

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY
NEW BRUNSWICK

AN INTERVIEW WITH SUSAN HERMAN
FOR THE
RUTGERS ORAL HISTORY ARCHIVES

INTERVIEW CONDUCTED BY
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TRANSCRIPT BY
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Shaun Illingworth: This begins an interview with Professor Susan Herman at the Brooklyn Law School in Brooklyn, New York, on July 30th, 2014, with Shaun Illingworth for the ACLU Oral History Project. Thank you very much for having me here today.

Susan Herman: My pleasure.

SI: To begin, I want to know a little bit about your background. Could you start with where and when you were born?

SH: I was born in 1947. I was born in Brooklyn, where I've ended up, but when I was three my parents moved out to Long Island where I went to elementary school and high school.

SI: Where in Long Island?

SH: Long Beach.

SI: Tell me a little bit about what it was like growing up out in Long Beach, what your community was like, that sort of thing.

SH: My community in Long Beach was a very upper middle class community; it was a commuter community. Most people's fathers came to work in the city and the mothers mostly stayed home and took care of the family. The community was very heavily Jewish, and so as I grew up, I kind of had the impression that anybody who wasn't Jewish was probably a sanitation worker or a bus driver.

SI: Was your family Jewish?

SH: Yes.

SI: Did that play a big part in your life growing up, religion?

SH: I don't know that religion played a big part in my life growing up. I was certainly sent to Sunday school and we went to some services, [but] the religion didn't really take. I don't actively practice religion today, but I think that there is something to the sensibility of your growing up Jewish, which I think makes you particularly sensitive to people who are marginalized and people who tend to get the bad end of history.

SI: When you were coming of age as a teenager in high school, were you interested in those kinds of issues, of people who were marginalized? It would probably be early, but the Civil Rights Movement was starting to gain steam and things were happening in the South. Were you following those events?

SH: I was vaguely aware of such things when I was in high school, but I graduated from high school in 1964 and I was a little too young to really be involved in those events. I think it would've crossed my mind from time to time, "Well, should I go to Mississippi?" but my mother never would've let me at the time. In my high school, it wasn't a highly political high school. There was really no tremendous presence for a debate society, and what I was doing in high school was more theater and a range of internal high school things.

So I wouldn't say I was especially political, but I think that if I had had to pick a side or vote, my values had already been formed.

SI: So were you interested in the arts, maybe a career in the arts?

SH: I was, I think I thought I was going to go into the theater. I did acting, but I never thought I was very good at acting--but I thought what I was probably doing well was directing myself. So I really always thought--I was quite stage-struck. I thought I would become a director. Or at least, that was what I was interested in doing.

SI: After high school, did you go directly to college?

SH: After high school I did go directly to college.

SI: Where did you go?

SH: I went to Goucher College in Towson, Maryland for two years, and then ended up moving back to New York and going to Barnard College in New York City.

SI: Did you study drama?

SH: I did a lot of drama. Yes, I took a few drama courses. I was a philosophy major; I didn't see any point in majoring in English or drama because I was doing all that reading on my own. I thought that to read philosophy I needed to do that with somebody and with instruction, so that was what I focused on for my major.

SI: That period of time, '64 to '68, was obviously a time of great change--social, cultural. Can you tell me a little bit about what the impact of those times may have been on you in your college years?

SH: Okay. I think that I was an official member of SNCC, the Student Nonviolent Coordinating Council, at one point. Again, I wasn't tremendously active in organizations on campus or anything like that. But the senior year of my college experience at Barnard was the Columbia strike, so that was very interesting. [Editor's note: In 1968, student protests erupted at Columbia University due to tensions over the university's racially discriminatory policies and alleged support of the U.S. involvement in the Vietnam War.] I was not directly involved with the people taking part in the strike, but my last semester of college classes were cancelled for about the last quarter or third of the semester. We didn't have classes inside the building because of the Columbia strike, so we had classes under a tree when we were having them at all. [laughter] Philosophy seminars would meet under a tree. One thing that I remember that really struck me as a very odd juxtaposition was that at the same time that students were occupying the building and worrying about what Columbia was like politically, Columbia had paid a large amount of money--I think it was \$45,000 dollars or something like that--to get special red granite on the subway stops there. So one thing that was happening at the same time as the Columbia strike was all the drilling and incredible noise and upheaval to be putting this red granite into the subway stations at 116th Street.

SI: So what did you think of this strike?

SH: It's very hard to think back. I'm sure I was sympathetic at some level, but again, I wasn't that highly involved in it at the time.

SI: When you graduated from Barnard, what did you decide to do? Did you try to get into acting?

SH: Well I actually had an interview with somebody at the American Place Theatre who said, "Oh, we'll see if anything comes up." That was not about acting, but just directing or something like that. And there I was, I had graduated college and I might at some point--they might call me to work on a production, but I didn't have a job. So I just looked in the *New York Times*, and I ended up taking a job at what was called *Bravo Magazine*. That was a magazine that first was owned by the Diners Club, and then after a year was sold to MetroMedia. The magazine was used as a program magazine for the Community Concert series, which was a series run by Columbia Artists Management. They sponsored all different musicians and I guess some actors, maybe some other arts too, like dance troupes, to go all around the country and appear at different concert venues, high school auditoriums, whatever, and they would put together packages of concert series for all the member organizations. We were the program magazine for that, a sort of *Playbill* where you would have a magazine and then you would have an inset with the program for that particular night, so we coordinated all that. The first year that I was there, we were also the program magazine for Carnegie Hall. So what I did, I was an editorial assistant, and I did interviews and all kinds of editorial work. I wrote features for the magazine, did administrative work, et cetera. It was a great job; I got to do book reviews, and went to concerts sometimes, and I got to interview all sorts of people including Rudolf Serkin and Alicia de Larrocha, really big-time musicians who were coming into Carnegie Hall, and to write features. So then when the magazine was sold to MetroMedia, they did not take the editors of the magazine because they had an editor for *Playbill* at MetroMedia who then became the editor of our magazine. I was the only person they took from the magazine because I knew something about classical music and the kinds of arts that we were talking about. So it ended up--I had a good position. I got a raise, I got a promotion to Editor-in-Chief. It was a very nice job, I got to do all sorts of interesting things, but having grown up in the 60's, I think I had an attack of political relevance. I felt like it was a nice job, but I just wanted to do something more meaningful, and that's when I decided to go to law school.

SI: What year did you decide that and what year did you enter?

SH: Well, I graduated from college in '68 and I entered law school in the fall of '71, so I was working for three years in between.

SI: Before we get into law school, I wanted to ask--it was also a time of great changes in art, like the Happenings Movement was going on, [and] Group Theatre was becoming more risqué, maybe, or more political. [Editor's note: The Happenings Movement was an art movement originating in the 1970s, a spiritual successor of Dada and Futurism, which aimed to engage the viewer and challenged conventional ideas of "art." Group Theatre was

an organization founded in New York City in 1931 by Harold Clurman, Cheryl Crawford, and Lee Strasberg. In the 1970s, companies and theaters such as the Chelsea Theater Center, were influenced by the Group Theatre philosophies.] Does anything stand out about what you were experiencing or covering that comes to mind?

SH: I think that one important experience from that period--I had a first marriage during that time, and my first husband's father was a partner of Morris Ernst, who was one of the great heroes of the anti-censorship movements. He was the one who got *Ulysses* into the country, and so forth. So one experience that I got to have was quite a number of dinners with Morris Ernst where he would tell his stories. I have some books that he gave me--one that his wife Margaret wrote with James Thurber that was autographed. [Editor's Note: James Thurber (1894–1961) was an American humorist and cartoonist for *The New Yorker*.] He was a very interesting person for me to get to know. I can also tell you one even earlier experience, since we're talking about "How do you become a civil libertarian?" Although I wasn't actively doing a lot of political things at the time, I think that my worldview was probably formed pretty early. So one story that I tell when people ask, "How did you become a civil libertarian?" is about something that happened when I was in third grade at my public elementary school in Long Beach, New York. The high school principal, for some reason, thought that it was fun to have third graders and all the students in the different classes put on plays. So that year we were doing a production of *Johnny Tremain*, a boy who ended up in the American Revolution. I thought this was very interesting, and so I decided that since there aren't that many words in the script of the play that I would take the book out of the library to find out more about the story. So I went to my public school library, and I found the book on the shelf and took it to the librarian, and said "I'd like to take this out," and she said, "Well, you can't take that out; it's in the boy's section." I had known that there was a girl's section and a boy's section, because I had been reading books out of the girl's section, like the fairy tale collections and the biographies of president's wives and the biography of Clara Barton, but it never actually occurred to me until then that I wasn't allowed to read the books in the boy's section. I thought that this was just advisory. So I don't remember being that shocked at the time; I just thought that was the way things were. But I went home and told my mother about it, and steam came out of her ears; she was just furious. So she called up the librarian and said that I should be allowed to read any book I wanted in the library--not just *Johnny Tremain*, but any book--and what did they think they were doing, anyway? So I could take out any book after that, and I think it wasn't that long after that that the school changed its policy. When I became President and reporters would say, "How did you become a civil libertarian?"--I thought of this incident as something that was probably very formative, watching my mother stand up to an authority which was telling me what I should read, what I should think, and to see her say, "No, you can't tell us what to think. You can't tell my daughter what to read." I think that was very formative. My mother is now ninety-five and when I was telling her about this, I asked "Do you remember this happening?" and she said "Well no, not really," because it wasn't as important to her as it was to me. So I told her the story as I remembered it, and she listened to it and said, "Good for me." [laughter] So that's my early story of probably the first awareness that I can remember of the kinds of

issues that the ACLU deals with. Who has the right to make that decision? Is it you or is it the school?

SI: Now you entered, was it NYU, in '71?

SH: Right. I went to NYU in fall of '71. Right.

SI: Why did you decide on NYU law?

SH: Well, I always thought I would die if I didn't live in New York. [laughter] I could imagine being in Paris for a while, but my geographic boundaries were quite small, and NYU seemed to be a school that was a better place for women. Having gone to Barnard, I went across to Columbia Law School at some point--I don't remember what year it was--and in the entire building, they had only one ladies' room. You heard stories about being a women at Columbia, and it just sounded difficult at the time. NYU, I think with my class--I'm not sure if it was the first class like that, but I think it was forty-two percent women. They had clinics, they had public interest things, things I was interested in. I didn't apply to any schools that weren't in New York, and NYU just seemed like a very good choice because it seemed to be consistent with my values.

SI: Did you think of going into public interest law right away, or were you somehow guided that way?

SH: I think that's what I always assumed I would do. I actually thought that law school was going to be really, really boring, because you see all the law books in a law library--it used to be books, right?--on the shelves. It felt to me like, "How do lawyers know what's in all those books? They must just have to memorize it all." I really didn't have a clue what was going to happen in law school. My father had been a lawyer, and he always thought that women who were lawyers were not happy people. He thought they did that by default if they didn't have children, and so I was raised to think that what I really should be doing was to be an English teacher, that that was a good job for a woman. But I did watch my father doing legal things over the years. So the big surprise for me in law school was that it was really interesting. [laughter] That we did talk about issues and interesting intellectual puzzles. So I liked it much better than I thought I would. I thought I was going to have to tolerate it to get the degree so that I could change the world through law, but instead I really actually liked law school.

SI: Going back to your father for a second, was he supportive of you going into law school?

SH: Yes, he was.

SI: Tell me about either some of the courses or professors that stand out in your mind.

