Being one of the nation’s best-respected civil libertarians comes with a certain amount of responsibility, and that’s one reason Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law and the Law School’s Interim Dean, keeps saying “yes.”

In the past two years, Stone has weighed in on some of the highest-profile issues of our time, offering his perspective at the highest levels of all three branches of government. He spent nearly five months holed away with four other experts to review National Security Agency practices in the wake of the Edward Snowden leak; joined a highly confidential group advising the Director of National Intelligence; met with White House officials on issues related to sexual violence on college campuses; and coauthored an amicus brief in the historic Obergefell v. Hodges case in which he and other scholars urged the Court to apply heightened scrutiny when determining whether laws, such as same-sex marriage bans, discriminate against gays and lesbians.

His work has had an impact. On June 2, 2015, President Obama signed the USA Freedom Act, which included several of the most important of the 46 recommendations Stone and the other members of President Obama’s Review Group on Intelligence and Communications Technology made in their 304-page report. The new law, among other things, imposes new limits on the bulk collection of US citizens’ telecommunications metadata by American intelligence agencies.

A few weeks later, on June 26, the Supreme Court handed down the much-anticipated 5–4 ruling in
Obergefell, recognizing the constitutional right of same-sex couples to marry.

In between those two milestones, Stone sat down with Assistant Director of Communications Becky Beaupre Gillespie to discuss his recent advisory work, offering insight on the government, how he deals with steep learning curves—and why he thinks scholars have a responsibility to share what they know.

**Gillespie:** Your 2013 participation in the NSA Review Group was the highest profile of these recent experiences—and the one that you’ve said affected you most profoundly—but let’s talk first about some of the work you’ve done this year. In January, you joined the Senior Advisory Group to the Director of National Intelligence, James R. Clapper. I know there are strict confidentiality requirements, so I’ll just ask this: what can you tell us?

**Stone:** There are roughly a dozen members of the SAG, chaired by a former CEO of Lockheed Martin. It’s fair to say the purpose is to offer advice to the Director of National Intelligence about a range of issues involving the intelligence community. People bring different perspectives to bear on it. Part of why I’m there is to bring a legal perspective and, in particular, a civil liberties perspective. They clearly want to hear that, which is very much to their credit. The meetings have been lively, serious, and impressive.

**Gillespie:** Around the same time, you were asked to advise the White House on the campus sexual assault issue, which has centered on a difficult balance between victim protections and due process rights for the accused.

**Stone:** It was just one meeting, in January, at the White House. They brought together five law professors—two from Harvard, one from Cornell, one from Penn, and me—to get our perspectives on how Title IX [which prohibits gender discrimination in federally funded programs and includes an obligation to protect students from sexual violence and harassment] is being enforced by the Department of Education. The five of us shared some pretty strong concerns, mostly focused on due process. We all agreed that campus sexual assault needs to be dealt with—either or both by the criminal law and by the universities. But we had two central questions: how do you define sexual assault, which is complicated; and what are the procedural mechanisms that should be employed in serious disciplinary matters against students? Before expelling or suspending a student, should the burden of proof be “preponderance of the evidence,” which is what the Department of Education has imposed, or should it be the more rigorous standard, “clear and convincing evidence,” which the five of us felt was more appropriate? It was interesting to us because as lawyers we have a particular sense of due process, and as law professors we understand that there’s a special harm done to law students who are expelled because this goes on their bar records and can destroy their careers. Law schools are therefore particularly sensitive.

**Gillespie:** Did you find yourself drawing not just on your expertise as a legal scholar but on your experience as a former Law School Dean and former University Provost? Did that change how you approached the questions?

**Stone:** When I asked them, “Why me?” part of the reason they gave is that it would be useful to have the perspective of someone who had been a dean and a provost. Did that actually have an impact on the way I think about these questions? Probably to some degree. Having had experience overseeing disciplinary committees, I do understand the dangers in this process. You’re dealing with an institution that has no expertise—universities are not designed to sort out complicated factual disputes about what happened in a particular situation. We just aren’t very good at this.

