

HOUSE OF LORDS

Select Committee on the Constitution

10th Report of Session 2007–08

**Counter-Terrorism
Bill: The Role of
Ministers,
Parliament and the
Judiciary**

Report

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Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary

CHAPTER 1: INTRODUCTION

Scope of the report

1. The Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. **We draw to the attention of the House provisions contained in the Counter-Terrorism Bill, in particular Part 2 (detention and questioning of terrorist suspects) and Part 6 (inquests and inquiries).** This report considers the respective roles of ministers, Parliament and the judiciary in the arrangements proposed by these Parts of the Bill.
2. In order to assist our analysis and deliberations, we wrote to Lord West of Spithead, the minister in charge of the Bill, on 25 June 2008. We are grateful for his prompt response, which we publish as Appendix 1 to this report.

The Government’s approach to the Bill

3. Our report expresses concern about aspects of the proposed arrangements in Part 2 and Part 6 of the Bill. Accommodating the needs of national security and respect for the fundamental constitutional principles on which a free society is based is a difficult task faced by governments around the world. It is clear to us that the Government have listened carefully to their critics. Indeed, the proposals contained in the Bill have emerged from compromises and concessions by the Government. **We make no criticism of the process by which the Bill’s proposals have been developed. Our concerns are directed at the outcomes that have been reached.**

The totality of terrorism legislation

4. In our December 2005 report on the Terrorism Bill, we stated that “While anti-terrorist legislation is not new, each incremental instalment, generated by concerns about public safety, must be considered not only on its merits but also in relation to the totality of such legislation”.¹ The powers contained in the Counter-Terrorism Bill need to be considered against the background of other recent anti-terrorism legislation. Table 1 below seeks to summarise key features in legislation enacted from the Terrorism Act 2000 onwards.
5. In a constitutional democracy such as the United Kingdom, a proper balance must be struck between the constitutional principles of security on the one hand and respect for the rule of law and individual liberty on the other. **The role of Parliament is to assess whether there is a necessity for new measures, to ensure that the measures are framed proportionately so**

¹ 4th Report (2005–06): *Terrorism Bill* (HL Paper 82), paragraph 4.

as to go no further than necessary, and to require that legislation provides for adequate judicial control of the exercise of new powers. Our purpose in conducting constitutional scrutiny of the Bill is to assist the House by identifying and clarifying the constitutional principles and practices that are either expressly or inadvertently affected by the proposals contained in the Bill.

Terrorism Act 2000	Anti-Terrorism, Crime and Security Act 2001	Prevention of Terrorism Act 2005	Terrorism Act 2006	Counter-Terrorism Bill
<p>Part 1: Definition of terrorism</p> <p>Part 2: Proscribed organisations</p> <p>Part 3: Offences relating to terrorist property and seizure of terrorist cash</p> <p>Part 4: Terrorist investigations, including cordons</p> <p>Part 5: Counter-terrorist powers, including arrest without warrant and detention (s 41 and schedule 8), search of premises and persons, stop and search, port and border controls</p> <p>Part 6: Weapons training</p>	<p>Part 1: Forfeiture of terrorist cash and property</p> <p>Part 2: Freezing orders</p> <p>Part 3: Disclosure of information</p> <p>Part 4: Indefinite detention without charge of foreign nationals suspected of terrorist involvement (repealed)</p> <p>Part 5: Religiously aggravated offences and race hatred offence penalties</p> <p>Part 6: Weapons of mass destruction</p> <p>Part 7: Security of pathogens and toxins</p> <p>Part 8: Security of nuclear industry</p> <p>Part 9: Aviation security</p> <p>Part 10: Police powers (fingerprinting, searches, photographing suspects)</p> <p>Part 11: Retention of communications data</p> <p>Part 12: Bribery and corruption</p>	<p>Provision to make ‘control orders’, a replacement regime for Part 4 of the Anti-Terrorism, Crime and Security Act 2001</p>	<p>Part 1: New offences of encouragement of terrorism, preparation of terrorist acts and terrorist training, etc</p> <p>Part 2: Proscription of terrorist organisations; extension of time limit for detention of suspects from 14 to 28 days (ss 23–25); all premises search warrants</p>	<p>Part 1: Powers to gather and share information (including removing documents, taking fingerprints and samples from a person subject to a control order without consent)</p> <p>Part 2: Detention and questioning of terrorist suspects before and after charge. Reserve powers for pre-charge detention and questioning for up to 42 days</p> <p>Part 3: Prosecution and punishment of terrorist offences</p> <p>Part 4: Notification requirements</p> <p>Part 5: Asset freezing proceedings</p> <p>Part 6: Inquests and inquiries</p> <p>Part 7: Definition of terrorism amended; amendment of control order regime; amendment of arrangements for forfeiture of terrorist cash; costs of policing at gas facilities; appointment of special advocates in Northern Ireland</p>