SH: One of the professors who stands out in my mind was Larry Sager, who I had first year for property. I guess we had constitutional law the second semester of first year, the first part of constitutional law, and I had that with Bob McKay. Then the second part of constitutional law was first semester second year, and for that my professor was Norman

Dorsen, who of course was one of my predecessors as ACLU president, but Larry was the person who I was closest to first year. He at the time was counsel to the New York Civil Liberties Union and he had a project that he was working on--I guess it was even during first semester? Maybe it was second semester; I can't remember which semester it was. But what he was doing was a study of all the different Supreme Court Justices in different areas to try to figure out what kinds of arguments were most likely to be able to persuade them. I volunteered to help with this study, and my justice who I drew was Potter Stewart. [Editor's note: Potter Stewart was a justice of the U.S. Supreme Court from 1958-1981.] I was looking at his decisions in the criminal justice area to try to see what kinds of arguments seemed to be important to him and what kinds of things you could do that would be more likely to get his vote. I still recall one thing that I found out--my interpretation was that he liked lawyers. [laughter] He thought it was very important for people to have lawyers, he thought lawyers really added a lot. So I read all these cases, all these decisions written by Potter Stewart, and wrote a report to Larry. Evidently he thought it was a good report, so he asked me if I wanted to be his research assistant for that summer between first and second year of law school. Now Larry was teaching Property. He taught very interesting exclusionary zoning cases and so that was the first thing that turned my attention. I thought "Oh, maybe I'll do that. That looks really interesting." The summer when I was Larry's research assistant, what he was supposed to be working on was an article on equal protection law. It's an article that he ultimately wrote and published in *Harvard Law Review*, and it was quite a big deal article about how at the time, everyone thought that there were two tiers of review of equal protection claims and he thought that there was or should be a third tier. It was an interesting article. So we started out the summer, and he was giving me a number of articles to read about equal protection because his idea of having a research assistant was he wanted somebody to talk to, not just somebody who would go fetch certain things. I thought this was very impressive and very respectful. I was reading these articles on equal protection law to try to get up to some sort of speed to be able to talk with him about his ideas. One day, he called me into his office and said, "Okay, now I just need you to take about an hour off of that research about equal protection because we have this situation that's come up at the NYCLU." The situation that had come up was regarding some students who were sharing a house in Belle Terre, a village on Long Island. They had just found out that the village of Belle Terre had an ordinance that prohibited them from living together in a house if there were more than two of them unrelated by blood, marriage, or adoption. Now, the way that this worked was that all of Belle Terre, which was about one square mile, was zoned for single family houses, and so the law defined "family" as no more than two people unrelated by blood, marriage, or adoption. The students living in the house were graduate students at Stony Brook University, and they hadn't known that Belle Terre had this law, so this was a surprise to them. The way they found out that Belle Terre had this law was that they went to the village clerk or whoever it was in Belle Terre to apply for their residents-only parking sticker, because there was a little beach in Belle Terre. There was a parking lot that was only for residents, but when they went to apply for their residents-only parking sticker, they were told by the clerk that they couldn't have one because they were illegal residents. This was the first time they found out about this and it made them nervous, so they called the

New York Civil Liberties Union to find out could this be done. The issue was referred to Larry, because Larry had litigated a case involving my home town, Long Beach, which was about a residents-only beach. They had different policies for residents than for non-residents. He had won the case that they couldn't be exclusive about the beach. They couldn't exclude non-residents or make it too impossible for them to come. So everyone thought, "Oh, well this is another beach case." Famous last words. So Larry said to me, "So I just need for you to do an hour or two of research about these grouper ordinances. Has anyone challenged the constitutionality of them, what's this all about?" I was looking up the challenges to grouper ordinances, doing a little research on that, when the students called Larry in a panic. They had just gotten a criminal summons that they were being prosecuted for violation of the law, because they were living in violation of the zoning ordinance. It turned out that in New York, violating a zoning ordinance is considered to be disorderly conduct, and each day that you violate the zoning ordinance, at least at the time, was a different count of violation. So by the time the village of Belle Terre served them with the criminal summons that they were going to be charged with violating the zoning ordinance, they were liable for hundreds of years in prison and millions of dollars of fines, because every single day was considered a violation. This was pretty serious. So they were supposed to--the summons was returnable in forty-eight hours, when they had to appear before the village justice of the peace in Belle Terre and say whether they were pleading guilty, or whatever. At that point, we had forty-eight hours to figure out what to do, so we went into high gear on research. I found a case from the New York Court of Appeals in the 1930s that said--and this was a great find, it was a good piece of luck or legal research--the New York Court of Appeals had said that if you want to prosecute somebody for violation of a zoning ordinance you have to, at least forty-eight hours in advance, serve them with a notice from the building inspector saying that they're in violation of the zoning ordinance. That had not been done. So I'm imagining that we're going to go to the village justice of the peace and yell, "Ha-ha, you have no jurisdiction," but Larry, being a grown-up lawyer, called up the village attorney and said, "Well, I guess we'll see you in court, but I don't know why you think you have jurisdiction, because no notice was ever served by the building inspector. I'm sure you know what you're doing, but that had never been done." What happened at that point--I had mentioned the forty-eight hours before, but this is actually where the forty-eight hours came in. So within hours of when Larry had this conversation, all of a sudden the building inspector tacks up the notice on the students' door that they're in violation of the zoning ordinance and they withdrew the summons. At that point, it was clear we only had forty-eight hours before the criminal summons was going to start to run. Therefore, in forty-eight hours we went to federal court, because that was our window. By Larry's strategy, he had enabled us to get into federal court because there was a case at the time--there still is--called *Younger v. Harris* that says if there's a pending state criminal prosecution, you can't go into federal court to ask them to stop the pending state criminal prosecution. For forty-eight hours, there wasn't going to be a criminal prosecution. So we drafted a complaint; Larry drafted a thirteen-page complaint faster than the speed of light, and I wrote a memo of law all about freedom of association and constitutional rights and how this ordinance was obviously unconstitutional, because how could a village or any form of government tell you who you could live with? Which I still think is right. We

wrote all this, and the case was filed in the Eastern District of New York, which covered Long Island. The judge that we drew, John Dooling, was a very lovely and smart man. We went to appear before him because we had asked for a temporary restraining order, while our litigation was pending about whether or not the ordinance was unconstitutional. We asked Judge Dooling to order that our students not be evicted. That at least there shouldn't be a prosecution for a while, while we were exploring whether or not the ordinance was unconstitutional. This was my first time meeting a federal judge, and he was a very lovely man. I'm recalling that we had something of an issue because Larry at that time was not admitted to practice in the Eastern District of New York, so the person who signed the papers for the NYCLU was Bruce Ennis -- a lawyer with the NYCLU, who didn't actually know about the case. [laughter] I got to go into court with Larry and with Art Eisenberg, who's currently the legal director of the New York Civil Liberties Union. They were both just wonderful; we would go out to lunch and they would ask my opinion about whether I thought we should be in federal court or state court. I didn't know much, but they were very respectful and very nice. So we're meeting with Judge Dooling, and Judge Dooling is reading this thirteen-page complaint about everything that's happened. He gets the village attorney on the phone of course, because that's proper, and he's reading the thirteen-page complaint which he just absorbs very quickly. He completely understands what's going on. At one point, he hears from the village attorney, and he says, "I'm inclined to sign the temporary restraining order, but would you mind if I made one change?" Of course you say, "What's that, your honor?" He said, "Well, it's the summer. Don't you also want me to order that your clients be allowed to go to the beach while the litigation is pending?" We said we supposed that would be all right, so he handwrites in to our order ... they can't evict the students, and they have the right to go to the residents-only beach during the summer while the litigation is pending. So there was that very successful first experience with Judge Dooling. Then I was sent out as the junior member of the team to talk to our clients, to look at their house and look at Belle Terre. They took me on a little driving tour around showed them the federal court order, and explained what was happening and where we were and what we were doing. I did that and I met the students, who were very nice, very lovely respectful graduate students, not rowdy partiers or anything, really working hard. So they look at the court order and we discuss all this, and they take me in their car to show me what Belle Terre is like. Then we drive over to the residents-only beach, and the minute the tires of their car hit the parking lot, this very large, burly man comes striding across the parking lot and says, "What are you doing here?" It felt to me like the sheriff in Mississippi who didn't want us in his parking lot. So everyone looks at me. [laughter] I'm thinking, "I'm not very big, I'm not even a real lawyer. What am I supposed to do about this large man who doesn't want us in his parking lot?" And then I thought, "Well actually, I have a federal court order right here in my bag." I got out of the car, drew myself up, and said, "Well, I'm with the New York Civil Liberties Union--kind of--and I have here a federal court order that says that these people have a right to be on this beach." And he melted. I thought, "This is cool; I want to do this." [laughter] That was my first experience, really, of the power of the federal courts and people standing up. It was like a much larger version of the experience with my mother in the library; you can stand up to authority and somebody can say, "No, don't do that," and it can happen. I think that was a very

important experience. As the case went on, Judge Dooling ultimately ruled against us and ruled that the ordinance was constitutional. We then appealed that to the Second Circuit, the Court of Appeals, and they reversed. They held that it was unconstitutional. Then the case went up to the Supreme Court, where we lost. That case was like my legal education. This case was also very rapid, because it went from the District Court to the Supreme Court in--I guess about a year. It was really quite a short time. This is now a case that's in all the constitutional law books. And that was my first big civil liberties case that I ever worked on, and I still think that it is outrageous for the government to be able to tell you who you can live with. They had all these feeble justifications like, "If there are too many adults in the house, it's going to be noisy, there are going to be parking problems," but you can deal with all those things directly- regulating how many cars you can park on the street, et cetera, so I just thought there was really no good reason for it. Even Justice [William O.] Douglas voted against us, which I think was his environmental concern coming out--you don't want too many people living in an area. Anyway, that was my first real experience with the Civil Liberties Union, and I think from then on, I was really hooked. That was the kind of thing I really wanted to do.

SI: Did you continue working with--I forgot his last name, Seiger?

SH: Sager.

SI: Sager.

SH: S-A-G-E-R. Yes, I did. We continued to work on the law review articles, and things like that. Then when I graduated from law school--I was also his research assistant for my second summer. So when I graduated law school, I was studying for the bar [examination], but during the same summer I worked at the ACLU National Office. I just offered to do whatever I could do to help. Burt Neuborne, who was the legal director at the time -- wonderful man--I think maybe he had just started teaching at NYU Law School, maybe not yet, but I had never known him at the Law School. But I met him when he was legal director and he was so impressive I just felt like if I could spend the summer carrying around his briefcase, I would learn a lot. But what he asked me to do was to work with a staff attorney named Marilyn Haft, who was working at a Sexual Privacy Project. I did a couple of things there, one of which was I did a survey of all of the state laws in existence at that time, 1974, that still criminalized adult consensual private sexual behavior. There were quite a few of them. Much to my shock, there was still in the Southern states on the books a number of anti-miscegenation laws prohibiting people from marrying somebody of the opposite [race]. They were clearly unconstitutional, but it was shocking to me that legislatures in--I don't remember exactly which states, but places like maybe Mississippi or Georgia--still did not feel that they could repeal this legislation even though it was clearly unconstitutional, even in the 1970's. So that was one big project that I worked on, and then the other thing that I worked on was a cert petition [petition for a writ of certiorari] in a case called *Acanfora*. A-C-A-N-F-O-R-A. It was about a teacher who had been fired when it was discovered that he was gay. That was [a] First Amendment privacy case and the Supreme Court didn't take the case, but that was my first exposure to litigation like that.

That was a really interesting experience. When I graduated from law school there weren't a whole lot of jobs available at the Civil Liberties Union, so the job that I took was at Prisoners' Legal Services of New York, where for two years I was a staff attorney and then I was associate legal director. We did litigation on prisoners' rights claims in 1983, claims about prison conditions, prison brutality, religious claims, a whole variety of prisoners' rights claims, as well as habeas corpus petitions of people who believed that their convictions were unconstitutional and that they should be released. [Editor's note: Habeas corpus is a legal writ which prevents the government from holding detainees indefinitely without demonstrating cause. It can be used to challenge the constitutionality of a conviction] Oh, I left out the middle step--right after law school, I actually had a clerkship at the Second Circuit. I was a pro se clerk. What that meant was that instead of clerking for an individual judge, I worked on the pro se petitions, which were mostly from prisoners, people who couldn't afford a lawyer. So there were a lot of civil rights cases, civil liberties cases, and a smattering of other things. But that was a protective decision, because instead of working for a judge where you could end up having any kind of law be your dominant experience--you could work for years on an anti-trust case, or something. I thought that I would be more interested in the subject matter of the cases that came through the pro se office. Plus, the other thing was that we were not supposed to be entirely neutral, because we were receiving papers from people who were not lawyers, so we were supposed to liberally construe the pro-se papers. If they had a claim, but they just didn't know how to say it, our job was to ferret out what the claim was even though they were saying it wrong. That felt to me like being a little bit in between being the neutral court and being a lawyer for a particular plaintiff.

