

## Interview with Senator Lindsay Graham (Republican Senator from South Carolina)

6.13.12

Q: History is the conflict between the service JAGS and the General Counsel's office in DOD - as we talk to many people you play a significant role in that, supporting your former colleagues or present colleagues, I should say.

A: Yeah, let's go back, let's go back a little bit. How did all this start. You know you want good guys and bad guys, well this isn't a good guy/bad guy story. Even though people like to portray it that way. There are some bad guys in it, but the motivations after 9/11 to acquire, uh, rapid intelligence to basically prevent a second wave of attacks was real. So I think the people who were in charge back then were very, very motivated to protect the nation and they looked at the legal infrastructure that existed prior to 9/11 as sort of an impediment to our ability to defend ourselves and instead of – anytime you cut corners in life you usually pay a price for it. So the motivation was we've got to find out what's going on, we've got to get these guys and I want to know what they're up to, we're not going to lose 3,000 more Americans. So that was the motivation. So here's where the friction hits. As you try to legitimately defend yourself against a second attack you run up against some pretty longstanding principles that have applied to mostly nation-state conflicts. And you had a group in the Bush administration that thought a lot of these laws and concepts were legal niceties that had to be avoided because they're impeding our ability to defend ourselves. And you had another group of people that had been basically taught from the cradle – JAGs – that there's certain way that America goes to war, even in non nation-state actors situations. And there's certain values we want to hang onto no matter what, no matter who the enemy is. So you had this clash between these people who were trying to, who were tasked with defending us. And another group who were tasked with defending us who had a different view of sort of the world was all about. I've always been the camp that were an ideology, we're not fighting a nation-state. There's no capital to conquer, no navy to sink, no air force to shoot down. So when you're in an ideological struggle the way you confront the ideology matters a lot. So when al Qaeda overplayed its hand in Anbar it blew up in their face. The awakening came basically from very brutal treatment. And I'm convinced that the Afghan population has no desire to go down the Taliban road again because it was such a miserable life. So what the JAGs were saying - "listen, you're talking about some things that violate longstanding principles here." And you had, uh, Mora, the Secretary of the Navy, you had people within the system that were basically saying "wait a minute, you know, we're setting aside things we've been embracing for a very long time and the downside is greater than the upside." And I believe that we're stronger as a nation when we embrace our values. I don't mind modifying the way we interrogate people. I don't mind having a classified section so the enemy doesn't know what techniques we may be using, but there're boundaries that I want to adhere to. The Geneva Convention, I didn't think, applied to unlawful enemy combatants, but our Supreme Court said it did. So the question for us, like waterboarding, you have a presidential cabinet saying "yes I would waterboard somebody if I had to." Well that's a unilateral withdrawal from the Geneva Convention. Clearly, waterboarding is outside Geneva Convention protocols, violates the War Crimes Statute that we just redrafted. The War Crimes Statute – original drafted - did not give people notice of what was illegal. The legal infrastructure –

Common Article III – was not written as a criminal statute so what we did with the War Crimes Statute we gave definition and structure and through military regulations we've outlawed waterboarding, there's no doubt now that you can't do these things, in the Army Field Manual. So, my context of this is that you had two competing interests. One – both motivated by defending the nation – and I just think what time has proven is that when you drift too far away from the values you're defending, for expediency, it always catches up with you.

Q: I see – grateful for that. I should say that our report, which I have no doubt is incomplete, but critical of lots of things. But its foundations is based on what you said which is what you said, that we understand even those that made mistakes did so with the motive to protect Americans.

A: Yes, and I think that's something they deserve, quite frankly.

Q: We grant them that...

A: Good.

Q: ...as a foundation.

A: And what they did just, quite frankly, got us off and it was confusing – they created confusion. I mean, the 35 or 50 techniques that they were going to issue to the field about interrogations clearly ran afoul of the UCMJ and our JAGs said "wait, we can't..."