CHAPTER 2: PRE-CHARGE DETENTION AND QUESTIONING

6. Under Part 2 of the Bill, it is proposed to permit an extension of the time a terrorist suspect may be detained and questioned by police before a decision is made to charge or release him or her. The chain of decision-making envisaged by the Bill is set out in Appendix 2. In Appendix 3 we set out further information about how prosecutors determine when there is sufficient evidence to permit a charge to be brought.
7. In the United Kingdom, the only lawful purpose of pre-charge detention and interrogation is investigatory—to build a case for particular charges. Detention before charge may not be used for general intelligence-gathering (for which the police and other agencies have a range of surveillance powers). Nor are pre-charge detention powers intended directly to protect the public from those under suspicion of involvement in terrorism (for which purpose there are other powers such as making control orders under the Prevention of Terrorism Act 2005 or, in relation to non-nationals, excluding a person from the United Kingdom).
8. There are two basic constitutional questions that need to be addressed in designing a system for pre-charge detention. What should be the maximum permitted time of pre-charge detention? And who should be empowered to authorise such detention?

What should be the maximum period of detention?

9. In the current debate there is no disagreement about the need to have in place a legal requirement for police and prosecutors to decide to charge or release a suspect within a specified time. The point in issue is what, in the circumstances of an investigation of serious terrorist offences, may properly be regarded as a necessary and proportionate time for police to gather sufficient evidence, given the fundamental requirement that suspects be charged and brought before a court promptly. In 2000, the Terrorism Act set that time at 7 days. It was increased to 14 days in 2003. In 2006 it was further extended to 28 days. The Bill seeks to create powers for the limit to be increased to 42 days on a temporary basis.
10. In a free society, the purpose of placing time limits on the detention and questioning of suspects in an investigation is to guard against arbitrary detention. A requirement that the police and prosecutors must, within a defined period of time, either decide to charge a suspect and then bring him or her before an independent and impartial judge for the trial process to begin, or to release the person, ensures compliance with the rule of law by placing the accused under the control of a court. Time limits also serve to prevent prolonged interrogation that may in and of itself amount to coercion, with the attendant risk of false confessions.
11. Although a time limit on police detention is widely accepted as a basic aspect of liberty of the person, international human rights instruments do not lay down any specific time limit. This is no doubt because, in the legal systems of the world, the respective roles of the police, prosecutors and the judiciary in the criminal justice process vary widely. The European Convention on Human Rights requires that those arrested shall be informed “promptly” of the reasons for their arrest and of any charge against them, and then be brought “promptly” before a judge (Article 5(2) and 5(3)).

12. The Joint Committee on Human Rights argues that the Bill
 “is incompatible on its face with the right of a terrorism suspect in Article 5(2) to be ‘informed promptly’ of any charge against him. For a suspect to be informed of the charge against him only after more than 28 days detention cannot be considered ‘prompt’”.²
13. The Government take a different view, arguing that
 “There is no specific [European Court of Human Rights] jurisprudence on the length of time that a person can be detained before he is charged but there is the overarching principle that detention under Article 5 must not be arbitrary. Extended pre-charge detention under these provisions [i.e. those in the Bill] is not arbitrary”.³
14. It falls outside our remit to examine the specific question of whether pre-charge detention of 42 days is or is not compatible with Article 5 of the ECHR; ultimately that is a question for the courts. As well as analysis of the case law of the European Court of Human Rights, assessment of the substance of the proposal to increase time limits of police detention requires analysis of the factual background, including the risk that the police may be unable to gather sufficient evidence to charge suspects within 28 days in complex cases and that an extension in pre-charge detention may lead to hostility to the police and a lack of confidence in the criminal justice system within some minority communities. Views on these matters have been gathered and analysed by the House of Commons Home Affairs Committee⁴ and the Joint Committee on Human Rights.⁵ We do not seek to duplicate the valuable work of those committees.
15. **It will be for the House as a whole to consider the rival legal analyses of the Joint Committee on Human Rights and the Government in deciding whether the Government have made a compelling case for the necessity of reserve powers to detain and question suspects for 42 days. If the House approves the time limit set out in the Bill, it will do so in the knowledge that the question of compliance with Convention rights is likely to be heard and ultimately determined by the courts.**

Who authorises detention?

