



Jameel Jaffer, American Civil Liberties Union

[by Regan Morris]

At just 33 years of age, Jameel Jaffer was recently named one of the top attorneys under 40 by the *National Law Journal*. LawCrossing speaks with Mr. Jaffer about his career at the American Civil Liberties Union (ACLU) and his thoughts on the Patriot Act.

Jameel Jaffer was one of the first attorneys in the United States with access to people detained on immigration charges after the September 11 attacks. He was working as a corporate attorney at the time for Davis, Polk & Wardwell and interviewing detainees as part of his pro bono work for the ACLU.

"And most of those people hadn't been able to see their families for a long time," he said of the detainees. "Some of them hadn't been allowed to see lawyers. And the ACLU was one of the first organizations to get people into the detention centers to find out who was being held and why they were being held."

Jaffer found the work incredibly rewarding. After September 11, when the ACLU expanded its operations, Jaffer joined the civil liberties group full time.

A litigator with ACLU's National Legal Department, Jaffer focuses his practice on national security issues. He has served as counsel in some of the most prominent cases involving the USA Patriot Act. He was co-counsel in the Freedom of Information Act case, ACLU v. Department of Defense, which resulted in the release of thousands of documents concerning the treatment of prisoners in Guantanamo Bay, Iraq, and Afghanistan.

Jaffer said he believes certain provisions of the Patriot Act are dangerous for Americans and that there is too much rhetoric surrounding the act. Many believe the Patriot Act is necessary to keep the United States safe from terrorists.

"We try to get people to see the substance of the issue and not just the rhetoric surrounding it," he said. "There are some surveillance issues in the Patriot Act that we've challenged, and there's a whole category of reasonable people out there whose first reaction to those kinds of challenges is 'Don't we need these kinds of challenges to make us safe?'"

Jaffer questions how many of the surveillance provisions keep Americans safer and says there should be more procedural safeguards to balance the need for security and civil rights.

In *ACLU & Doe v. Ashcroft*, Jaffer filed his case completely under seal because the case concerned national security letters, or NSLs. The letters, which existed before the Patriot Act, allow the FBI to obtain personal records about people from communications companies like Internet Service Providers and phone companies if the FBI feels the records are relevant to a terror investigation (the personal records do not necessarily have to be from a terror suspect). People who receive NSLs are barred from telling anyone.

The letters were allowed under Section 2709 of the Electronic Communications Privacy Act, enacted in 1986. The Patriot Act revised Section 2709, allowing the FBI to move faster in issuing the NSLs.

In September, a New York District court ruled that "the compulsory, secret, and unreviewable production of information required by the FBI's application" of the

NSLs violated the Fourth Amendment and that the non-disclosure provision violated the First Amendment. It was quite a victory for Jaffer and the ACLU. The government has appealed.

"That's an interesting case for many reasons, but one of them is that we had to file the case entirely under seal because there is this non-disclosure provision in the statute that prohibits anyone who receives any of these national security letters from disclosing that to anyone else," he said. "If you're a library and you get one of these things, or you're an Internet Service Provider and you get one of these things, you can't tell anyone else that you got one. And one consequence of that is that anyone who wants to challenge these to the extent that the law contemplates challenges at all—the challenge has to be filed under seal."

Jaffer, who studied law at Harvard after earning a Master's degree from Cambridge, is also working on a case in Michigan involving Section 215 of the Patriot Act, which allows the FBI to order libraries and other organizations to provide personal information about their customers.

"I think there are certain provisions of the Patriot Act that are very dangerous. I wouldn't say that about the whole act. In fact, I think there are some provisions of the Patriot Act that make sense, that should have been enacted even earlier," he said. "The thing about the surveillance provisions that is particularly problematic is the absence of judicial oversight."



Without judicial oversight, the FBI could obtain records without probable cause, he said. Even if you are not an official suspect in a case, the FBI could find out what books you are reading, what websites you visit, and what political organizations you belong to, Jaffer said.

"And this is all information that the FBI can obtain about people who aren't suspected of having done anything wrong," he said.

Jaffer said detaining people without trial could create a culture of fear in the United States and that while many are focused on Abu Ghraib and abuse scandals abroad, there are cases in the United States where people are being held without charges.

"That's one of the things that Americans take justifiable pride in, that their system doesn't allow for—or until recently—didn't allow for those kinds of indefinite detentions and didn't

allow for the abuse or torture of detainees and always allowed detainees access to counsel, always allowed them access to due process," he said. "That's what's been taken away. That's what the current administration is denying to the detainees who are held in these places."

Despite his success at such a young age, Jaffer was relatively late to the law. He initially thought he wanted to work in economic development in the developing world. Born in Canada, Jaffer was a math and English major at Williams College in Massachusetts. He spent a year as an investment banker at Lehman Brothers, and then he studied development and economics at Cambridge before going to Harvard Law School.

"I thought I would go to law school and do development work, sort of law and development, which was then sort of a hot

field. And that's still something that I find very interesting—the connection between law and economic and political development," he said.

Jaffer said he may decide to go back into economic development one day, but for now the ACLU, he says, is the most rewarding job he's ever had.

"I can't imagine having a more rewarding legal job," he said. "I found that interviewing the detainees was so fulfilling. Those people really needed our help. We were their only link to the outside world and I thought that if I could use my law degree to help people like that, I would be a much happier lawyer."