**Gillespie:** Yet they’re being called upon to fill this role. How will this play out—or, rather, how do you hope it will play out?

**Stone:** My own view, like that of the other four individuals who were there, is that there needs to be a
Gillespie: Do you think your advice was heard?
Stone: Not really. I think that it was an interesting meeting—they gave us the full opportunity to express our concerns, but they did not really engage them in the way I would have expected in the meeting. The absence of any substantive feedback after the fact left me with the sense that it was at best a fact-finding meeting and was at worst, “OK, we’ll check that off. We did that.”

Gillespie: You helped write an amicus brief in Obergefell v. Hodges, which more than a dozen other constitutional law scholars signed. Tell me a bit about the brief, and the experience.

Stone: The basic argument it makes is that laws that discriminate against gays and lesbians should be tested by heightened scrutiny—by analogy to laws that discriminate against African-Americans or women. It argues that there are four criteria that the Court takes into account in making that judgment. One is whether the characteristic is immutable; second is whether the characteristic is one that has been subject to a history of discrimination; third is whether the characteristic is relevant to the ability of people to perform in society; and fourth is whether the group is fully capable of protecting itself in the political process. We explained why each of those criteria satisfy here and urged the Court to adopt that approach.

Gillespie: Let’s talk a bit about your work on the NSA review panel. Two weeks ago, President Obama signed the USA Freedom Act, which must have felt like a big achievement.

Stone: That work has had an enormous impact, much more than I expected at the time. The USA Freedom Act, and a number of other reforms that the President has instituted himself, simply would not have existed but for the fact that we wrote the report. The potential impact of our work became clearer to me as the process went along. It became apparent that the attention being paid to us by members of the House and Senate, the intelligence agencies, and the various privacy and civil liberties groups was escalating as our work went along. And as it became evident that these groups were taking us seriously, other groups realized they had to take us seriously, too. By the time we finished our report and turned it in to the President, it seemed possible that it would have a real impact.

Gillespie: And there was consensus among the members of your group, which represented a mix of very different perspectives and backgrounds.

Stone: It remains surprising to the five of us. Michael Morell [former Deputy Director of the CIA] and I had lunch recently, and we noted how incredible it was that we all—especially Mike and I—agreed on all these things. Part of it was that we learned to trust each other, and we learned from each other, and the combination of those two things enabled us to find common ground in lots of situations we otherwise never would have imagined possible. Once I understood more fully why certain aspects of the programs were important and valuable, I agreed to things I previously didn’t think I’d agree to. And Morell and Richard Clarke [cybersecurity and antiterrorism advisor to two presidents] similarly came to understand better why civil liberties and privacy were critical and that it was possible to modify these programs in ways that would retain their effectiveness while still preserving these other interests. A lot of it was understanding from each other how we could make things better. It wasn’t, “Let’s throw out national security” or “Let’s throw out privacy and civil liberties”—it was trying to figure out how to do a much better job of achieving both.

Gillespie: Developing this kind of trust and finding this kind of common ground isn’t easy, especially when
the stakes are so high and the issues are so big. It’s not something that happens often in, say, broad public discourse or in Congress. How did your group do it?

**Stone:** The main thing is that it wasn’t necessary for any of the sides to throw their concerns out the window. The goal was not to “win.” We were able to recognize that the programs, as they existed, could be made better without sacrificing one interest for the other. So why is this able to happen here and not in politics? Well, first of all, because this isn’t politics. Politicians, even if they’re capable of seeing a better approach, feel constraints that prevent them from being able to do the right thing. Happily, within this group, we were able to figure out how to do the right thing without feeling like we were betraying anything important, and not feeling answerable to anyone but ourselves.

