power that they have now-- now claimed. And I think that they ought to be concerned.

So I-- you know, maybe this proposal for a new AUMF will go somewhere. But if it does-- I-- I don't think it'll go somewhere because the Obama administration's really that keen on it. It'll-- and so far nobody-- I-- I don't think there's anybody-- to put it crassly-- I don't think there's anybody they-- they wanted to kill who-- they couldn't find some legal argument to, you know, who-- who's killing they couldn't find some legal argument to-- to-- to justify. (NOISE) So-- you know, the other-- but one of the things that's complicated about the AUMF is, you know, the-- the current AUMF is vague enough that the Supreme Court has said, "It has to be read against international law."

And so the arguments about the meaning of the AUMF are really arguments about-- international law. People argue about what IHL requires, what it doesn't require. Or they req-- they-- they argue about-- you know, when is there an armed (BANGING) conflict under international law?

If Congress were to enact a much more specific AUMF that conflicted with international law-- you know, I don't know how we would deal with that. I don't know how the courts would-- w-- would deal with that. You know, maybe there would be a supremely clause argument against (BANGING) the AUMF in that situation. But-- but it would-- I think it would make litigation on this issue much-- much more difficult. And it's already quite difficult.

## **MALE VOICE #4:**

I may just have a f-- a follow-up (COUGH) question to both the last two questions

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that were asked which is given the history of-- some of the-- U.S. courts interpretations and acceptance of associated forces-- the decision in Holder in relation to-- humanitarian providers-- humanitarian--  
(OVERTALK)

## **MALE VOICE #4:**

--assistance providers, how well are U.S. judges doing at correctly interpreting international humanitarian law-- in such a way that if you did get the issue of post-targeting assessments or post-strike assessments in front of them, that they would even be capable of providing us with a type of interpretation that we're comfortable with?

## **JAMEEL JAFFER:**

Yeah, I mean, I don't think there's any guarantee that we would get an interpretation that we're-- that we're comfortable with. I mean, I think that the Supreme Court, you know-- in-- in the few cases in which it actually assessed-- the AUMF-- cases like Hamdi, you know-- the Supreme Court, (COUGH) you know, those decision are seen as in (COUGH) general human rights friendly decisions.

But the Supreme Court has-- has for the most part stayed out of this-- you know, except-- except to make the decision that the lower courts have the authority and the obligation to hear (NOISE) habeas petitions filed by detainees at Guantanamo. The Supreme Court since (UNINTEL) has-- has-- has stayed out-- of these questions altogether.

And the D.C. circuit has been essentially left in charge. And the D.C. circuit-- has-- has been quite-- generous to-- the Bush administration and the Obama administration in interpreting the AUMF. So-- so-- if the D.C. circuit is the court that's gonna make these decisions I think that that's-- that's a problem for us. But, you know, having judges involved at least creates the possibility of resistance to these policies. And without judges involved there's not even a, you know, possibility. So we're arguing for judicial oversight for that reason.

## **FEMALE VOICE #4:**

This is Lisa Magaralisa (PH) from the National Security Human Rights Campaign. I was curious that you said you-- you thought that the question of judicial review would be resolved fairly soon. You-- you said within a few months. Do you really think-- is that sort of the assessment that things are moving that quickly?



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## JAMEEL JAFFER:

No I-- I didn't mean to say that it'd be resolved (BANGING) in the next few months. I think it'll unfold over the next few months. You know, there's-- what-- what I understand is that Senator Feingold who at one-- sorry, Senator Feinstein who-- who at one point had proposed the drone court is now having second thoughts about whether that's the best idea.

And-- now there is this movement among some law professors to push this after-the-fact judicial review-- which again, you know-- I think is a better idea. While it has its, you know, fundamental flaw, I think it's a better idea than-- a drone court that exists solely to review-- you know, death warrants or proposed death warrants.

So I think it'll play out, you know, in Congress over the next few months and-- or begin playing out in Congress over the next few months. And then meanwhile there's this litigation in D.C. in which a court is being asked to do-- you know, exactly what I was discussing, after-the-fact judicial review. And-- you know, we'll see how the court responds to that. So-- but, you know, these legal arguments and litigation-- the litigation is just a small piece of this. And ultimately I don't think that these decisions are going to be made because courts order the government to do one thing or another.

I think the litigation can influence the debate. But it's the larger debate that matters. And that political debate is influenced by all sorts of thing, right? It's influenced by-- the drawdown of troops in Afghanistan. It's influe-- influenced by elections, it's influenced by-- media reports about civilian casualties. It's influenced by Rand Paul's filibuster.

It's very difficult to predict-- you know, when-- when the public will get excited about any particular issue or-- upset about any particular issue. And-- very difficult to predict how these big institutions like Congress or the courts will respond to-- respond to those things what might happen. You know, w-- what-- at the ACLU I think what we're trying to do is, you know, the lay the groundwork so there's the possibility of institutions doing the right things when those opportunities happen to come up. But-- you-- you know, I feel like we-- we control only-- we have control over-- a very small number of-- of-- of these factors.

## FEMALE VOICE #5:

Can I just follow up? I mean, I think one of the really interesting issues around the drones debate is that it in a way it connects to Guantanamo and to the administration's reluctance to let some people go. And so I-- I'm just curious how you see this connection. I mean, how you define the legal basis for tar-- drone targeting? Also connects to how you justify continuing to hold people under law of war, detention-- or in some other context. So I wonder if you see the two problems as linked and what the advocacy strategy around that needs to be, separate, very separate, because there's a little more momentum on drones? Or does it need to

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recognize that connection?