Q: That's separate...there...appropriate motivation on all sides, easy to say, is separate from some of the techniques used in this conflict. 'Cause we talked at length to Jack Rives and about how they really – I'm talking about the other side now, the General Counsel side, for shorthand – suppressing, presenting things, we're talking about bureaucratic maneuvering here that was not necessarily admirable.

A: Here was the biggest offensive thing to me is that he shut out dissenting voices, he tried to go around people, he tried to marginalize the military legal community cause they weren't giving him the answer he wanted. That's a danger in and of itself. Forget about the issue in front of you; that whole concept of, you know, basically going around people who are in the proper chain of advisors, trying to suppress their input, trying to throw them a bone in terms of we're listening to you when you're not. You know, the civilian leadership can go down whatever road they would like, but I don't like the idea of telling military lawyers, who have a duty to their client, and their client is not... their client is their commanders. And those who are fighting this war. They deserve the ability to have their say without feeling like they're being suppressed

Q: I assume this all is uh... agreeable to Captain Eiler, I—

(7m02s) Q2: --I'm also, sir, an Air Force IMA

A: Oh, good.

(7m10s) Q1: Fellow JAG for you.

A: Oh good. Well I just think that the JAG legal community was thinking that these techniques can come back to haunt us, because military lawyers think about the precedent we set. What we do on our watch today can become the precedent for our enemies tomorrow. Now we all know that al Qaeda and Taliban are not gonna give you a fair trial; they'll cut your head off, they're barbarians. But this is not the only war we're ever gonna be in. So, the reason I object to the first executive order regarding military commissions is that they had a provision in there where the jury, the panel members, could be given classified information - not shared with the accused. And the reason I objected to that is that becomes a precedent - so if we have a guy on trial in Iran, and he's sitting at the defense table, and the judge or their form of their equivalent of a jury, whatever system they have, they're discussing information about what he allegedly did. And they won't share it with the accused, and the excuse is that it's too sensitive for you to know about. The right of confrontation is lost. So, I'm not going to be party to that.

Q: What did you do to help, uh, people like Rives and Mora?

A: You gave him, you know, just uh stood up for them, stood behind them, encouraged them to speak truth to power.

Q: Now did you talk administration officials yourself?

A: Absolutely! Absolutely. And eventually we got in a good place: we re-wrote the Military Commission Act. We did the Detainee Treatment Act - we got everybody on board eventually. But the unsung heroes of this is the military legal community.

A: Now the other techniques the CIA - see, you had a lot of pushback in the uniform services, but the techniques; waterboarding, as far as I understand, was only done...

Q: ...Yes.

A: --by the Agency. Now...

Q: ...Well, I'm not sure of that.

A: That I know of.

Q: ...That we've acknowledged.

A: There were some special forces units out there doing some things that...

Q:...Yes, that's right

A: ...And they wound up being held accountable I think. But, the bottom line is that the ticking time bomb case can't drive policy. We can't make an exception. Okay, you got a guy, you think there's a nuclear weapon about to go up in Washington, I got the prisoner, the President says, you know, "Waterboard him, gouge his eyes out." Well, you can't give our executive that authority, because then you really don't have a rule of law anymore. And that was - I rejected that scenario you had to choose between those two concepts.

Q: So, two of the questions we're going to have to face for our task force are, uh, whether they have a finding that torture indeed occurred. Acts that occurred that could be fairly classified as torture. You said waterboarding is, so I take it you have no...

A:...The question is are you going to prosecute people who engaged the activity. My answer is I'm ready to move on because the legal infrastructure, the War Crimes Act, before we rewrote it, was not sufficient to... to be a basis for prosecution.

Q: No, but you have the predicate of the recognition that these acts did occur...

A: ... yeah.

Q: Even though they... for good and fair reason they shouldn't be prosecuted. Yes.