**Gillespie:** Has this work impacted your beliefs in any way? Are there things you look at differently now?

**Stone:** My confidence in Congress is even lower than it was before. I don’t think Congress was effective in meeting its oversight responsibilities. One of the recommendations I regret not making—and this just didn’t occur to us—is that entities like the Review Group should be appointed on a regular basis. Inside this intelligence world, people get obsessed with compliance, with making sure people are not violating the rules. They forget to ask if the programs can be made better. The best way to do that is to have fresh eyes. The reason we were able to contribute as much as we did is because we came in with fresh eyes.

**Gillespie:** Participating in the Review Group has given you a unique vantage point. What have you learned about the people working in the intelligence community?

**Stone:** The responsibility of keeping the nation safe against a potentially grave terrorist attack is awesome. Those people live with the feeling every day that it is on their shoulders to prevent another 9/11—or a chemical attack, a biological attack, a nuclear attack. Seeing the dangers as they do—the real dangers that exist out in the world—is pretty impressive. Most of us happily assume that those risks aren’t as great as they are. But the fact is, these government officials are good at what they do, and we haven’t had another 9/11, and people think we don’t have to worry about it. But we do have to worry about it, and there are people who are worrying about it. I came away with a real sense of respect for the work they do and the burden they carry. On the other hand, the NSA needs to understand that we should never trust the intelligence community. The potential for them to do bad things, even for good motives, is enormous. The pressure on them to keep the nation safe could lead them, in the absence of very serious checks and balances, to err too much on the side of keeping us safe without fully preserving our civil liberties and privacy.

**Gillespie:** You’ve made no secret of the fact that you developed immense respect for the NSA over the course of this work. Were you surprised to feel this way?

**Stone:** I went into this with the assumption that the NSA had run amok, that the NSA was a law unto itself, that
it was devising these programs without approval and without supervision. That’s what the media had led us to believe. What I found—and this was really was surprising to me and it really impressed me—was that the degree of oversight in this realm was far greater than what I had ever imagined, and that the executive, the Congress, and the judiciary had approved and authorized even the most problematic of the NSA’s programs. Even beyond that, what I found was that the NSA was a pretty scrupulous entity in terms of attempting to stay within the authorities it had been given.

**Gillespie:** How have these experiences informed what you do as a law professor, both in the classroom and in your scholarship?

**Stone:** It certainly affects my work in the classroom because I can draw upon all this when I teach. I’ve drawn upon this kind of material in my Elements class and in my First Amendment class. In terms of scholarship, though, I’ve been ambivalent about writing about it. I’ve written a lot in terms of op-eds and the *Huffington Post,* but I’ve avoided writing about it in a more serious way because I have so much classified stuff in my head. Anything I write has to be cleared. It’s more of a pain than its worth. It’s hard to write seriously about this, too, when there are things I know that are relevant but that I can’t talk about.

**Gillespie:** How is this work like being a law professor,
or a law school dean, or a university provost? Do you flex some of the same muscles when you’re working on an advisory committee?

**Stone:** What I bring to every meeting, whether it’s the discussion of the sexual assault issue or the Senior Advisory Group or the NSA Review Group, is who I am as a thinker, a lawyer, and a law professor. I ask questions, I make arguments, I push people hard. I make them confront their own beliefs. I do the law professor thing. Within the Review Group, there are recommendations we made that are, at least in part, the product of that perspective. One of the things we talked about in the very beginning of the report, and which shaped a lot of the report, was the work I did writing *Perilous Times* [Stone’s 2005 book examining how free speech and other civil liberties have been compromised during wartime]. A key part of educating other members of the Review Group was talking to them about our history and about the fact that, during periods of crisis, we have always overreacted. It was critical for them to understand this. We had to start from that assumption. That helped all of us see the ways in which we could better critique the existing programs. I brought to bear in these conversations a lot of the work I did in *Perilous Times* and in another book, *Top Secret.*

More than that, though, I brought into the mix a certain intellectual style, a distinctive way of approaching questions. Part of that is being a lawyer, and part of it is being a law professor. The kind of probing I attempted to bring to our discussion—not only to educate myself but also to get others in the groups to think critically about their own perspectives—is the same thing we do in class and at faculty workshops every day.

