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JURISPRUDENCE

The National Twinkie Defense

Sen. Lindsey Graham doesn't think we need anti-torture laws, just anti-torture niceties.

By Dahlia Lithwick

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Sen. Lindsey Graham of South Carolina loves the law. Nuts about it. We know this because he tells us this many, many times at this morning's Senate subcommittee hearing on "What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration." We know he loves the law because he says "[t]he fact that we embrace the rule of law is a strength" and that "the *only* way is to operate within the law," and he says these things mere seconds after he explains that in the desperate days after 9/11, when the lawyers were crafting legal arguments to legalize conduct that was illegal, they did so because "[they saw law as a nicety we couldn't afford.](#)"

So the real question for the committee, the one we never get to, is how much rule of law can we afford, and what happens to the rule of law when you're getting it for 10 cents on the dollar?

Graham dismisses today's hearing as a "political stunt" because "we would not be having this hearing if we were attacked this afternoon." What this really means is that for all his talk of legality and law and the rule of law, in his view the law means one thing "in the quiet peace of the moment" and something entirely different in the immediate aftermath of a terrorism strike. It's sort of like a national [Twinkie defense](#), but Graham is willing to strap a saddle onto that Twinkie today and ride ... and ride and ride.

Former State Department counselor Philip Zelikow is also thinking about how we will all go crazy after the next terror strike when he testifies: "We could be hit again and hit hard. But our decision to respect basic international standards does not appear to be a big hindrance in this fight. ... Others may disagree. They may believe ... that America needs an elaborate program of indefinite secret detention and physical coercion in order to protect the nation. The government, and the country, needs to decide whether they are right. If they are right, our laws must change and our country must change. I think they are wrong."

So it's really very simple. If torture and indefinite detention and wiretapping are justified, says Zelikow, we need to make them legal now, before the next attack. But nobody—not even Graham—is willing to say that these things are justified. Graham is at pains to say water-boarding is abhorrent. When another witness, Professor Jeffrey Addicott of St. Mary's University School of Law, testifies that "it's just propaganda that we tortured people," Sen. Graham shuts him down. When Addicott insists that it's "insane" to close Guantanamo because it would be "sending a message to the world that we have something to apologize for," Graham cuts him off to concede that America does indeed have an "image problem." Nobody is allowed to undermine the rule of law—except Graham, of course.

All morning, Graham clings to the argument that he believes in the rule of law. And as he does so, he explains that the lawbreaking that happened with respect to torture: a) wasn't lawbreaking, b) was justifiable lawbreaking, c) was lawbreaking done with the complicity of congressional Democrats, d) doesn't matter because al-Qaida is *terrible*, or e) wouldn't be lawbreaking if the Spanish police were doing it.

Graham asks Zelikow, who argues for closing Guantanamo, how many released detainees have rejoined the battlefield. Zelikow hazards that the number is about a dozen. "What if your son or daughter was killed by them?" parries Graham.

Zelikow produced a legal memo in 2006 disputing the constitutional underpinnings of the torture regime. That memo was disappeared and never heard from again. Zelikow says it's now been located and is undergoing review for declassification. As he puts it, on receiving that memo, the White House could have said, "Let's take another look at this," and see whether there was any validity to the different opinion, or "This shows how rusty you are in practicing law. We need to tell you why you've misunderstood this area of the law." But the White House did neither. They just buried it and "shut down challenges even from peers inside the government."

The highlight of the hearing was supposed to be former [FBI interrogator Ali Soufan](#), who was [going to testify](#) to the fact that abusive interrogation was "slow, ineffective and unreliable" and that Bush administration claims about critical information that was elicited through torture were "half truths," since most of the information they cite was gleaned by other methods. Soufan testifies from behind a panel for security reasons, and photographers are purged from the room, which is all very *Get Smart*, but Graham won't give the man a chance to speak. Time and again, Soufan—the only man present who has ever conducted an interrogation—begs to speak. But Graham keeps hollering at him about how dare he purport to speak for all interrogators everywhere. (Erm. He didn't.)

Ethics expert David Luban testifies that the Office of Legal Counsel memos were an "ethical train wreck" that "read as if they were reverse engineered to reach a predetermined outcome." Luban's main point is that if your 4-year-old Googled "water board," they would discover a 26-year-old appellate opinion repeatedly referring to the technique as "torture." But somehow this "single most relevant case in American law" was never even mentioned in the torture memos. Graham's [masterful cross examination](#) of Luban ranges from accusing the man of never having met Jay Bybee or John Yoo, accusing him of calling another panelist—Addicott—unethical since he also believes water-boarding is not torture, and accusing him of misleading the panel for failing to cite a case. The net effect of this performance is to establish conclusively that shouting at, browbeating, and humiliating someone is unlikely to produce any useful intelligence. Such subtlety would be lost on Sen. Graham.

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