A: Yeah, I told... yes, absolutely. I've been a military lawyer for 30 years: I can't think of any JAG who would come up to you and say that waterboarding doesn't violate abuse of prisoners under the UCMJ, the Convention Against Torture, uh, Common Article 3; I just can't believe anybody would say that this technique doesn't inflict severe emotional and physical pain.

Q: I concur. Absolutely.

A: And if you don't believe me, I'm doing an article... (to aide) When's it coming out? ...on waterboarding. The history of waterboarding. It's coming out in the JAG, uh, Air Force JAG...

Q: In the law review, sir?

A: Yeah

A: So yes, I think these techniques ran afoul of who we are as a people, and clearly outside of what the legal community and the military has been proposing.

Q: To those ends, sir, where you aware of, uh, some of the OLC opinions that even sort of, that followed the work that you and Senator McCain did, like around 2007?

A: Yeah and they were tortured legal reasoning.

Q: Tortured legal reasoning? (laughter)

A: Yeah I mean, come on. I mean you're trying to bend metal.

Q: Right.

A: No, it just made no sense. I mean they were trying their best to create legal lanes that I think were 1) dubious, and 2) long term, damaging. We've done more harm than good. I mean, look how long, we're still talking about this.

Q: Right.

A: One thing you learn from war, is if you can get the population on your side in an insurgency campaign, you're making advances. Detainee policy, from Abu Ghraib to GITMO to Camp Bucca to Bagram – how much time and effort have we spent around detainee policy? And when we get it right... General Stone, Doug Stone, is the unsung hero of Iraq—

Q: --He certainly is, of Afghanistan

A: a model for any future conflict.

Q: We don't have these problems anymore.

A: No—

Q:--We just have drones, we just kill them.

A: I'm okay with killing people.

Q: Yeah I understand that... but that does mitigate the questions over detention.

A: Well I think it's a short-sighted policy because if you, if you take humane detention off the table, you're not serving the war fighter well.

Q: No it will always be there. Let's talk about...

A: We don't have a jail, that's the problem, *inaudible* killin' all these people.

Q: I'm sorry, Senator, closing Guantanamo.

A: Yeah.

Q: Um, if I'm correct, at the beginning of the Obama administration you had Obama, Bush and McCain all thought it should be closed...

A: And me

Q: And you, I know, I've been saying, you supported that. It didn't happen.

A: Want me to tell you why? Okay, well what happened, is that I don't think the administration – and maybe even Senator McCain – quite understood how the public feels about this population of prisoners. Easily demagogued issue.

Q: Excellent.

A: I would be willing to close Guantanamo Bay, but the legal infrastructure around the prison in the United States has to recognize we're at war. This is where the left gets upset. I believe in indefinite detention. I don't believe the law enforcement models the exclusive way to fight this war. As a matter of fact, I think it is the wrong way to fight this war, generally speaking. Holding someone as an unlawful enemy combatant, you can hold them without criminal trial, either through military commission Article 3 trial is a technique and a tool we need to preserve because we're at war. When you capture an enemy prisoner on the battlefield, you don't worry about reading their rights, you try to gather intelligence within our values. But the day that you say you can't do that, you have to go the law enforcement model, and no war has ever been fought using the law enforcement model. So what I told the president, I'll be glad to move these prisoners, we just need to codify, uh, indefinite detention under the law of war. Now we eventually did that, but at the end of the day, that was a bridge too far for the administration. When they put KSM in Article 3 courts, I objected to the high heavens, because it basically undercuts military commissions. If he's not an enemy combatant, who would be? If the guy who planned the attacks on our country doesn't fall into that category, who would be?

Q: Sure. So you're—

A: So the deal was to bring him back into the... to military commissions; we'd close Guantanamo Bay and move the prison population to Illinois. Never happened.

Q: And what about, you said, underestimating how people felt about this, but I thought you were really saying the potential for demagoguery on—

A: I told him, I sent him a memo.

Q: But, so I'm going to ask you a specific one about Sam Brownback. Putting Guantanamo prisoners in Fort Leavenworth, he, I'm only using him as an example, talked about how dangerous this would be for Kansas. Do you believe that?