SI: So how did that work? Would you just process them for somebody else or would you take up one person's cause and see it through?

SH: It was all chronological; we had all these motions, because I was working for the Second Circuit Court of Appeals, not the district court. So the way that these cases came up was that people had been denied whatever they were asking by the district court, and then they were asking for either leave to appeal to the Court of Appeals in a habeas corpus case--you had to get permission to take an appeal to the Court of Appeals--or, in the 1983 cases, the civil rights cases, the civil cases, people would be asking for leave to proceed in forma pauperis. [Editor's note: In forma pauperis refers to the waiving of the costs of a lawsuit for a litigant.] In other words, not to pay the filing fees, and most often for assignment of counsel. So our job was to look through all the motions and to decide whether or not the people had a strong legal claim--strong enough that they should be excused the filing fees and perhaps assigned counsel in the civil cases, or whether or not they should get a "certificate of probable cause," it was called, to take an appeal to the Court of Appeals in habeas corpus case and hope to get the District Court reversed. There were some very eye-opening cases there. One of the cases that I remember was a case involving a man named Nathaniel Williams, who was a prisoner. He had been involved in a fight in the prison and some other inmate had had a broken piece of glass and severed off Nathaniel Williams' ear in the fight. Mr. Williams went to the infirmary holding his ear in

his hand, and one of the doctors said “Oh, you don’t need that,” and threw it away and just kind of sewed up the stump. As a result, he had no place where he could lean his glasses. It didn’t actually effect his hearing, but it was really a serious problem. There was a district judge who had been a hero of the Civil Rights Movement who found that that just ... the claim, that that was a frivolous case. So the Court of Appeals reversed that, and sent it back saying “It doesn’t sound so frivolous.” But there was a whole variety of cases, and some of them were nothing major, but some of them were really very heartbreaking cases of prison conditions and people who were ill and were not getting adequate medical care. The whole gamut, brutality cases. Anyway, looking at all those cases was how I then ended up at Prisoners’ Legal Services.

SI: Can you tell me a little bit more about the work you had been doing on--I forgot what the term is, but the [case] targeting gays and lesbians?

SH: The *Acanfora* case?

SI: Yes. A little bit more about that.

SH: I just worked on that one case, and the question was trying to get the Supreme Court to take the case. At the time--this is 1974. So at the time, that was mostly considered a First Amendment case, that this teacher was being retaliated against for being out. It was just one piece of the puzzle. The ACLU had a lot going on, and in fact in 1971 or ’72, the Minnesota ACLU had brought the first same-sex marriage case, which at the time they lost, but there were things happening throughout the ACLU at that time that were really--not the beginnings; the ACLU had worked on cases involving lesbians and gays since the 1930s when Lillian Hellman’s play, *The Children’s Hour*, was banned in Boston because it was about lesbians, and the ACLU represented Lillian Hellman. [Editor’s Note: Lillian Hellman (1905-1984) was a playwright and author. *The Children’s Hour* was the first play she wrote and published in 1934.] So I often tell people that because the ACLU works in sixteen different areas, we don’t always get the recognition of how active we are in particular areas, but we have a long pedigree, longer than most of the organizations that people would think of as the preeminent organizations today in things like LGBT rights or some other areas. We were there first.

SI: What was the outcome of that case?

SH: The Supreme Court did not take the case; I was working on a cert petition. Our client had lost in the Fourth Circuit, and he was fired and that was that. I don’t know what ever became of him.

SI: I wanted to ask, also: we’re identifying high points, low points of the ACLU’s history. One of the high points seems to be the impeachment of Richard Nixon--a burst of membership, and all that. At that time, you would’ve been at least beginning to get involved with the ACLU. You would’ve been involved for a few years at that point. Does anything stand out about that? Was that particularly important to you and the people you knew?

SH: Well, I wasn't really involved within the ACLU at the time. I wasn't really following everything the ACLU was doing. I had my own tunnel vision of the things that I was working on, but I wasn't on the board, I wasn't on any committees. I guess I first became involved with the ACLU serving on a committee in 1976 or '77. I had known Joel Gora, who's now my colleague at Brooklyn Law School, and at the time was a staff attorney at the ACLU and I met him while I was working with Larry Sager on the Belle Terre case. I think he had suggested that I might become involved with the ACLU, to be on a committee or something like that, after I had finished law school. But at the time, because I was working for the court, I thought that was inappropriate. I don't know if anyone else would've thought so, but I thought it would've been a conflict so I didn't agree to do it then. I'm trying to remember what year it would've been. Did I actually start while I was still working for Prisoners' Legal Services or did I not start until I was teaching, which was 1980? Yes, I'm not sure what year I started, but in any event, Joel had suggested I get involved with a committee and I didn't do it at least until after I left the court. I would have to look back to see whether I actually started in the late 70s or in 1980. But before I got involved with the committee, certainly, I didn't have that deep an overview of what the board was doing, generally.

SI: Just as somebody on the ground, who was interested in the ACLU's work, was that a key thing for you?

SH: The Nixon impeachment?

SI: Yes.

SH: No, no, it really wasn't. I have to tell you that after I was on the board, the ACLU had taken positions in a couple of impeachments, and we also had a policy that permitted us to weigh in on the appointment of Supreme Court justices, to approve or disapprove, oppose or recommend. I believe it was when John Ashcroft was appointed, there were a number of people on the board who were arguing that the Attorney General was just as important as Supreme Court justices, and therefore we should also weigh in on whether to approve or disapprove the hiring of an Attorney General. [Editor's note: John David Ashcroft is a Republican attorney who served as U.S. Attorney General from 2001-2005 under the Bush administration.] I recall my position at the time was that I thought that started to get far too close to partisanship. That if you wanted to argue that the Attorney General was that important to civil liberties, well so was the President, and there was no way that we were going to support or oppose candidates for President, because we're non-partisan and we're supposed to be non-partisan. So what we do about presidential elections is we will publish an analysis of the candidate's civil liberties record. That may speak for itself, they may line up with us in hundreds of places or be opposed to us in every place, but we never say, "Vote for this person," or "Don't vote for this person." We are just non-partisan. So my position, which ultimately prevailed, was that the only way to be consistent about that was to not be about people--to be about issues, but not people. At this point, we changed our policy about supporting or opposing impeachments, or supporting or opposing the nomination of Supreme Court justices, and we're just not about people. We do not take

positions on, “Yes, this person,” “No, not that person.” Most people are a mixed bag; they’re with us in some places, and not in others. I think that to be seriously nonpartisan, which is something that we really aspire to be, I think you can’t start saying “Well, we like that person and we don’t like that person.” To me, it’s sort of like [how] your mother never says, “I don’t love you anymore.” She says, “I don’t like your behavior.” When Barack Obama ran for president, we had an analysis of all the candidates’ voting records where we had torches, and candidates would get one to four torches on individual ACLU issues depending on whether they were in agreement with our policies and positions. At one point, Ron Paul was ahead of Obama. [laughter] Because where he was with us, he was really, really with us, and when he wasn’t, he was really, really not with us. That’s one example; you have one candidate who we think is terrific and will make a lot of progress on some issues, but really be opposed to us on others, as opposed to, perhaps, another candidate who’s with us on more issues, but who we don’t think is going to make as much progress. I don’t think we should be choosing between those people. That’s just democracy, that’s not the Constitution, who you are going to choose. Anyway, that became my position. To me, it’s not about whether or not you impeach Nixon. It’s about whether or not you have a strong position on what was wrong about what Nixon was doing.

SI: That change took place after the beginning of the Bush administration?

SH: Yes. If I’m remembering correctly, I think that the ACLU did oppose the appointment of Robert Bork. [Editor’s note: Robert Heron Bork was a Republican legal scholar and judge on the Court of Appeals for the District of Columbia Circuit, who was nominated for appointment to the U.S. Supreme Court by President Ronald Reagan in 1987. The nomination was ultimately rejected by the Senate.]

SI: Yes, I was thinking of that case.

SH: But that was before the change of policy, so I couldn’t put a year to the change in policy off the top of my head, but it was during my time on the board because I was one of the people who was taking the position that we should move in that direction. That otherwise it was a real slippery slope, if you’re going to support or oppose Supreme Court justices and then the Attorney General, and then you’re going to be for or against impeaching people who are harming civil liberties. That’s getting you too close to electoral politics.

SI: To go back to your earlier career, how long did you work for Prisoners’ Legal Services?

SH: For four years.

SI: Okay.

SH: ’76 to ’80, and then in 1980 I started teaching.

SI: Okay. Why did you make the switch to teaching?

SH: I think there were two different reasons, one of which was that I had been doing prisoners' rights work for four years and the courts were just getting worse and worse. Every time we would think of a way to win a case, they would stack the deck higher in the other direction. There was a case called *Jones v. North Carolina*, I think it was *Prisoners' Labor Union*, where I worked on an amicus brief. It was a case in the Supreme Court, and it was a First Amendment case about prisoners. I could see that what the Supreme Court was going to be likely to say was, "Well, whatever the prison thinks. If they say there might be a problem, they're entitled to say, 'No, you can't have something called a labor union.'" even though it wasn't really a union; it was just a group of prisoners who wanted to get together and express their various grievances. So I wrote a brief for the Supreme Court on this. I think it may have even been for the main brief, not an amicus brief. What I said was look, you can't just say, "Oh, whatever the prison thinks." You should have some test, like if there's no reason in experience to believe that there's a problem here, that they can't just tell prisoners, "You can't do this, you can't do that." The Supreme Court, they just blew that off. They were not interested in looking at all at what prisoner administrators did. We used to say to each other at Prisoners' Legal Services that we thought we were actually better litigators, and that if we had the law in our direction the way there was the thumb on the scale on the other side, that we would never lose a case. But it began to be very frustrating, because we would litigate cases and if the issues would get up to the Supreme Court, the Supreme Court would just say "No, prison administrators can do whatever they want." It was just getting really hard to win cases, so I found myself feeling increasingly critical of what the court was doing. I felt like I was going to be better as an academic, being able to just say, "Well, here's what they should be doing," instead of having to work within the context of--they got to say, "You lose." I just wanted to take a broader view. Plus, at the same time, a personal thing that also contributed to that decision to go into teaching was that my daughter was born in January of 1979 and, as a litigator, I didn't have control over my own life. My daughter was born in January; in December, she was almost one year old. It was December, we were about to have a Christmas party and invite a whole lot of people over to our house as we did around that time of year. I was in Buffalo, where we had a guard brutality action that was pending against some guards at Attica. We had had the good luck to have a prisoner who happened to be in his cell at the time that a beating was taking place, and he could see through a mirror in his cell, reflected, what was happening. We actually had a witness, and the guards hadn't realized that he was there because it was in the back of his cell. So we were trying this guard brutality case in Buffalo in the Western District of New York, in December. Buffalo in December, to begin with, is not where you want to be in December. [laughter] It was incredibly cold and windy; I was sleeping on a mattress on the floor of a colleague's house, and we were doing this trial, but the judge who had the trial assigned to him, Judge Curtin [John Thomas Curtin]--was at the same time presiding over the school desegregation case in Buffalo. [Editor's note: Judge Curtin issued four racial desegregation orders for the schools of Buffalo, New York in 1976.] His schedule was that he would meet with what he called "the school people" every day until they would run out of steam, and he just felt that they weren't going to do any better that day, that there was no place else to go that day, wouldn't make any progress. So if that happened, then he would call us and have our trial for a few hours. What should've

been maybe a day and a half trial was taking two weeks. Every day we had to be prepared for trial, which is really grueling; you have to be looking up all the evidentiary rules and what might come up, and be really prepared. Sleeping on the floor, and so forth. Then in the middle of the two weeks was when I went home because we were having this Christmas party, and so I had to get up at 4am on Monday morning to take the early flight to Buffalo in case we had to be in court. I kissed the almost one-year-old baby goodbye, and I thought, "I just can't do this. I cannot have my life be controlled by other people." So I went into teaching, where it's not that you don't work hard, but at least your schedule is under your own control, and nobody says to you at the last minute, "Okay, you're going to have three extra classes this week." It was largely a personal decision of lifestyle, but I think academia has suited me.