16. A second basic constitutional question arising from the scheme of the Bill is “who should authorise pre-charge detention?” It is relatively uncontroversial that, in our system, the police should have initial decision-making power to determine that it is necessary to hold a suspect for a short length of time. In all cases, the general criminal law permits police officers—in the form of a custody officer unconnected with the investigation and later a more senior officer—to decide that it is necessary to hold a person for the purposes of gathering evidence for a short time. In the general law under the Police and

² 21st Report (2007–08): *Counter-Terrorism Policy and Human Rights* (Eleventh Report): *42 Days and Public Emergencies* (HL Paper 116/HC 635), paragraph 42.

³ Explanatory Notes to the Bill (HL Bill 65-EN), paragraph 306.

⁴ 1st Report (2007–08): *The Government’s Counter-Terrorism Proposals* (HC 43-I).

⁵ 21st Report (2007–08): *Counter-Terrorism Policy and Human Rights* (Eleventh Report): *42 Days and Public Emergencies* (HL 116/HC 635); 20th Report (2007–08): *Counter-Terrorism Policy and Human Rights* (Tenth Report): *Counter-Terrorism Bill* (HL 108/HC 554); 9th Report (2007–08): *Counter-Terrorism Policy and Human Rights* (Eighth Report) (HL 50/HC 199).

Criminal Evidence Act 1984, that period is 36 hours. Application may then be made by police and prosecutors to a District Judge (Magistrates' Court) for a warrant authorising detention for up to a total of 96 hours (four days).

17. Since the Terrorism Act 2000, a similar pattern of police then judicial authorisation has been followed in relation to terrorism investigations. The police have power to detain a suspect, subject to regular internal reviews by officers unconnected to the investigation, for an initial period of 48 hours. Thereafter, police and prosecutors may apply to a Magistrates' Court for warrants of further detention to detain a suspect for a maximum total period of (since amendments in 2006) 28 days.
18. The Counter-Terrorism Bill proposes a triple layer of authorisations for extended detention: by the Home Secretary making a reserve power order; by Parliament approving an order; and finally by a senior judge hearing an application from the DPP under the terms of an order. At each stage, and almost certainly in rapid succession, broadly similar questions are decided: whether there is a need for extended detention and whether the police are conducting the investigation diligently and expeditiously.
19. We now go on to consider whether the scheme of the Bill confuses the separate roles of the executive, Parliament and the judiciary.

The role of the executive in pre-charge detention

20. Before the reforms introduced by the Terrorism Act 2000, when the main terrorism threats related to Northern Ireland, applications for detention beyond 48 hours (up to seven days in total) under the Prevention of Terrorism Acts were determined by the Secretary of State (i.e. a member of the executive). In 1988, the European Court of Human Rights held in *Brogan and others v United Kingdom* that detention authorised by the Secretary of State breached the requirement of Article 5(3) of the ECHR that a detained person "shall be brought promptly before a judge or other officer authorised by law to exercise judicial power" or released. In that case four suspects had been held for between 4 days and 6 hours and 6 days and 16 ½ hours. The Government of the day responded to this ruling by entering a derogation to permit the continuation of executive authorisation of detention for up to 7 days in relation to Northern Irish terrorism. The option of introducing judicial control of the authorisation process was rejected because the "Government concluded that no way could be found of doing so without undermining the independence of the judiciary particularly in Northern Ireland".⁶
21. The Terrorism Act 2000 introduced judicial control in place of ministerial authorisation throughout the United Kingdom. The Government rejected calls for the retention of the Secretary of State's role in relation to Northern Ireland. For the Government, Lord Bassam of Brighton said that "I cannot accept that this matter is so inextricably linked to the executive that it cannot be transferred to the judiciary".⁷ He added "Fundamentally, we believe that it is right in principle that matters relating to the liberty of the individual

⁶ Secretary of State for the Home Office and Secretary of State for Northern Ireland, *Legislation Against Terrorism: A consultation paper*, Cm 4178 (December 1998), para 8.2.