A: I think—

Q: Isn't that an insult to our military police?

A: No I think we had 50,000 German prisoners housed in the United States in World War II. Yeah. Well, maybe it was 50,000 we took from the British, I mean hardcore Nazis. So I don't buy the idea that we can't deal with 300 people. But you have to look at the prison populations different than normal prison populations. That's where I think we got it wrong. We didn't understand that people are sensitive. I wouldn't want to house them in Charleston. I'd want a military—

Q: How about the brig?

A: No, I don't want them around a population center. Joliet, Illinois was one willing to accept in a very rural part of the country.

Q: Tell me why you don't want them around the population center.

A: I just don't want—

Q: I mean they're inside

A: High-value terrorist suspects to be housed near major population centers or important national security infrastructure. To think there won't be an attack to help these guys is naïve. But, I don't mind housing them in the United States because we did this in other wars.

Q: How about Leavenworth?

A: You know, you don't want to force it on a community. We found a community of the willing . . . see that's what you don't understand about the politics. You don't... when you push people too far... you want buy in in the war on terror: you don't want to force conflict. And to tell somebody, "You shouldn't be concerned about this prison population," is wrong, but to say this is beyond our capability as a nation is completely wrong.

Q: But the concern... but the public concern is legitimate you think?

A: Yeah. Legitimate concerns, but to say "We can't find a place to put 300 people in a prison," in the continental United States, given our history in WWII makes no sense to me.

Q: Do you know, sir, if early on, um, ten years ago, was there, did General Rives or the others: did they approach you? Or how was it that you initially, if you're able to say—

A: Well I got my own fight with the General Counsel folks. You know, about the military commission rules and procedures. Then, uh, as Abu Ghraib came about, uh, we were learning more and more. But I think it was a combination of just public exposure, and my desire to fix the problem. I engaged them. And through my engagement with them and myself and Senator McCain trying to get to the bottom of what the hell's goin' on, that's how we started interacting. Then I found a treasure trove of objections. And like Secretary Rumsfeld, I talked to him personally about this: he thought, you know, he stands 8 hours a day. So he looked at these techniques: he was honestly trying to balance things, he did listen to the JAGs, but the system got corrupted by the General Counsel's office basically shutting them out.

Q: I'll try to finish with you, let you get on...

A: Okay.

Q: Closing GITMO now... still a good idea? Feasible?

A: No. Zero likelihood.

Q: It's finished? I mean, for the foreseeable future. For the foreseeable future.

A: Yeah cause there's just no congressional support for it.

Q: Okay. And uh—

A: Here's the problem: if we're not going to close it, we need to use it, because we're a nation without a jail. If you captured some high value target tomorrow, you just can't put him on ships for sixty days. And this leaves our war fighters in an untenable spot. If you have no humane detention of a high-value suspect developed, you wind up letting them go or killing them. And we're denying ourselves intelligence-gathering opportunities, and we're also putting our war fighters in a very bad spot. So I've embraced the fact that we're not going to close GITMO; let's use it. You've got people at Bagram - you got 52 third country nationals, something like that, somewhere around 50 third country nationals that are not Afghans, they gotta go somewhere. And all of them are not going to be repatriated back to their host country for different reasons. And Afghanistan is not going to be the U.S. jailer forever, so we need to do something with those folks.

Q: By the way, when we spoke to former detainees when we interviewed in London, uh, and they were always one of the principled parts of the constituency for closing Guantanamo, in terms of its value in the world, in their world, it's gone. Closing it now wouldn't...



A: No, I agree, I mean the reason... well if politically the administration feels like they can't use it, then it needs to be replaced. Or use it. I mean, if you feel like it's so tainted we can't use it as a nation, then it's incumbent upon all of us to find a substitute...

Q: You mean because of the symbolic value?

A: Well, no, for the practical needs of a confinement facility.

Q: Oh it's a very modern... what they have now is pretty good.