SI: Can you characterize for me Brooklyn Law School, in general, and what your department was like when you joined?

SH: When I first came to Brooklyn Law School, I had some choices of where to go and so I was actually looking at all the people on the faculty to see who I thought I would like to work with. One of the most important comments that was made to me, that I realized only in retrospect was part of the hiring campaign, was Joel Gora, whom I had known previously, who said to me, "I like coming to work every day. I like my colleagues." I thought, "I want to like my colleagues. I want to like going to work every day." So I chose to come here, and in fact I do like my colleagues and I like coming to work every day because they're just terrific people whom I got to work with over the years, some of whom started around when I did, some a little before, some a little after. But I think we really had an extraordinary group of people here, and it's been a very comfortable place for public interest types. We started a public interest law program for law students over twenty-five years ago. A number of people on the faculty were interested in that, and at the time we felt like, "Well, are we pushing our values? Are we imposing our values on the students?" but the students very quickly took it over. [laughter] It wasn't just our values; it was their values, too. This has been a good place for public interest people. There are a lot of clinics, a lot of students who really--I don't know what percentage of my students would love to work for the ACLU after they graduate, but unfortunately we don't have the resources to hire them all.

SI: You said it was when you made the switch to academia that you really got involved in the ACLU board.

SH: Yes.

SI: When you were first elected, it was to the National board or was it the affiliate?

SH: I wasn't involved with the affiliate; I was working with the National board, and I was working first not on the board, but on a standing committee called the "due process committee." What the standing committees did was they would vet issues for the National board, and make recommendations about developing policy in particular areas. It's going to be hard to remember some of the issues that we talked about at the time, but one was --

for example -- whether or not the ACLU should take a position on jury nullification. There was this "fully informed jury" project at the time, that was really urging that juries be told that they have the right to nullify the law. So the question, of course was, is that something a civil libertarian should support? Ultimately what we recommended, what ended up happening, was not to take a position on that issue because sometimes fully informing a jury is a pro-civil liberties and sometimes it's not. We just didn't see that the position that you took on that would really matter. We also had while I was chair--I became chair of the due process committee after a few years, I don't remember exactly what the dates would've been but they're probably written down someplace. While I was chair of the due process committee, we drafted a sentencing policy, including opposing sentencing guidelines that allowed no discretion in sentencing. We took positions on different aspects of sentencing, we also looked into decriminalization of drugs and recommended a policy that was far more extensive than any policy the ACLU had had before that on decriminalization of drugs. So it was a whole variety of issues in the due process area. At the time, the ACLU had -- I think it was like four subject matter committees. There was due process, there was academic freedom, there was an equality committee, and I don't remember what else there was, but there were standing committees. One of the things that happened after I was on the board was that Gara LaMarche and I were appointed to be the committee on committees. [laughter] We recommended to the board eliminating the standing committees, which were composed of people not on the board, and instead going to a system where we would have ad-hoc committees of mostly board members that were appointed by the president to vet issues and bring proposed policy to the board. I think that's been an appropriate resolution, because given that we have such a large board, our board members are really always wanting to do more. They want to be more fully employed, so having all this work done by people who were not on the board just didn't make as much sense as having board members do it. Plus, you ended up with the situation where you had the people who knew most about an area because they were just studying this one thing and spending a lot of time going into the background of whatever, jury nullification or whatever it was. Then they would know the most, and you would take the issue to the board, where people didn't have as much time or couldn't go into discussion or couldn't go into as much depth in the area as the committee had, and it was the board that was making the decision. It seemed like a good idea that more of the decision makers should be people who had actually done the greater amount of work.

SI: I just want to clarify some of the terms.

SH: Sure.

SI: So you would have standing committees, that maybe would have some board members on it, but mostly [non-board members]?

SH: I don't think they had--no, they didn't have any board members on them.

SI: Didn't have any.

SH: It was just people from the community who had all different backgrounds. On the due process committee, we had people from -- I think probably all lawyers on the due process committee, [but] on some of the other committees they may have had educators or people who were not lawyers. But people from all different backgrounds who would look at due process, who have expertise in the general subject matter area. The idea of the standing committee was that you would be appointed to this committee by the president, and then you would just serve on the committee and you would get whatever issues came up in your area.

SI: But there were also projects, right?

SH: The projects were on the staff.

SI: The staff.

SH: Those were actual ACLU employees working in different areas, but that was the staff and so they did not propose policy because the formulation of policy is considered to be the province of the board, of the lay leaders. So you would consult with the staff to find out what's happening in their area, what's an area where you really need to have more policy guidance. So you would consult with them, but the decisions about drafting and adopting policy were made by the board with the help of the standing committees to whom they had delegated particular subject matter.

SI: Now, was Ira Glasser the executive director when you joined the board?

SH: He was, yes.

SI: Okay. So you were on the committee and then I think 1980, you joined the committee?

SH: I think it was 1980, but we could check the date again. I think it was when I went into academia that I felt I would have the time to do this and Joel had suggested this. It might have been before that, but we can check that date. So what happened was that I was on the due process committee, and then in that capacity I got to know the board some because I reported on behalf of the committee to the board. "Here's the policy we're recommending on sentencing. Here's the policy we're recommending on double jeopardy." That was a big one because we were not recommending an exemption for civil rights cases, which became a big thing during the Rodney King prosecution. [Editor's note: Rodney King was a taxi driver in Los Angeles who was beaten by LAPD officers following a car chase in March of 1991. Controversy erupted over the acquittal of the officers in a California criminal prosecution, resulting in riots and the demand for a federal retrial, which some critics thought argued violated double jeopardy by trying the officers for the same crime twice. The law is settled here, so our double jeopardy policy was only aspirational, not something a lawyer could really argue.] They'd be there and [I'd] talk to the board, so they got to know me some and I got to know them some, so then my name was proposed for an at-large position on the board, the National board.

SI: Do you know approximately what year it was that you took the at-large?

SH: I think it was '86. What I can do is--I think I probably have this on my resume here.

SI: We can put it in later.

SH: Just put it in later? Okay.

SI: I just want to get a general sense of the timeline.

SH: Yeah, I think it was about '86.

SI: It was a few years.

SH: Yes.

SI: So at the time--

SH: I was on the due process committee for a few years. Vivian Berger had been chair and then Nadine Strossen, and then I was chair when Nadine then went on the board and she stopped doing the due process committee.

SI: Okay. When you joined the board in the mid-80s, we'll say, can you characterize the relationship between the board and the staff, and the working relationship then?

SH: Well, at the time, Norman Dorsen was president and I think that we didn't see a lot of what was going on behind the scenes. I don't know if this was still true at that time, but the organization was smaller and Norman had had an office at the ACLU because as General Counsel, he had actually been writing briefs and doing a lot of legal work. So at the time the relationship between the staff and the board was that the staff was not as large or as empowered, and so the board did a number of jobs that, in retrospect, were probably not ideal to have lay leaders doing. I'll give you one example: one thing that happened under Anthony Romero, when he came in, was that he created an affiliate support department. Now, before Anthony, the affiliates were kind of out on their own, and so what would happen from time to time--they did have the ACLU brand; they were ACLU affiliates. So we had a lot of issues that would come up with people in the affiliates taking positions that people felt were not consistent with the National positions, saying things that we just thought were wrong or harmful. The affiliates do have the right to have different policy, but sometimes the problem was that they were just coming up with different interpretations of policy, where they didn't have unique policy. Then there were also times when the affiliates would get into trouble. It was actually later when I was on the executive committee that I first really became aware of this, but what would happen is that if a particular affiliate was having a problem, the executive committee would send out representatives--a psychologist and a lawyer--to go talk to the affiliate and try to help them get over their problem, and it was often people who had no relevant expertise. They were just people who were on the executive committee who were trying to help out after the problem. So Anthony starting the affiliate support department, now called the "Affiliate Support and Advocacy Department," I think was very important because he got experts in who could help the affiliates prevent problems, and they also now create templates for all sorts of things that affiliates do so the affiliates don't have to reinvent the wheel. If you

have to hire a new executive director, the Affiliate Support and Advocacy Department can help you by giving you backup on, “Okay, do you want to retain the search firm? What do you do? How do you do the interviews? What kind of contract do you want?” They have samples, they have templates, they have all sorts of things. So I feel like over time, there aren’t as many affiliates that have had problems that have exploded because what could otherwise have been problems are prevented. It was a different relationship with the board and the staff because we didn’t have that national staff at the time to help the affiliates, so it was left to the board and especially the executive committee to help the affiliates. When I was elected General Counsel, which I think was 1988, maybe ’90 -- I think maybe I got on the executive committee in ’88 and was General Counsel in ’90, but we’ll look up the years, however that happened. I wrote quite a number of briefs as general counsel within my area of expertise. We also had, at that time, General Counsel would put on a Supreme Court breakfast in which we would describe to reporters what litigation the ACLU was doing. That, too, was a holdover from the time when the unpaid general counsel were doing a lion’s share of the legal work. Gradually, what we figured out was that it didn’t make a lot of sense to have the lay leaders talking about the work that the staff was doing when you could have the staff talk about that. [laughter] So as Anthony grew the organization, we got to have more lawyers, and they were doing much more of the legal work. We didn’t really rely on lay leaders for that, although we continue of course to rely on cooperating attorneys. But it seemed to make sense to have the staff speak for themselves. I’ll give you a third example of the division at the time between the lay leaders and the staff, which was the investment policies. The investment committee was composed of interested board members, who again, thought they had good ideas about investment strategy but they weren’t necessarily experts. This is a place where this isn’t about ACLU staff, but our current investment committee is investment professionals, appointed by the President. That’ll give you some sense; I think this is part of the maturing of an organization, that you move from something that’s more lay-driven and more amateur-driven to more professionalization in the staff.

SI: You mentioned that affiliates would get into trouble and they’d send out a board member and someone else. Can you give me some examples of what trouble they might get into? Is it more organizational?

SH: Organizational problems--I think we could find examples going back to the minutes of executive committee. We had the “troubled affiliates” section of the agenda, and some of it was financial problems -- they just were falling apart. Some of it was division problems, so if you had two different affiliates within a geographical area how they interact can be a problem, who’s in charge of what. We have some very strange geographical decisions that have historical basis. What we just recently did, for example, is we now have a Kansas affiliate in Kansas and a Missouri affiliate in Missouri, but we used to have an Eastern Missouri affiliate and a Western Missouri and Kansas City [affiliate]. They were an affiliate that didn’t match the map. Then in the D.C. area, we have a National Capital Area affiliate and a Maryland affiliate and a Virginia affiliate, and of course the Maryland and Virginia affiliates cover suburban Washington. There are a lot of issues that come up when

you have affiliates that are in close proximity who don't necessarily--they have to split the turf. So that's complicated, and then there were just individual people, [such as] an occasional executive director, who turned out to be a problem.

SI: By the mid-80s, you were very heavily involved.

SH: Right.

SI: The due process committee, was it eliminated, or was it just recasted?

SH: It was eliminated when we had the committee on committees, but that was a few years into my tenure on the board. I actually continued to be chair of the due process committee after I was on the board, so there was some overlap there in terms of time. I don't recall what year it was that we eliminated the standing committees, but by that time I was on the board and I had been the last chair of the due process committee.

SI: Was it just replaced with an ad-hoc committee that dealt with due process issues?

SH: It was replaced as needed with individual ad-hoc committees as issues came up. So we no longer have to divide things into "due process," "academic freedom." We just look at issues [that] come up. I'll give you an example pretty recently: Do we want to take a position on judicial elections, whether they're pro- or con-civil liberties? We just appointed a committee, we picked people who we thought would be somewhat knowledgeable or able to handle those issues, and we just created an ad-hoc committee on that. That's just called the "judicial elections" committee. So you would just have individual ad-hoc committees on anything we need policy on. Now, one thing that I think is disappointing to many of our board members is that although one of the board's major jobs is to set the substantive policy for the organization, we don't need to spend as much time on that these days because we already have five hundred pages of policies in the policy manual. We need to deal these days with things that have just come up for one reason or another. Occasionally, there's something like judicial elections, that we've just never really looked at before, for who knows what reason. But then there are new issues that come up because of technology, there are issues that come up because a clash has arisen between two principles and we have to figure that out, or sometimes we revisit things. But the amount of time that we need to spend on substantive policymaking is really not as great as it would have been at earlier points in the organization, when we did not yet know what we thought of the death penalty. What do we think of the death penalty? We think "no." [laughter] We've already resolved that.