## **JAMEEL JAFFER:**

Yeah, I'm-- I don't have-- I-- I definitely don't have a complete answer to that question. I mean, there-- you know, the two issues are linked for many reasons. One of the reasons they're linked is that the government is relying on the AUMF in both situations.

So the question of the scope of the AUMF-- comes up in both situations. Now whether the government's authority to detain is-- the same as its authority to kill, in other words-- you know-- does it-- does it have the-- the same authority to kill people that does have to-- that it does to detain them-- I think is a complicated question and not one that any court has yet had to-- to-- to resolve.

But as for, you know, our advocacy strategy-- you know, I-- I guess I had given up a little bit on trying to-- to drive the debate-- you know, and instead am spending more time thinking about how to take advantage of whatever it is that people are talking about right now. And-- you know, I think that Rand Paul's filibuster for all of its flaws-- and there are many flaws-- did create an opportunity to bring attention to the scope of the claim that the government was making-- the possible-- abuses of this authority-- the possibility of judicial oversight.

There are all sorts of things that we were able to talk about because Rand Paul had got people's attention. The leak of the white paper to NBC News was another such opportunity. The-- the-- John Brennan's confirmation hearing provided another-- opportunity.

And there was a time when we used to-- we at the ACLU used to spend a lot of energy trying to keep people on one topic for a long time or-- or saying that, you know, over the next three months we're going to-- make progress on Guantanamo specifically. And-- you know, to some extent we still try to do that. But-- but I think we've shifted a little bit towards-- being more responsive rather than proactive in that particular sense.

## **JONATHAN HOROWITZ:**

So you have time for one or two more questions.

## **FEMALE VOICE #6:**

I have a question.

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## JONATHAN HOROWITZ:

Yeah, please.

## FEMALE VOICE #6:

(UNINTEL) Economic Development Fund (?). How complicated does your life get when governments like Pakistan, you know, they don't admit it-- but have given permission for drone-- drone strikes to (UNINTEL) to kill Pakistani citizens-- at U.S.'- - well, there's some conclusion there but that's happening. How much does that complicate what you do? And second, how much of an opportunity is that to go at this by getting at the Pakistani government for allowing the killing of its own citizens without any-- court or any case or—

## JAMEEL JAFFER:

Right, well, you know, for-- for a long time it wasn't obvious to me why the government wouldn't release the (UNINTEL) memos. You know, they were willing to say so much about their legal analysis publically. You know, this white paper that they gave to Congress is also-- an extensive legal analysis.

And it-- wasn't obvious to me why they weren't-- releasing the memos themselves. It's still (COUGH) not obvious to me why they're not releasing the memos themselves. But one of the arguments they've made is that-- the memos-- apparently-- name specific countries.

And to release the memos would in-- in-- I guess because the-- the-- the naming of the countries are so intertwined with the legal analysis-- the naming the-- the-- the releasing the memos would require them to break promises that they've made to foreign intelligence services because they have guaranteed other countries that they will keep these-- keep these secrets.

Now they're-- I have a lotta questions about that. It's-- it-- it's-- you know, it-- it doesn't seem plausible to me that the names of countries really are so intertwined with the legal analysis or so intertwined with other documents-- that they refuse to-- to release. I don't see why they can't just redact that information and provide us the rest of it.

But then there's another-- you-- you know, there's sort of-- a more fundamental question which is-- should-- should the government be making these promises to other countries? Be-- should the government be saying to Yemen and Pakistan-- "Yes, we will-- keep it secret (NOISE) that we are carrying out strikes in, you know, in your countries?" And it may be true that there are cost to not allowing the government to make those kinds of promises. But there are also costs to allowing the government to make those kinds of promises.

And one cost is that the American (BEEPING) public doesn't know in which countries

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the government is at war. Right, the government is using military force in some number of countries that we don't know. And that's a cost to this kind of secrecy.

One of the frustrating things about litigating these issues is-- is that there is no mechanism in American law-- by which some institution other than the executive branch can weigh those costs. There's-- there's no-- there's no mechanism that allows somebody independent of-- of the executive branch to say, "Well, it may be that there are costs to this kind of-- openness. But (BEEPING) the benefits to this kind of openness outweigh those costs." Now I suppose once answer is, well, the political process is the balancing. You know, American citizens will decide. If they don't like the secrecy, there are going to complain about it and they're going to get rid of people who are-- executive officials who are-- overly reticent. And they're going to elect people who promise to-- who promise to be transparent.

But that argument I think goes only so far because you don't know what you're not being told. And-- you don't know in which countries the government is at war. And part of, you know-- this is-- it's deep secrecy. David Pozen, who's a professor at Columbia has this-- great article about this kind of secrecy where you don't know what you don't know. Calls it *Deep Secrecy*.

And this kind of deep-- deep-- deep secrecy is-- not really something that can be addressed through the kind of political process that I was just describing. If we don't know what we don't know then it's difficult to hold people accountable. So, you know, that's just a long way of saying that-- for better or worse-- I think worse-- nobody is actually weighing the costs of that kind of secrecy against the benefits, if there are benefits to it.

## JONATHAN HOROWITZ:

So we're at the one hour mark. Unless there are any extremely pressing questions-- I'll probably wanna end it here and give a big thank you-- to Jameel. I think the-- the end-- discussion about-- about the linkages between the U.S.-- other governments that it's operating in-- really exposes the complexity of-- of the debate and the responsibilities of, say, the Pakistan government or the-- or Pakistan civil society and the U.S. government and U.S. civil society and engaging on all these issue-- as well as all the other countries we do and don't know about. So thank you for all-- joining us. And-- thank you, Jameel.

## JAMEEL JAFFER:

Appreciate it. (APPLAUSE)

\* \* \*END OF TRANSCRIPT\* \* \*