⁷ HL Deb, 24 May 2000, col 692.

should be in the hands of the judiciary. Indeed, I should have thought that there would be general agreement on that point in this place”.⁸

22. **We agree with the policy of the Terrorism Act 2000 that after an initial short period of detention authorised by police officers unconnected with the inquiry, any further authorisation should be a matter for the judiciary. That policy not only accords with the requirements of the ECHR but also reflects the basic constitutional principle that individual liberty is to be protected by the courts.**
23. We considered whether the proposals contained in the Bill undermined that principle. Lord West told us that they did not: “There is no change to the principle that the judiciary are responsible for authorising the continued detention of a suspect before charge” because “The Home Secretary’s role is to decide if and when the 42 day higher limit should be made available as a matter of law” and “The Home Secretary will not be involved in the conduct of a particular investigation or the detention of individual suspects”.
24. Under the scheme of the Bill, there will be a connection between the decision of the Home Secretary to make a reserve power order and particular investigations which have led to the detention of one or more suspects. Indeed, the Home Secretary’s decision to make an order will be prompted by a report from the DPP and a chief constable that there is an operational need to detain one or more suspects and that the particular police investigation is being conducted diligently and expeditiously (clause 24). Nonetheless, the Home Secretary’s order will only provide the courts with the power to consider in individual cases whether detention up to 42 days is justified; the actual decision on whether to detain a particular suspect will continue to be taken by a judge.
25. **We are satisfied that the Bill preserves a constitutionally proper division of responsibilities between the Home Secretary and the judiciary. The Bill maintains the principle that in any given case it will be a judge, not a minister, who determines whether an individual suspect continues to be detained by the police. In this respect, the reserve power orders in this Bill are very different from the executive authorisation of detention included in earlier Terrorism Acts.**

The role of Parliament in pre-charge detention

26. Until now, Parliament has had two straightforward functions in relation to pre-charge detention. The first is to set the maximum permitted period of detention in primary legislation; we have noted above that in recent years Parliament has agreed to increase the time limit from 7 to 14 to 28 days. The second function is to have general oversight of the operation of counter-terrorism legislation, aided by the periodic reports of independent reviewers. Scrutiny of counter-terrorism policy falls particularly within the remit of the House of Commons Home Affairs Committee and the Joint Committee on Human Rights.
27. Under the scheme proposed by the Bill, Parliament will be involved in several different ways:
 - (a) The chairmen of three committees (the Home Affairs Committee, the Joint Committee on Human Rights and the Intelligence and

⁸ Ibid, col 693.

Security Committee) will receive briefings on a Privy Counsellor basis about the Home Secretary's decision to make a reserve power order

- (b) Each House will debate and vote on a resolution approving a reserve power order, ahead of which the Home Secretary will lay a statement before Parliament and information about the independent legal advice she has received
- (c) If a reserve power order is approved by each House, Parliament will subsequently be informed by the Home Secretary on each occasion when a court grants an application by the DPP for a warrant authorising detention up to 42 days
- (d) Within six months of the reserve power order ceasing to be in force, Parliament will receive and scrutinise a report by the Independent Reviewer of Terrorism Legislation.

Tasks (a), (b) and (c) are new ones for Parliament.

Privy Counsellor briefings to three committee chairmen

- 28. The Government will show the chairmen of the three committees mentioned above the police and DPP's report and the independent legal advice commissioned by the Home Secretary. In his letter, Lord West told us that "This will ensure that these key individuals are aware of the circumstances leading to the Home Secretary's decision and therefore able to participate fully in the subsequent debates on the issue" and that "Giving these documents to the chairs of these committees will therefore provide a level of reassurance to Parliamentarians and the public that the Home Secretary is acting properly and in accordance with the law".
- 29. **We are unconvinced that "Privy Counsellor briefings" to three committee chairmen will enhance the effectiveness of parliamentary scrutiny. The chairmen will be unable to share with their committees their assessment of the confidential information they have been shown—and may even refuse to view the information in the first place for this reason—or to consult their committees' legal and specialist advisers for guidance and analysis. It is also difficult to understand how having access to secret material will enable the chairmen to participate any more fully in parliamentary debates than other members. Moreover, we are concerned that there is a risk that the consensual ethos of select committees will be undermined if some members have privileged access to information not made available to others. In our view, this proposal is untenable and should be removed from the Bill.**