SI: I want to spend a good amount of time on the post-9/11 period, but I also want to know what do you see as the big issues of the 90's?

SH: Of the 90's?

SI: Yes, that you were most passionate about or that the board spent the most time on.

SH: It's hard for me; I'd have to go back to the minutes to really remember what we spent the most time on, but I think one of the big issues that looms large to me is the double

jeopardy issue. This was around Rodney King. I think several years before that--I don't remember the exact date, but the due process committee proposed a double jeopardy policy to the board, and we had concluded that double jeopardy is double jeopardy for any kind of case, and so we proposed our policy [which] was that we did not believe that there should be a dual sovereignty exception to the double jeopardy clause. Now, the Supreme Court says that there is. They say it's not double jeopardy if one state prosecutes you for a crime and then a different state prosecutes you for exactly the same crime, because they're a different sovereign and so they can. The place where this comes up, which then arose in Rodney King, was the courts had said that it's not a double jeopardy problem if a state prosecutes you for something and then the federal government prosecutes you for the same thing, for the same conduct. We proposed, and the board accepted, a "same conduct" test, that if jurisdiction number two is charging you for the same conduct that jurisdiction number one has charged you for, even if they called the crime a different name, that should still be double jeopardy. In the state-federal context, a state would prosecute you for murder or whatever and then the federal government could prosecute you for violation of civil rights, but if it was based on the same conduct, that you were believed to have killed the same person, we thought that should be considered double jeopardy. When the Rodney King case came up and the officers had been acquitted in state court, then there was a call for federal prosecution. There was a member of the board, Michael Meyers, who moved that we suspend our double jeopardy policy because he thought that, looking at the Rodney King case, that it was wrong and that we should allow the federal government to do a re-prosecution in a civil rights case. [Editor's Note: Michael Meyers is the co-founder of the New York Civil Rights Coalition.] The fear was, "What if the state had a sham prosecution and they didn't really do anything?" Then, "Why shouldn't the federal government be allowed to come in and do the prosecution?" I thought it was wrong to suspend our policy just because a case had come up, and ultimately the board agreed with that. We had suspended the policy for a little while, and then the board really looked at whether or not our previously adopted policy should be our policy and concluded that it should. Now, I have said a lot about this because I actually wrote two law review articles on all that. First, I was asked by the UCLA law review to write an article about--they did a symposium in which they had Paul Hoffman, who argued that there should be a civil rights exception, and then they had Paul Cassell, who was expected to argue a more pro-government position but actually ended up agreeing with us that there shouldn't be a dual sovereignty exception. [Editor's note: Paul Hoffman was the Legal Director of the ACLU in Southern California from 1984 to 1994. Paul Cassell is a law professor at the University of Utah and former federal judge.] I wrote a piece that was about--I'll give it to you later--that was about the ACLU's struggles with this, which was called "Double Jeopardy All Over Again." It was about telling the whole experience--in that article I have in great detail the exact dates of the policy proposals, and just explaining what the ACLU had done and why. Then, I wrote another article on double jeopardy when Akhil Amar was writing a series of [publications]. He was marching through the Bill of Rights and saying how they should be revised. [Editor's Note: Akhil Reed Amar is a legal scholar and Yale University Sterling Professor of Law and Political Science.] I wrote a piece in the *Columbia Law Review* to respond to him, which also went back over some of the Rodney King ground. There's a lot on the

record. So it's easy to find dates, and exactly what was going on, on all of that. But that for me, was a big issue, because that had been my committee that had proposed the policy. It of course was very important to people. I still remember a wonderful African American woman, Gwen Thomas, standing up and saying, "That could have been my son." I understand the emotions on that side, but I felt that a double jeopardy bar is a double jeopardy bar, and you wouldn't have said, "You can't give those people a lawyer, because what if they get off? You can't give them a jury trial." If you have a constitutional right, which I think you do, not to be prosecuted twice for the same offense, you shouldn't start making exceptions to it because there's a case there where we want somebody to be prosecuted. It's part of nonpartisanship; you can't look at the results, you have to look at the process. I actually thought that the dual sovereignty doctrine encouraged the federal government to hang back and not be helpful in the state prosecution and investigation, because in fact the way the law was since the Supreme Court had said there was a dual sovereignty exception, was that if the federal government became too involved in trying to help in the state prosecution, at that point they forfeited the ability to do it again. In most cases, federal policy was not to try people again for the same conduct. Anyway, I thought that federalism should work a different way, that we should have a more cooperative model, rather than, "You do it and then we do it," because it's the same double jeopardy problem. Practice makes perfect; you keep coming at somebody. So that was a big issue to me in the 90's. It's hard to just remember offhand what else happened in the 90's. I'd have to look back at the minutes and think, "Oh yes, there was that."

SI: Obviously technology was changing, [there was] the introduction of the Internet, which affected privacy. Do you remember that being a significant issue?

SH: I think this was in the Nineties, we had a committee that did really major policies on data privacy and what happens if there's collection in the private sphere as opposed to the public sphere. We spent a long time on data privacy, which I think was in the 90's. Just hard to remember what else, just off the top of my head.

SI: I wanted to go back to the relationship between the executive director and the board. Was Ira Glasser the executive director for that whole period until Anthony Romero took over?

SH: Yes, yes. That's right. Ira was the executive director; he was there for--I think it was--was he there for twenty-seven years? He was there for a long time.

SI: I think it was the late 70's when he was [executive director].

SH: It was before my time when he arrived, but he was the executive director the whole time I was on the due process committee and then when I was on the board until 2001, when Anthony was hired, so he was the only other executive director I knew. Ira was a very powerful person, and he would very frequently weigh in and tell the board what they should do. There was a real issue, there was an issue that came up around the decriminalization of drugs because Ira was very passionate about that issue and had committed the organization to opposing criminalization of drugs in some respects. It was

not altogether clear that he was authorized to do that by policy, and so my committee, the due process committee, was asked to look at whether or not that was [allowable], what position the organization should take. We agreed to be diplomatic, and to say, “Well, we weren’t going to say whether this was reconsideration or whether the executive director had gotten out ahead of the organization, but we would consider what we thought was the right policy position for the organization.” Ira was very anxious about that; he sat in on some of our committee meetings and expressed his point of view very forcefully, because he was I think quite anxious that if the committee recommended a different position or if the board reached a different position, he was going to strongly disagree. I think that everybody was also being careful of the question of whether or not he had gotten ahead of the organization, because we felt no need to accuse him. The question was really what you needed to do from here on in. But he was a very powerful personality, and so in those days, one thing that the executive committee did that we have since only very recently decided to change was the executive committee got the board to pass a policy that said that when the executive director hired a senior staff member, fired a senior staff member, or substantially changed the position of a senior staff member, [they] couldn’t do the hiring without approval of the executive committee and couldn’t do the firing or changing the nature of the responsibilities of a senior staff member without consultation with the executive committee. I think that’s right. We just recently, lining this up against other organizations, we thought it was quite unusual to have that level of control over an executive director’s hiring. I think that was a product of another era. I don’t think I was around when that initial policy was formulated, but that I think says something about the relationship between Ira and the board, that they wanted to have that control over his hiring power.

SI: Before we get into the post-9/11 period, are there any other issues that stand out from your time on the board before then?

SH: Well the one that’s always been one of the hardest for us is campaign finance. We’ve looked at that, I think it’s something like seventeen times. This discussion has come up again and again. I can’t remember the most recent date, but we keep revisiting that issue because that’s an area where we just have to agree to disagree. Members of the board have very different visions of what the First Amendment means, and there are people who feel very passionately on both sides so we have a number of members and donors who say to me, “I so disagree with the ACLU’s current position on campaign finance that unless you change, I’m going to drop out.” But we also have people who are equally passionate on the other side, who if we did change our position I think would be very upset with that. That’s just been one of our most difficult issues, because I think it really casts into focus the difference between a libertarian interpretation of the First Amendment--“I get to say what I want and the government can’t tell me what to say,” just a shorthand--as opposed to a more instrumental interpretation of the First Amendment, that the First Amendment is to allow participation in the political process and you can’t outshout somebody else, and therefore the government can prevent you from outshouting somebody else so that they can participate. That’s kind of oversimplified, but to me those are basically the two points of view. Each one has some historical validity, and you can argue for either one. It’s just that,

I think, [that] has been our most difficult issue because people just have radically different positions and cannot agree on which vision is correct. We keep revisiting that again and again, and I don't think it's particularly good to keep revisiting that because if you one day have a position that fifty-one percent of the board supports and you come out yelling about that, and then the next day the forty-nine percent becomes the fifty-one percent because two people have changed, I think that can be very harmful to the organization. One thing that that has meant is that campaign finance has not been one of our top priorities, because to me it's not right to make something so divisive a top priority when we have so many other things we agree on. I think it's dangerous for the institution, for the organization, to be taking very strong positions when they're so contested internally. That was something that I questioned when I first got on the board -- okay, so if we vote fifty-one to forty-nine percent that this should be our position, is that really something that we really want to then go full speed ahead on? At the time, the answer was "Yes, yes we do." We decided that's our position. Sometimes I think that's right, but sometimes I think you have to take account of the fact that the board is deeply split on a particular issue. I think the conclusion, to me, may be "Maybe that's not our best foot forward. Maybe that's not where we should be spending our resources, on something on which people disagree so radically."

SI: You mentioned before that there can sometimes, particularly before Anthony Romero created the--

SH: Affiliate Support and Advocacy [Department], right.

SI: --Affiliate Support, that there could be a real difference--the affiliate and the board and differences over policy, and so on.

SH: And there still can. We have a policy that allows affiliates to adopt a different policy. It's sort of like our federalism policy. So if North Carolina, say, wanted to have a different position on campaign finance or whatever, they can. Then we have a policy that says that if things come to a head and if a case goes to the Supreme Court, North Carolina could not file a brief on the opposite side of where National was filing a brief. At that point, the National legal director would get to mediate because you can't speak with two different voices in the same forum. But if North Carolina wants to argue that in North Carolina people should have different rights, or more rights--Southern California is much more into economic justice rights than some other affiliates-- we do have a "unity without uniformity" policy.

SI: I wanted to ask if there were any cases where an affiliate went a little farther than the board would want--not that you felt stuck, but that it was a thorny case?

SH: I think there used to be more than now, but I think we've really resolved what the lines are there. There were a number of places where, over the years, I think we've really resolved major governance issues in a way that has prevented the kind of friction you're describing. The idea that we know the answer to that now--in fact, Michael Meyers, who I was saying had gotten us to suspend our double jeopardy policy, convinced the New York Civil Liberties board to pass a policy saying, "Yes, there should be an exception to double

jeopardy for federal civil rights prosecutions.” So that’s their position. So, you know, fine. But if it ever came to a Supreme Court case, then the Legal Director could decide that we want to speak with one voice and that the National policy is what will prevail. It’s not a really problem, because within their own jurisdiction they do have the autonomy to take a position that’s different from the National position. Now, at some point you can have a real extreme. One thing that happened during my time and this was before I was president--this would’ve been the early 2000s I think--is that the South Carolina affiliate was taken over by libertarians. They very much agreed with parts of our work, but they very much disagreed with other parts. At that point, we concluded that they weren’t really an ACLU affiliate, so we ended up having a very long and painful process to disaffiliate them and to say, “You can have your own organization if you want to do only part of what we do and to not believe in the other parts of our mission, but we need to reboot the ACLU of South Carolina and have people who do--you can’t use the brand if you don’t agree with enough of the policies.” We have some National policies that do commit the affiliates, things on basic due process. You can’t just fire your executive director and say, “go away” if you’re not within your rights to do so. We have diversity policies. One of the most important things that the board did, and this certainly preceded me, I think it was during the 1960s even, was to pass a financial structures policy, which really settled what happens when you’re trying to raise money. When National raises money, you could talk to people in New York, but those people are also people the New York Civil Liberties Union might want to talk to. If you don’t want to have competition over the same donors or have a problem because the donor gives money to the ACLU and you don’t know [if] they mean the affiliate or the National, what we did was we just worked out--we hammered out a policy--this is not “we,” this is before me--but the organization hammered out a policy of what are the rules. We have sharing formulas, so we assume that if somebody joins the ACLU nationally, they also mean to join the local affiliate unless they say otherwise or vice-versa. Therefore we have percentages that each gets, and we worked it all out in advance. It just makes things so much easier.