A: It's probably the best run military prison on the planet. Now. I mean it's the model for how to run a prison. Common Article 3 compliant, very well-run jail. But the question the fact is that we're not using it. President Obama can't put someone new in Guantanamo Bay cause the left would go nuts. And he's gotta either change his position, or we all as a nation have to come up with an alternative to Guantanamo Bay. Cause this can't last. We can't go for the next decade not having a confinement facility. And Bagram, *inaudible*, is off the table. The Afghans are not going to become the jailer for America.

Q: No, mmhm. Next year we're out.

A: I don't blame them.

Q: Rushing to finish.... EITs, I think you might've been a co-sponsor for the Ayotte Amendment. Uh, which at least recognizes, it would seem, the need for some permission for some prisoners to use some of our techniques. I'm speaking in general terms. But you also earlier told us you know what torture is, you're a lawyer, so what do you think, um, what do you think should be?

A: If there's a classified one it should be classified, you shouldn't tell him. The Army Field Manual should not be the only way to interrogate a prisoner. I don't think any country should publish their interrogation techniques online and say, "Here, go read it for yourself." I think we should reserve classified interrogation techniques in the hand of professionals for high value targets and put on the table techniques that are within our values but are not known to them.

Q: Are you aware, Senator Graham, at all, have you heard much rumblings here on the Hill about the, uh, the Senate Intelligence Committee's, their report about the efficacy of enhanced interrogation techniques? I know that there have been many books, you know, there's a lot out there currently, and I didn't know it's been some time in the works, and just didn't know if you...

A: No, I just know that enhanced interrogation techniques like waterboarding and other things that we were doing violate legal constructs we've embraced in the past.

Q: But some coercive techniques you think may be effective.

A: Absolutely. See I'm in the camp of one, not telling your enemy. The most effective thing is uncertainty. The guy doesn't know what's going to happen to him.

Q: So, by the way, of the ones out there – waterboarding you've put off the table—

A:--well I'm not going to share with you what I think would be effective enhanced interrogation techniques. But the list that was briefed to me by the CIA when we were writing the Detainee Treatment Act, I was okay with.

Q: Okay. And then the only concern there would be trusting them.

A: Was what?

Q: Trusting them.

A: Yeah you gotta have your check and balance system. No, that's exactly right.

Q: Who does? Who's the check, who's the balance?

A: Well you have to build in the regulatory process of who are you allowing these enhanced interrogation techniques. A structure that would allow people to be able to go back and review your behavior.

Q: Okay. In the military, in judic..., in congress?

A: I wouldn't make this available to the military. I don't want to get Sgt. Smith in trouble. I want to keep it really traditional law of war interrogation on the military side. We're talking about non-military situations.

Q: So, at the last, you don't take as a lesson from the broad purported abuse that went on – you don't take a lesson from that that you really can't control this once you...

A: That's exactly right. Here's what I've learned from this: detainee policy matters in an ideological struggle more than it matters in the nation-state conflict. And that when you drift, when you drift away from the values that you're fighting for, that differentiate yourself from the enemy, you wind up doing more harm than good. It's not necessary to collect good intelligence to completely abandon regimes that you fought and have fought for and advocate; it's just not a necessary trade off. Having said that, you go too far when you lock your nation down to the Army Field Manual that's published online and that's all you have available to your nation. That's going too far. So what I would say the right balance is on the uniform services side, stick with the Army Field Manual. In the intelligence community where you have trained professionals at a higher level than you do in the military, make available to them classified interrogation techniques with a regime of accountability around them, that could be used in limited cases to protect the nation. That's where I—

Q: But they wouldn't, those techniques—you don't want to be specific—

A: Right.

Q: But they wouldn't be those that we all sitting here agree...

A: They would not violate the legal infrastructure that I helped write.

Q: Senator, we're—

A: You're doing your country a good service here; good luck.

Q: And we're grateful to you for your time, and good to see you again.