Scrutiny and approval of the order declaring the reserve power exercisable

- 30. Each House of Parliament will scrutinise, debate and within seven days decide whether or not to approve the reserve power order. Each House will have before it a statement by the Home Secretary that there is a "grave exceptional terrorist threat" (as defined by clause 22 of the Bill), that the reserve power is needed urgently and that the reserve power is compatible with Convention rights. The statement must not, however, include the name of the detained person or material that might prejudice the prosecution of that or any other person (clause 27(4)). Each House will also have a version

of the independent legal opinion obtained by the Home Secretary, redacted to remove any sensitive or prejudicial material (clause 25(6)–(7)).

31. Speaking at the Bill’s Report Stage in the House of Commons, the Home Secretary explained that:

“Parliament’s role in approving the order is not a negligible or an insignificant safeguard. I am constantly surprised at parliamentary colleagues who believe that their role is so insignificant in the thinking of a Home Secretary. Trust me—Home Secretaries think very carefully about what they have to explain to Parliament and what they need to have approved by Parliament ... Parliament will be able to debate the general security threat; the progress of the investigation; the police numbers involved; the number of suspects detained; the outline of the plot; the what, why and when; the number of countries involved; whether the Home Secretary’s decision was properly founded; and whether she had indeed received reports from the police and the DPP”.⁹

32. There are in our view significant difficulties with this stage of parliamentary scrutiny of the reserve power order. Although the order will, like normal legislation, be expressed in general terms—and will on the face of it merely permit the DPP to seek warrants for further detention from a court—the reality would be that the order would be made in relation to investigations into particular individuals. Indeed, as the Home Secretary acknowledged, the debate on the order is likely to include “the outline of the plot” and the “what, why and when”. There are principled and practical objections to this arrangement.

33. In the House of Commons the Speaker, and in the House of Lords the Leader, so far as normal practice provides, will advise on the parameters of permissible debate, but it is easy to foresee that members and select committees of both Houses will, in their questions, speeches and reports, have to tread a tightrope between on the one hand exercising parliamentary privilege of free speech to ensure that there is as full scrutiny as possible of the Home Secretary’s course of action and on the other hand avoiding remarks—individual and collective—that may serve to prejudice fair trials and threaten the independence of the judiciary. Moreover, members of both Houses may be contacted by the families and legal representatives of the detained suspects—indeed, the proposed scheme might encourage such people to make representations to their MP and others.

34. In their 1999 report, the Joint Committee on Parliamentary Privilege stated:

“The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented and tested. Although the risk of actual prejudice is greater in a jury trial, it would not be right to remove appeal cases or other cases tried without a jury from the operation of the rule. Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public

⁹ HC Deb, 11 June 2008, cols 327 and 400.

confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment”.¹⁰

35. Even though reserve power orders do not engage the strict application of the sub judice rules, given that no charge will have been brought, the principle set out by the Joint Committee that Parliament should demonstrate respect for the role of the courts in debate should nonetheless apply in the context of these orders. Indeed, as the Joint Committee recognised, drawing the line in the application of the sub judice rules at the point of charge “does not remove the obligation on individual members and select committees to act responsibly and avoid actions which impede criminal investigations or abort trials”.¹¹
36. In our letter, we asked Lord West to provide greater details—amplifying or adding to the matters referred to by the Home Secretary in the House of Commons on 11 June 2008—of what matters would in the Government’s view be (a) appropriate and (b) inappropriate for debate in Parliament on a resolution to affirm a reserve power order. **No such further details have been provided. We are unconvinced that the Government have properly thought through this aspect of their proposed scheme.**
37. Effective debates in Parliament would not only need to avoid touching on potentially prejudicial matters, they would also need to ensure that the order is subject to a degree of scrutiny commensurate with the fact that individual liberty would be at stake. Parliament will, however, almost certainly need to operate without fully knowing the factual background. The Home Secretary’s legal advice is likely to be redacted to remove material the disclosure of which would be damaging to the public interest or might prejudice the prosecution of any person (clause 25(7)). **We are concerned that Parliament would be asked, under the scheme of the bill, to make decisions that in the circumstances it is institutionally ill-equipped to determine.**
38. There has been little discussion as to whether the votes in each House to affirm a reserve power order will be subject to the guidance of party whips in the usual way or whether members will be permitted to have a free vote. If (as would seem likely) it is the former, we are concerned that a judge determining an application for extended detention will be called upon to exercise powers a matter of days or perhaps hours after a highly politically charged debate in Parliament in which there has been a clear division on party lines and over which there continues to be party political controversy. **There is a risk that this will be perceived to undermine the independence of the judiciary.**
39. **In developing this scheme, the Government have sought to devise ways in which Parliament may be involved in decision-taking about police detention of terrorist suspects. Insofar as the motivation is to ensure democratic accountability, this is understandable; in our view, however, it is muddled. The Bill risks conflating the roles of Parliament and the judiciary, which would be quite inappropriate. It is ill-advised to create a decision-making process that requires**