SI: Again, we can go back at any time, but tell me about September 11th and its effect. I want to know about its effect on the organization, but also, you’re based in New York. What was that experience like?

SH: September 11th was a trauma. Anthony Romero had just started working six days before September 11th, so after his first week on the job. First of all, the ACLU office as you know is downtown, at 125 Broad Street, so the office was closed as a downtown building. So Anthony’s been on the job for a week and his employees can’t report to work, the payroll is in the building, he can’t pay people. This is before communications were so decentralized, so the computers were in the building, the telephones were in the building. People are calling the ACLU to find out our reactions and we don’t have access to our telephones or our computers. The center of communications shifted to Washington, D.C., where we were responding. In addition to the logistics, how do run an organization when the building is closed and you don’t have access to the physical building. It was also the fact that the staff working downtown--a number of people were really quite traumatized.

They were afraid to go to downtown Manhattan. Anthony had brought in a psychiatrist to actually do counseling sessions with the staff, and to work with people just on a personal, individual basis, about their own fears and concerns. That was his introduction to running the organization. Now I think that in many ways, the post-9/11 period turned out to be one of the ACLU's finest hours because we had people--some of the legislative people in Washington D.C. who were completely on the case about the PATRIOT Act. [Editor's note: The PATRIOT Act, signed into law by Congress in October of 2001 during the Bush administration, is a law that aims to strengthen domestic security and prevent future terrorist attacks by broadening the powers of the government.] The PATRIOT Act was passed like six or seven weeks after 9/11 with no hearings, no testimony, so no one really much knew what was in it, including certainly the members of the Congress who voted for it. Nobody had done an analysis of, "Is this a good idea? Is this a bad idea? Here's how this changes the law." Some of it was a Department of Justice wish list that they had had, of powers they had always wanted. Some of it was things that were just being made up, "What can we throw at terrorism?" I actually happened to be down in D.C. during October--I guess at the end of October when the PATRIOT Act--you could then read it, it had just been passed, and one of our Washington lobbyists, Rachel King, had the job of analyzing the PATRIOT Act to figure out what there was in there that we would object to. This was a really hard job; the PATRIOT Act went on for three hundred pages, and it was composed of all these amendments of dozens of different sections of previous law. Some of the amendments were really cryptic. What the PATRIOT Act said for example was, "In section blah-blah-blah, delete the word 'the' and add the words 'a significant.'" Without going back and looking at all the laws and figuring out what that changes, and why, and how, and how do the other laws interact, who knows what that means? When I was in Rachel's office, she had yellow stick-ems in every volume of the U.S. code and they were all over her office. This was, again, before people really did computer research. It was a treasure hunt. It was an incredible job that she and her colleagues were doing, of trying to figure out what was in there, how did it change previous law, what was dubious in terms of what might not be a good idea. What Rachel in the Washington office came up with was a list of provisions of the PATRIOT Act, including section 1.25, the library provision. It had six or eight provisions that we should oppose. She did the analysis of what do these provisions say, why should we be concerned about them. That became, I think, one of the principal sources for people to find out what was in the PATRIOT Act, because nobody [knew]. There was no summary, there hadn't been hearings. This was the early days of computer research, but we were able to track the number of hits on our website, which went up astronomically. All the journalists were looking to our website to see, "What's going on here?" and "Is there anything to be concerned about?" I think to the extent that you go around the country today and a lot of people, when you say "PATRIOT Act" they sneer and they regard that as an overreaction, I think much of that reaction is directly attributable to the work that the ACLU did in those days. Nat Hentoff, who had been a former board member who was one of the ACLU's most eager critics, wrote an article that was called "ACLU on the Ramparts." He expressed his admiration for the organization that at a time when people were just traumatized and most people were taking the position that, "Well, the government must know what's best for us and we'd better not say anything because we

don't want to get in the way, because we have to prevent terrorism," that the ACLU-- people all over the organization were speaking up and saying, "Well, wait a minute. Are we sure we want to do this?" That was the legislative front. The communications department came up with the [Keep America] Safe and Free campaign, which I thought was just the right tone. We don't have to give up our freedom; throwing our rights at terrorism is not going to help, and so we really have to be more thoughtful. That was one front. Now, I remember--one of the first discussions that I remember being involved in about our policy and what we were doing after 9/11 was about the detentions, because at that time nobody knew. Everybody had the idea that probably we were locking people up, but nobody knew what was happening. Everything was behind a curtain. We had been hearing rumors that people were in the house of detention and had been picked up, but we didn't know who or why or how many. We were trying to figure out, how do you get a handle on that? How do you find out when the government doesn't tell you what they're doing and how many people they're locking up? We didn't know--were they using harsh interrogation techniques on people? It seemed so difficult to find out. We tried a couple of different things, and one of the things that our staff came up with--there's a story that was recounted in the *New York Times* about Jameel Jaffer and Amrit Singh, who were both staff attorneys at the time, who decided to try using the Freedom of Information Act. A senior attorney said to them at the time, "Oh, come on. You really think any court is going to order the government to release information that they say can't be released because of national security?" He said, "Lots of luck. I'll give you a nickel for every page you get released." Well, famous last words. After they got the torture memos, hundreds of thousands of pages of memos, he reneged on the bet. Part of our strategy was the Freedom of Information Act, and just to try to get the government to tell us things. That had mixed success; it was partially successful, but did not really altogether succeed in helping us to find out who was being detained after 9/11. Another front was happening in New Jersey, because as it turned out, there were so many people who were being locked up that there was not enough room to house them all in New York and so the federal government had a contract with some of the New Jersey county jails in Hudson County, I think, and Passaic County, to house some of their overflow people there. It turns out that in New Jersey, there is a sunshine law that says that the people of the state have the right to know who's housed in the jails. Ron Chen [Ronald K. Chen] and the Rutgers Law School clinic, with the ACLU of New Jersey, brought a lawsuit in New Jersey saying, "Tell us who's in the New Jersey county jails. We have a right to know." They won that case, I believe, in the trial court, and then the person who was the head of the Immigration and Naturalization Service of the time, before that became part of the Department of Homeland Security, issued an order preempting the New Jersey law. He just said, "No, you can't reveal this information because it's important to the federal government that you not." That created a lot of questions about whether that was proper preemption, but we lost that case at the appellate level. But it was a really good try, to try to find out who was being locked up. As I said, the Freedom of Information Act litigation about the detentions had mixed results, and we ended up getting some information but not that much. Now the idea that I had, and I remember this from an executive committee meeting, probably around October-November, I don't know exactly the date, but what I said was that maybe we could use the Vienna

Convention, because under the Vienna Convention if you lock up somebody who is a citizen of another country you're required to tell that country so that the country can make sure that if their citizen needs a lawyer, they have a lawyer, etc. It's a convention that we signed on to. I thought that, well, unless we're not honoring the Vienna Convention, who actually knows who's in our jails are the other countries, the consulates. Anthony thought this was an interesting idea, and so the staff ended up writing a letter to a number of the consulates to say, "If any of your nationals have been locked up, if you've heard that they've been locked up, we can help you find out what their rights are. Let us know." The country that really took that offer most seriously was Pakistan. The staff ended up talking with the Pakistanis, and ended up sending a film crew to Pakistan to interview people who had been deported. I think this was also a very important moment, because one of the things that I think is important in getting people to realize that they're overreacting to something--where the ACLU started with the Palmer Raids, where those thousands of people were deported--is you have to know how this is affecting individual people.

[Editor's note: The Palmer Raids were a series of raids carried out by the U.S. Department of Justice in 1919 and 1920, which resulted in the arrest of thousands of individuals across the U.S. suspected of being radical leftists.] So the film crews in Pakistan were the first opportunity to talk to the actual people who had been deported for really no good reason. Maybe they had overstayed their visas or falsified the application, but it sure didn't mean they were terrorists. There were people who were just being detained. We now know that we were right to be concerned about the conditions under which people were confined. There was sort of an attempt to do a kind of --end run around all the government secrecy in every way we could. Again, I think it really was one of the ACLU's finest hours because we really did remain true to our principles, and even though we had a number of people on our staff who were quite traumatized--you didn't need to tell the ACLU staff about how serious 9/11 was. I live in Park Slope in Brooklyn, and every morning for a month I walked out of my building and could smell the smoke of 9/11. We'd walk our dog in the park and charred pieces of paper would still be floating down. We completely understood the threat of terrorism, but we also were trying very hard to provide a counter force to the idea that we had to just give the government any power they wanted to claim, that they thought at the time might help to prevent terrorism. My view is that I think it's understandable that in October of 2001 that Congress was panicky, that people were panicky. I think they overdid it. They tried to give the government all these powers in case that would help to fight a terrorist, but now it's fourteen years later almost, and I think there are many of those powers that we still have not really reexamined to see if we were right. In those days, that was before we even knew what had happened on 9/11; it was before the 9/11 Commission had operated. So how can it possibly be true that you guess all the things that you're going to need to do to fight terrorism when you don't yet know what's happened? I think, as a society, I think that the fear that was unleashed on 9/11 has continued to prevent us from really looking seriously at whether we're doing the right things, whether they're effective, whether they're cost-effective, whether they're counter-productive, and I mean "cost-effective" not only in terms of money but in terms of rights. So this has been--one of our biggest issues since 9/11 is to try to push back. I hear from people all the time, "This isn't about us. We need to do this to be safe; why should we

care?” I think the ACLU has really been a major force in trying to counter that, “Oh, who cares?” attitude to our rights.

SI: I realize that I should have asked about this before talking about 9/11, but can you tell me about what it was like going through the executive director search?

SH: Oh, okay. It was really interesting because we got to know Ira better during that process. Ira had so many talents and abilities that one thing we were saying to ourselves is, “How could you possibly replace this man?” He just had so many talents and so many things going for him. One thing that was difficult about the search--well, let me tell you, I think that this was a tribute to the ACLU board, because we had an eighty-one person board and one of the most important things the board does is to hire an executive director, because then the executive director gets to wield the power of the organization in the day-to-day work. Well, our search firm recommended to us that you could not really have the board interview several finalists, because if you had people who were going to be going toe-to-toe in front of eighty-one people, you were not going to get the caliber of candidate you wanted. It was a very clear recommendation that what we should have was to appoint a--I think we didn't call it a “search committee,” we called it the “screening committee” or something like that--and the idea was that you would have this committee interview finalists, screen and winnow down the process and interview candidates, and then make a recommendation of one person to the board. The board agreed to that. It was hard; there were a number of people who kept saying, “I'm on the board, this is the most important thing we're going to do. How could I not be part of it? How could I only get the final person and just say yes or no?” But I think, probably, that was very important. I take seriously when the experts tell you you're not going to get the caliber of candidates who you want if they're just going to have to slug it out in front of the board. One of the difficult things about this process was the confidentiality, that we were supposed to be keeping secret who we were considering seriously. We had a very thoughtful process, as you can imagine, as civil libertarians would. We had the search firm, which was really terrific at doing interviews and so forth. They prepared notebooks for us of all the people who had applied and all the people we should be looking at, and then we winnowed that down to a pool of eight. We interviewed those eight people in quite extensive interviews, and selected three finalists for a second interview--I think that's right--and then made the recommendation of Anthony Romero to the board. It took a lot of time, but I learned a lot about the process and how the search firm really knew a lot more than I did about how you interview people and what kinds of questions you asked.

SI: Now, I know your current book deals a lot with these issues we just discussed about 9/11.

SH: The 9/11 issues, right.

SI: Unfortunately, I didn't get a chance to read the book entirely. I just got snippets and I listened to some of your interviews about it, but it seems like there's a lot of examples of how this affected individuals. Obviously you're drawing on research, but I saw one

interview where you talked a lot about the Muslim charities and how they were affected. In your experience, were you working with the ACLU at the time to address their issues?