**Gillespie:** Were there pieces of this work that felt less familiar or were difficult for you?

**Stone:** Oh, it was a nightmare—both in the NSA context and now in the SAG context. The intelligence world is incredibly complex, and everybody talks in acronyms. Of the five of us in the Review Group, I was the one with the least inside-the-government experience.

**Gillespie:** How did you deal with that?

**Stone:** It felt like being a first-year law student thrown into a third-year class. It was an extraordinarily challenging learning experience, trying to figure out how to get up to speed. There were things I knew, and things I could bring to bear, that the others didn’t have. But fundamentally, to even talk the talk, you had to know what NIST [National Institute of Standards and Technology] was and what ODNI [Office of the Director of National Intelligence] was. And I didn’t. So from the outset, I had the sense of being dropped into a black hole and having to scramble to know what everybody else was talking about. It was daunting, and it really did remind me of being a first-year law student. A first-week law student. I had to figure out how I could justify my existence in this group. In some ways, I think each of them felt that—but I think I felt it the most because I started the farthest from the starting line. But, because I always feel a need to contribute in important ways in everything I do, it made me work harder. I needed to figure out how I could make a meaningful contribution. And that was both fun and deeply, profoundly challenging.

**Gillespie:** In the end, was that a valuable part of the experience—to be at your level of accomplishment and still be pushed in such profound ways?

**Stone:** Yes—it was a great experience in every way. It was fascinating to learn about this part of the world. It was fascinating to deal with the group and to experience those interactions, which were really remarkable. It was a unique experience in my life. We were asked to solve insoluble problems in a ridiculously short period of time and to write a 300-page report. We had a hundred different meetings with all parts of the intelligence community, with privacy and civil
liberties groups, with the House and Senate intelligence and judiciary committees, with individual members of Congress and the Department of Justice, the CIA, FBI, Homeland Security, and on and on. It was endless. Each entity had its own perspective, and we constantly had to try to absorb all this input and grasp all the different perspectives. It was an amazingly challenging experience.

**Gillespie:** Other than the obvious reason of not saying no to the President, why say yes to these opportunities?

**Stone:** Partly a sense of public responsibility and partly a sense of curiosity. I agreed to do the Senior Advisory Group mainly for those reasons. My sense was that, possibly for the first time, the intelligence community trusted someone they perceived as a civil libertarian enough to invite him into this world, and to the extent that I could offer a perspective that might not otherwise be voiced, I knew I could be valuable. I figured I should do that. If I’d said no, they probably wouldn’t have asked someone else like me. I’d gained credibility from my experience on the Review Group.

**Gillespie:** This last question gets to the root of our theme for this issue of the *Record.* Why is it important, from the Law School’s standpoint, for scholars to accept, or even seek out, opportunities like these?

**Stone:** We, across the University, have expertise that is extremely valuable not only to other academics, our primary audience, but to the general public. One of the reasons I’ve taken to writing a lot in the *Huffington Post* and in newspapers is because I came to the view that educating people in general is something we can do that is a real public service. And this is true across the whole university—it doesn’t matter whether you’re an anthropologist, a historian, an astronomer, or a law professor—we know all sorts of stuff that can help educate the American public about issues ranging from science to sociology to art. I get great satisfaction from knowing that I’ve helped people better understand issues that matter to me. It’s important for people in the academy to realize they can add great value by sharing their insights with the public. With the government work, it’s the same thing. We have a perspective that is different, and it’s useful for people in government to hear that. It will help them do better.

As professors, we focus so much—appropriately—on scholarship, but I think it is also important to recognize that we can contribute to the larger society precisely because we are scholars.