¹⁰ First Report of 1998–99 (HL 43-I; HC 214-I), para 192.

¹¹ Ibid, para 196.

Parliament and the judiciary to ask and answer similar questions within a short space of time—or at all. Far from being a system of checks and balances, this is a recipe for confusion that places on Parliament tasks that it cannot effectively fulfil and arguably risks undermining the rights of fair trial for the individuals concerned.

The role of the judiciary in pre-charge detention

40. In the scheme envisaged by the Bill, there may be judicial involvement in two main ways: in hearing applications by the DPP for warrants to detain suspects; and adjudicating on any judicial review challenge that might be brought against the reserve power order itself.

DPP's applications for a warrant to detain

41. Under the scheme of the Bill, Schedule 8 to the Terrorism Act 2000 will be amended to set out amended procedures for seeking pre-charge detention warrants (Schedule 2 to the Bill). In England and Wales, the judge hearing the application by the DPP for detention beyond 28 days will be either a High Court judge or a designated circuit judge.

Judicial review of a reserve power order

42. A second way in which the judiciary may be involved is if a judicial review challenge is made to the legality of the reserve power order on grounds that it is incompatible with Convention rights or is unlawful under domestic grounds of judicial review (illegality, irrationality and procedural impropriety).
43. In relation to the Human Rights Act, the Joint Committee on Human Rights has considered whether a 42-day limit is compatible with Convention rights. They have concluded that “the legal framework which will be created by the Bill is both not compatible with the right to liberty in Article 5 of the ECHR and will inevitably lead to breaches of the rights in Article 5 in individual cases”.¹²
44. In relation to domestic grounds of review, the fact that an order has been passed by affirmative resolution in Parliament will not prevent the Administrative Court considering whether the order is ultra vires. In *R (on the application of Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, the Court of Appeal quashed the Asylum (Designated Countries of Destination and Designated Safe Third Countries) Order 1996—which created a “white list” of countries to which failed asylum seekers could be returned without serious risk of persecution—on the ground that the Home Secretary had, in designating Pakistan, acted irrationally in his evaluation of the position of women and members of the Ahmadi community. Lord Phillips of Worth Matravers, for the court, said:

“The fact that, in the course of debate, the Secretary of State or others make statements of fact that support the legitimacy of the subordinate legislation, and that the House thereafter approves the subordinate legislation, cannot render it unconstitutional for the Court to review the material facts and form its own judgment, even if the result is discordant with statements made in parliamentary debate” (paragraph 37).

¹² *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, para 42.

45. The court held that Article 9 of the Bill of Rights 1689—“that the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any Court or place out of Parlyament”—did not prevent the court reviewing the delegated legislation. Lord Phillips stated:

“Subordinate legislation derives its legality from the primary legislation under which it is made. Primary legislation that requires subordinate legislation to be approved by each House of Parliament does not thereby transfer from the Courts to the two Houses of Parliament the role of determining the legality of the subordinate legislation” (paragraph 33).

46. **While there may be formidable practical difficulties in obtaining instructions from a detained suspect to question the legality of a reserve power order, there are a number of interest groups who would have standing to bring a public interest challenge. In determining whether the order is valid, the Administrative Court would make its own assessment as to whether there is “a grave exceptional terrorist threat” and whether the need for the reserve power is urgent. The court would not be precluded from reaching different views from that of the Home Secretary or Parliament. The elaborate decision-making scheme, involving delegated legislation, set out in the Bill provides far greater opportunities for legal challenge than would a straightforward statement in primary legislation of the maximum permitted detention period. It is a weakness of the Bill, not a strength, that it is likely to lead to high-profile litigation during a time when the response to terrorism will be a matter of high controversy.**