SH: Well, when I decided to write the book it was midway through Barack Obama's first term, and there were a few reasons why I decided to do that. We had been regarded during the Bush administration as the opposition to the Bush policies, and our ACLU membership went way up during the Bush years because there were a lot of people who, as I think of it, really came to understand that what we had always been saying was right. [laughter] Bush made them really nervous, the idea that he was going to wield that much unilateral secret executive power. Made them very nervous. But some of those people, because they were Democrats, when it became Obama they stopped worrying. People would say to me, "Oh, the PATRIOT Act, is that still around? Didn't that go away when Bush went away?" My joke that I used a lot in speaking was that people were saying that the ACLU could really close down shop and maybe put a nice banner across the front door saying, "Mission accomplished!" because we all knew how effective that had been before. We were getting a lot of that, plus, one of my opening anecdotes in the introduction of the book is that I was sitting next to a woman all night at a dinner who said to me, "Tell me what the ACLU is doing, but don't tell me about that Guantanamo stuff." She said, "Why should I care about those people? They're not even Americans." That really put the idea in my mind that one of the problems was that people didn't know what was still going on, and they didn't know how they were being affected. It wasn't just Muslim men who were being affected, as serious as that is, but it was really all Americans. I decided to write a book that I thought had not been written yet, about the impact of all the post-9/11 measures on ordinary Americans. Instead of just the rights arguments that the ACLU had been making, and by that time others had been making case-by-case, to really talk about the erosion of democracy. One example of what I meant by that was the librarians in Connecticut who received national security letters, which had a gag order attached, so they were not permitted to testify in Congress when the PATRIOT Act provision was being renewed. They wanted to tell Congress that the PATRIOT Act provision being renewed was a problem and that although the Attorney General was assuring Congress that the libraries were safe, he only meant under that one provision and not under this other provision. They wanted to just tell about their experience; they never intended to talk about the particular information the government had asked for, but they wanted to talk about whether this was the right approach for the country and what was actually happening in libraries and they weren't permitted to do so. So to me, the combination of the government's secrecy, plus the increasing surveillance involving making everything that individuals were doing transparent to the government, is a real threat to democracy. That's the reason I decided to write the book. Some of the book is based on ACLU cases, but not all of it. There were a number of cases that were just criminal prosecutions, that really had nothing to do with the ACLU, and I just did research. Part of it I did off the ACLU website, but partially I was also just going other places. I interviewed most of the major people I was talking about, and then I of course worked with ACLU attorneys where they were representing some of the people I was telling about in the books. I also was just really impressed by things like our staff report on the Muslim charities; nobody else was doing that, and it was so

important. What I was hearing was that people in the United States didn't know much about the Bush administration's war against the Muslim charities, but people in the Middle East did. It was really counter-productive, because what the FBI was doing was showing up all over the country on the doorsteps of Muslims, saying, "Why did you give to that charity?" Even charities that weren't suspected of anything. They were alienating people so much that people who we would've liked to have as allies came to view the FBI as their enemy. That was sort of the overall idea of the book. I also felt like, that was after I had been elected ACLU president, so I was thinking, "I have this platform; what am I going to do with it?" So that was one of my choices of what to do with my time, to write the book. My publisher, Oxford University Press, was just wonderful. They sent me on a really big book tour, a number of cities down the West coast and around the country, just setting up things at Powell's Bookstore and clubs and the public library in Philadelphia, just all different places, to talk about the book. That was why I'd really written the book. I didn't write the book to sell books and make money, I wrote the book because then that's your platform to be on radio and T.V. and to really write in different publications, and to really try to spread the idea of what we're doing. To me, this is something we still haven't come to terms with. I did an updated version of the book for the paperback, which just came out in March 2014, and Oxford let me do a new preface and an epilogue, and so in the preface I get to talk about Edward Snowden and how a lot of this is a great big "I told you so" about this surveillance. But most of the chapters in my book are about things other than surveillance and the things that we're debating now, whether we want to reign in the NSA. But there are all these other areas in which we expanded the law and retrofitted the law to create all sorts of dragnets that we're still not doing anything about, because most people are not aware of them. That's been one of my chosen missions, is to try to promote education of the American people about what it is that the law is doing, and what potential it has, because there are a lot of people who trust Obama to use the dragnets; they don't think he's going to use them except against terrorists. I think that confidence is misplaced, because Obama is not the only person in the federal government. There are a lot of people in the FBI, et cetera, who can do things with these laws that are not President Obama's personal decisions. Plus, someday somebody else will be president, and we're not doing anything about these laws. If we don't do anything to cut back these governmental powers while we have a Constitutional law professor for president, then when will it ever happen? Anyway, that was one of the things that I just chose to do with my platform as President, in addition to running board meetings and things like that.

SI: Tell me, why did you decide to run for president of the ACLU?

SH: Well, earlier this hadn't been something I wanted to do because I was being a mother in addition to working, teaching, and so forth. The timing was appropriate for me. I felt that I could spend the time and I could ratchet up my contribution. I just thought that my skill set fit. As an academic, one thing that you get to do is a lot of speaking and writing and you get to decide how much of those you want to do at various times, so I had developed skills in speaking and in writing publically. Also, the fact that the last three presidents of the ACLU had been constitutional law professors, I think is no coincidence

because a lot of the skills that you use in running board meetings are classroom skills-- handling a group of people and how to organize a discussion, being fair to everybody. That's something that I really feel that I am able to do. I think, by the way, it's very interesting that the first two presidents of the ACLU were ministers, and then the most recent three had been constitutional law professors. I think that says a lot about where civil rights and civil liberties have moved, into law from the churches. People ask me, "Why do you want to spend that much time at the ACLU?" Well, I feel like there are a lot of wonderful organizations out there that do work in an individual area of civil rights or civil liberties--whether it's racial justice or women's rights or First Amendment and the reason that the ACLU is my organization and the reason that I'm willing to spend this much time and be the spokesperson for this organization, is that I think we are unique in connecting the dots. We're not just about the rights of me or of my people; we are about recognizing that all of our rights are the same, and that if you want to have the right to decide what to say or what your religion should be or who to live with, you have to grant the same right to other people. That you're not going to make those decisions through whatever government you control, that you're going to allow them the freedom to make those decisions. That if you don't want to be discriminated against on the basis of stereotypes, you shouldn't do it to other people. One thing I love about the ACLU is we have veterans of the Civil Rights Movement--racial justice, of the Women's Rights Movement, we have LGBT activists, and instead of only working for their particular right, they get that you have to do it across the board and that it's a much stronger position if you really have the allies and you're able to say what we all have in common. Due process is the same thing; if you wouldn't want to be locked up on an island off somebody's shore for a dozen years without any fair hearing, you can't do it to someone else. To me, a lot of the ACLU is just so basic; it's the golden rule. That's something that I'm really willing to spend a lot of time on, to try to educate people. I think there are a lot of people in this country who don't understand the ACLU. They don't understand what we're doing because they only look to the results as opposed to the process. It's hard to tell which is the chicken or the egg, whether I have this point of view because I'm a lawyer or whether I became a lawyer because I have this point of view, but I am able to put on the blinders and not look at the results. I don't care whether the First Amendment claim that we're making is that Nazis can speak and the Ku Klux Klan can speak. They get to speak. I disagree with what they say, but to me it's not about what they say and it's not about the results. I don't want to decide our campaign finance policy based on what's good for the Democrats because that's not it. We should be deciding the policy on principle. To me, what's important about the ACLU are these principles, the non-partisan principles. It just so strikes a chord with who I am, that I believe that reasonable people can differ. I think that, in a way, this may be related to the idea that we have a number of people in the ACLU who are deeply religious, but there are some parts of religion that are fundamentalist that basically say, "My religion is right and everyone else is wrong." That's just not something I'm willing to say. I can't say, "My religion is the correct one." I may think that, but I think I have to allow you the space to think that your religion is correct.

SI: Interesting that you brought faith-based organizations into the [conversation.] I just want to look at one of the articles I printed out. It's from when you first became the president. You said you wanted to do that, you wanted to bring faith-based institutions more into the fold.

SH: I think what I was thinking of was, again, the early Civil Rights Movement. I think that there are many churches--the humanist churches, the churches which do believe in fairness. I think they should be with us on many more issues, and I think that what seems to me to have happened in this country is that the churches are not as progressive as they used to be. More churches are more dominated--I may not be correct about this as a matter of history, but it's my perception--are more dominated by more exclusive points of view. What I would like to see is for more of the religious people, more of the churches, to be with us more. I run into many of these people; I ran into a man a few months ago with "Catholics for Choice." There are people who really do get that their religion should not be used as a means of disrespecting other people or preventing other people from making their own choices. That you can believe what you believe, but that's what you believe, and it's not something that is so necessarily true that you can impose it on other people.

SI: Do you think that's been successful, trying to bring these groups more [into the ACLU]?

SH: I think it's impossible to measure. All we can do is try to build bridges. Sometimes people say to me, "Well why didn't I know that the ACLU takes this position?" Well, you know. [laughter] If we had endless money, we'd take out ads in all the newspapers and T.V.s and say, "Here's what we're doing and here's what you [need to know]." Unfortunately we don't have an endless communications budget, so you can only do what you can do.

SI: Has that been controversial at all among the board members?

SH: No, I don't think so. I don't think so; I think there are a number of people who worry about the religious right and particular threats to civil liberties, but that certainly doesn't mean we're anti-religion in any way. In fact, the ACLU vigorously defends the free exercise of religion. We've had to put a whole separate page on our website to show where we do, too, represent Christians. There are a lot of Christians who feel that we're anti-Christian because we don't believe in government-sponsored religion and we don't believe that the Christians, if they're the majority in the neighborhood, can have denominational prayers and crèches at city hall, or crosses that celebrate veterans, and make everyone else feel left out. I don't think that's anti-religion; I think that's more the establishment clause than free exercise.

SI: In your role as president, did you have to get involved in other aspects of the organization like fundraising, legislative contacts? Can you describe the role, more than just governing the board, what you're called on to do?

SH: Well certainly there's the board, and one of the first things I did as president was I wrote a transition memo suggesting that we take a look at our own governance structures. We did that for a number of years, and recently came up with a proposal that was the compromise that the board agreed on. Then the affiliates agreed to modestly reduce the size of the board, delegate more authority to the executive committee, and have term rotation among the representatives. The internal part has been important to me, and that's something I've spent time on. In addition to that, I have done some communications work. Legislative, mostly we have a very professionalized organization so most of the lobbying is done by our professional lobbyists in D.C. but I help out as necessary. Sometimes there are meetings to which they insist on having the head of the organization, so I've gone to a number of meetings at the Senate, one in the White House, where they have insisted that it has to be the head of the organization. That's fine, so I cooperate with that, and the staff has been very generous about briefing me to prepare me for those meetings. That's one thing. Development, also--mostly when I go around the country I will meet with major donors because when I tell an affiliate, "I'm going to be in your area; is there anything I can do for you," what they like to do, with their major donors, they like to reward their support and fidelity by offering them access. "Hey, the National President is going to be in town, would you like to have lunch?" I do that kind of thing, but most of the real development work is done by professionals. They don't look to me to do the fundraising; they have a very excellent development department and development director, and that also has been part of the professionalization. In earlier years, I think the lay leaders, board members as well as the president, were called upon to do more of the development. It was just all hands on deck. There's that and then there's just also administration. Stuff comes up, whatever it is, so I talk with the Executive Director. We have the most confidential relationship. We talk about some things, and then in concentric circles, then the executive committee will be included in more things than the board, and then the board.

SI: Can you comment in general on what the working relationship has been like between you and Anthony Romero?

SH: Anthony? Anthony is terrific. If you're only going to have one employee, you want it to be Anthony. One of the difficult things over the years is that he tells me about all the other organizations that have been trying to recruit him. My position is always, "Why would you want to work for them?" [laughter] But he's really been an excellent colleague, and I think we've really had a very good working relationship. One thing about Anthony that I learned when we were doing the search for an executive director, all the interviews that were done, is that his references were really extraordinary, top to bottom. He's very good at dealing with heads of other organizations and he's good about dealing up, but he's also wonderful at managing down. One of my favorite comments that was made about him--it was made by one of his former colleagues, I guess at Ford, who was talking about how he had relationships with many of his young colleagues, really inspiring. He said, "Anthony could convince a cabbage to get a Ph.D." That's my experience; he's really just an extraordinary person, and we're so fortunate to have him. I think, going back to the search, it turned out that even though Anthony was not somebody who had experience in

civil liberties, the fact that he had all those years at the Ford Foundation reviewing organizations to see what made them work and what made them not work was really very good training for this job. He loves budgets, he just likes how things work.

SI: In doing some of the research, I found a bunch of articles that showed items from the board, and board members were going to the press and airing out their grievances. What do you think about that? I think one of the major issues was privacy-related, and fundraising tactics in general, and privacy related to how information on donors is collected.

SH: Right, right. Well, we had some individual board members for a while who felt that we had, instead of an eighty-one person board, who felt that we had eighty-one boards. They were people who regarded themselves as whistleblowers, and so if they didn't like a direction they thought the board was going in, they would go to the press and say "Look what they're about to do!" Some of the time, they would be saying things that we were never going to do. That sort of built on itself, because they then complained that somebody had suggested that the board should look at whether or not to expel these people from the board because they kept running to the press to say, "Look what they're doing now." We never seriously considered expelling them, but they got an article in the *New York Times* saying we were considering it and then claiming that we hadn't done it because they had exposed us. It was very frustrating because they were giving such a distorted picture to the *New York Times*. That was news; "ACLU Well-Run" is not news, but "ACLU Hypocritical" is a good story, even if it's not true. I think that they were getting far more attention and credit than what was appropriate for what kinds of things they were going to say. We were talking about privacy, so one of their concerns was--this was an entire story in the *New York Times*--that Anthony has a shredder in his office. Anthony writes drafts of letters to major donors and he wants to shred them because he's not sure that's what he wanted to say, but they were trying to make that something pernicious, that he was destroying documents that should be in the archives. They were just extremely skeptical. That's fine; they're entitled to their opinions and they were entitled to bring that point of view to the board. It's often very valuable when people within an organization will be challenging, and be willing to say that, but the way that they were doing this--again, nobody was ever saying, "You don't have the right to go to the press," but they created such an area of tension around what they were doing because they were saying somethings that almost nobody else agreed with. Nobody was going to kick them off the board--we're the ACLU. [laughter] You don't kick them off the board for talking to the press. There was at least one circumstance where the press was told something that was said in executive session, and that is wrong, but our meetings are public meetings so we had to put up with our gadflies. Sometimes it's not easy.

SI: I don't know if it's related to that topic, but you mentioned that term limits are now to be part of the new system. You've certainly been a member of the board for a long time; if you were joining the board now, you wouldn't have the benefit of that.

SH: Right, I would have like three terms. Yeah, right. Excuse me, it's not limits, it's rotation.

SI: Rotation, okay.

SH: So you can have long-serving people, but the idea is they have to step off for a year. That's so that you don't have people who have a lock on elections because of incumbency. You just have a chance to bring in some new people and get some new voices. If people want to come back, we have a nominating committee that can nominate somebody to return. We'll have to see how it goes. [laughter] But I'm hoping it's going to be beneficial, because I'm hoping it's going to mean that we're going to have more new and different voices.

SI: Going back to your own election, what is an election like on the ACLU board? Is it an esoteric exchange of ideas, or is it a mudslinging campaign? [laughter]

SH: The main thing was that we had debates before the board. I can't remember all the details. I guess there was really one principal debate that we had to prepare for, and people asked us questions. They just had some completely fair system where people would submit questions, and if their question was selected out of the box they got to ask their questions. One thing which I had very mixed feelings about was that the person who ran for president against me is terrific. He's wonderful, and he also would've been a great president. It's a shame that we were both prepared to do this at the same time. The person who I ran against, Rob Remar, is a lawyer. He agreed to--which I think was just so generous of him--he agreed to step up and do what the organization most needed, which was to serve as our treasurer because we had a treasurer who was about ready to retire. What could be more important than all the financial management? His attention to detail is wonderful. Great lawyer, and a terrific person. I think what I was bringing to offer the board was a different skillset, a background more in public speaking and the writing and the kinds of representational things. Plus, I had had the academic experience of running rooms full of people and all. It was really an interesting experience, but what made me feel better--actually, I hesitated about whether or not to run when I heard that Rob was planning to run, because I thought, "I don't need to do this. The organization will be well-served." I had to think seriously about did I want to do it, and was I just offering a different choice to the board in terms of my particular background and skills.

SI: We talked a little bit about the affiliate advocacy and support group, but have you played a role in trying to grow the affiliate network to increase membership as president?

SH: In a way. I think, again, the most important thing is the staff level efforts. But I have done a lot of traveling around the country, speaking about the book, about other things, and so I have been to at least half the affiliates and I do whatever I can to help support them and help them grow. But that's pretty ad-hoc; it's not really part of the job description. That's something that the president of the affiliate would do, because the structure of each affiliate replicates the National structure. There's a staff, there's a board, there's a board president, there's an executive director. One of the things that we do at National conferences is we have discussions about, "How are your affiliates doing in terms of your executive director-board relations? Can we talk about that? Here's what we do and here's what you do, and can we all talk about what works and where problems are?" We try to help each other. But I think the growing of the affiliates is not one of my main job descriptions.

SI: This is a question that can apply to your whole time on the board--not just your presidency--but how have you seen the affiliates, the fact that they're all represented on the board and bring their own concerns, how has that shaped policy? Can you think of specific ways that you've seen that happen? Just a background for the question: I was looking at some of the other affiliates and their history before the '80's and such when you were involved. It seemed like the Southern California affiliate, for example, was driving at certain issues that became National policy. Northern California was looking at other issues. So have you seen that in your own period, where an affiliate was really driving one issue that the National adopted?

SH: I think that does happen, and as you say, Southern California has I think been partly successful in driving an agenda toward more economic justice. We haven't so much changed a lot of our policies, but the staff has certainly more recently been doing more work around foreclosures and around due process issues that are our traditional issues, but in a way that really speaks to those concerns. Of course the affiliates have an influence on policy, but part of it is just not a particular affiliate but just where most of the affiliates are. Sometimes, it's surprising. You look at most the affiliates and wonder, like the judicial elections thing--I was surprised that not more people thought that we should be taking a position against judicial elections, because that had been their experience in particular states. But I think they kind of looked around nationally and just decided that, systemically, it was the wrong thing to oppose elections because sometimes appointments can be as much of a problem as elections. Sometimes you want a democratic antidote. In terms of having all the affiliates represented, I think that, again, there's two parts to the story--one of what's happening on the board, and one thing that the board did decide because it had been mostly composed of affiliate representatives, fifty out of eighty-one. We're now to fifty out of sixty-nine, and the only way we reduced the board was by cutting in half the at-large contingent, because the affiliates were not willing to have a board where not every affiliate was represented all the time. We talked about other models, which many other organizations do, of having some sort of rotation or different classes of affiliates. In the '60's, when the affiliates all became represented on the board, that was considered an antidote to too much control by New York. That's continuing to be the attitude. But in terms of how the affiliates are doing, a lot of this again is the story from the staff side, because another thing that Anthony has done in addition to supporting the affiliates structurally with the affiliate support and advocacy department, he is also supporting a number of the affiliates financially. He said when he was looking at the map, he realized that most of our support comes from New York, California, the coastal states, whereas the most serious civil liberties problems are in the middle of the country. What he was trying to do was to spread all that around, and so we have two programs, one is a guaranteed minimum income program for affiliates, which helped to allow every affiliate to have a staff attorney. Each affiliate, the affiliates have grown a lot under Anthony, each and every one. They all have staff attorneys and they all just have more capacity. Then, he also started a strategic affiliate initiative program, where you can't do enormous support for every affiliate but you can pick out some. They have all these criteria for picking out strategic affiliates. They're having a lot of civil liberties problems--it looks like if you

made an investment in them so that they could do some high-profile litigation and so forth, maybe they then could attract enough local support to really be able to get along on their own. The strategic affiliate initiative has been tremendously important. We are supporting the affiliates a lot more, and I think that that's led to somewhat less friction than we've had sometimes in the past about the affiliates being suspicious of National. It's like, "You're the big bad federal government who tries to tell us what to do." I think that attitude has really diminished, because I think we're feeling much more like one organization because the affiliates' concerns are being completely recognized.

SI: Let me pause for a second.

[TAPE PAUSED]

SI: Go ahead.

SH: One more thing that I decided to do with my presidency, in addition to the book and governance reform is, one of the things that is of greatest concern to us is the graying of our membership, that we're looking for more ways to attract younger members who really should realize that they're going to want us there when they need us, so they should support us and they should understand what it is that we do. But the other aspect to that is that so many people know so little about the Constitution. I think a lot of the misunderstanding of the ACLU springs from people not really knowing what's in the Constitution in the first place, so they don't get what we're trying to do, that when we represent the Nazis in Skokie, it's not because we're Nazis and we agree with their speech. [Editor's note: *National Socialist Party of America v. Village of Skokie* was a famous case in 1977 regarding the right to free speech, in which an ACLU lawyer named Burton Joseph successfully defended the right of members of the National Socialist Party of America, formerly the American Nazi Party, to march through Skokie, Illinois, which had a large Jewish population.] There's a principle there. One of the things that I thought would be good to do was to try to do more of a communications campaign to try to reach more students, because I think the schools is where you really reach a lot of people. I was telling the people in the communications department about Constitution Day. There was a federal law that was passed about ten years ago, in which Congress required that any school that takes federal money--maybe more than ten years ago, I shouldn't say ten years ago, but the federal law is that any school that takes federal funds in any form is required on September 17th to do an educational program about the Constitution. A lot of schools don't know about this; some ignore it, and a lot just do things that really bore the students to tears because their idea of a Constitution Day program is, "Let's talk more about the framers. You'll learn all their names. You'll learn who Thomas Hutchinson was, and how many people, and where was it." All these details about history that usually are really dry and boring to most kids. What I thought was, wouldn't it be great if the ACLU could really help with Constitution Day by providing materials that would be more interesting to kids. What does the Constitution mean to you? What would a day in your life be like without the Constitution? Where would you have a concern that the Constitution might be relevant to? The communications department has just taken this idea and run with it. They had materials for Constitution

Day 2013, and September 2014 is going to be the second year they're doing this. The materials keep getting better and better; there are lesson plans, there are video games and crossword puzzles and quizzes and all sorts of things. Constitution Day brought to you by the ACLU. They're doing the programs, so I don't get the credit for that because they're just doing so much terrific work, but I do take credit for having put them on that path, for having suggested the idea. This program is now going to be available for fifth to eighth or ninth graders, and what we're trying to do is to spread the word not only among civil libertarians. The affiliates are really helping out with this; they send speakers out for Constitution Day, and they can get our materials out there, but also among teachers, because September 17th comes pretty early in the year, and a lot of teachers have not had time to prepare yet what they would do for Constitution Day. We have materials that are just terrific for them to use. The communications staff, I think, was very self-restrained in not using it as just an occasion for ACLU propaganda, so they have materials that people who don't particularly agree with us could also live with. I'll tell you one final funny story for the Archives, which is that the ACLU of Mississippi got a call from a woman whose child goes to school in a county in Mississippi that the ACLU has to sue all the time. They can't figure out the difference between not having school-sponsored religion but letting the kids have appropriate religious expression, and et cetera. It's really just a place where the law has not quite caught up with them yet. This woman told the ACLU of Mississippi that her child had come home from a school in this county with materials that said "ACLU" on the top. The school, without even telling the ACLU, was using the Constitution Day materials, which I thought was just great. It's a real tribute to the materials that even people who really totally disagree with us nevertheless saw the materials and thought that it was just a really good way to teach about the Constitution. That's something I'm really excited about. I feel like the more people know about the ACLU the better they understand us, the better we do.

SI: Well, thank you very much for all your time today.

SH: Okay. Well, thank you, Shaun.

SI: Again, I might come back for a second interview.

SH: Okay, sure.

SI: Again, thank you.

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Reviewed by Molly Graham 5/13/2013
Reviewed by Susan Herman 12/12/2015