Habeas corpus

47. At the Third Reading of the Bill in the House of Commons, the Home Secretary undertook to look carefully at a new clause proposed by William Cash MP who sought to ensure that habeas corpus would not be restricted.¹³ Habeas corpus is an ancient writ available from the High Court where an applicant or his legal representatives allege that he has been unlawfully deprived of his personal liberty. It is, in other words, a type of judicial review. In recent years it has fallen out of favour with practitioners; the modern judicial review procedure under Part 54 of the Civil Procedure Rules is generally seen as a more effective means of challenging detention. Habeas corpus also provides much narrower grounds of review since the courts have held that it may only be used to challenge “jurisdictional error” (a mistaken view of legal pre-conditions for the exercise of a power) by the minister or other public authority responsible for the detention. **We do not regard habeas corpus as significant to the debate about judicial control over extensions of detention time. Modern judicial review provides an equally robust mechanism for dealing with legal challenge.**

¹³ HC Deb, 11 June 2008, col 397.

CHAPTER 3: INQUESTS

48. Part 6 of the Bill makes provision in relation to inquests. **We draw to the attention of the House the proposals to permit the Secretary of State to issue certificates requiring an inquest to be held without a jury (clauses 77 and 78) and proposed arrangements for appointing and removing “specially appointed coroners”.**
49. We asked Lord West to explain why these provisions, which have a wider application than just counter-terrorism cases, were being included in this Bill rather than the Coroners and Death Certification Bill planned for next Session. We did so because it will be important for Parliament to be able to scrutinise the proposals in the context of the reforms to the coronial systems planned by the Government. Lord West explained that the Coroners and Death Certification Bill “will not gain Royal Assent and come into force within a sufficiently short timescale to address the problems we are concerned about in relation to pending inquests”. **We welcome the Government’s indication that they are considering a sunset clause to enable matters to be discussed again when the Coroners and Death Certification Bill is introduced. In our view, such a sunset clause is essential.**

Certificates for inquests without juries

50. The Bill seeks to amend the Coroners Act 1988 and the corresponding legislation in Northern Ireland to empower the Secretary of State to issue a certificate that because secret material needs to be considered, an inquest must be held without a jury. We accept that there may be circumstances in which such material cannot be revealed in open court. The constitutional question is who should decide that a jury be dispensed with in particular cases—a minister or a judge?
51. Clauses 77 and 78 of the bill provide that the Secretary of State may issue a certificate requiring an inquest to be held—or if it has started, to continue—without a jury at any time before an inquest is concluded. We asked Lord West whether it might not be more appropriate for such a decision to be taken by a judge. We did so because it seemed to us to be constitutionally inappropriate for ministers to be directing how inquests are conducted, for two reasons. First, coroners are independent judicial officers and inquests are judicial proceedings. Second, inquests in which secret material may need to be considered may very well involve deaths that may have been caused by the actions of agents of the state. Our view was that a more constitutionally acceptable model would be to provide for the Secretary of State to apply for an order from a senior judge for an inquest to proceed without a jury where secret material has to be considered.
52. Lord West’s response was that decisions to certify non-jury inquests should be an executive rather than a judicial function because
- “assessing the sensitivity of this material requires not simply evaluation of information that is available, but also (for example) evaluation of the significance to be attached to the overall intelligence picture informed by a further appreciation of national and international conditions (relating to security matters, and otherwise). The Secretary of State would be in the best position to assess the requirement of national security and

international relations and to determine, in any particular case, whether the public interest requires a certificate to be issued requiring an inquest to be held without a jury. Indeed, this has traditionally been a function for the Executive alone, with the judiciary giving due deference to the executive's role".

53. **In our view, Ministers should be required to apply to the court for a non-jury inquest, rather than being empowered to determine without any judicial oversight that there will be such an inquest.**

Secretary of State or Lord Chancellor?

54. In the amendments proposed by clause 79 of the Bill, the Coroners Act 1988 would be amended to enable a list of "specially appointed coroners" to be maintained by the Secretary of State, to conduct inquests with secret material. We asked Lord West why the Bill specified the "Secretary of State" rather than the "Lord Chancellor" as the minister responsible for appointing and revoking the appointment of this new cadre of coroners. Two reasons are given.
55. The first is that the Bill "refers to the Secretary of State for Justice who is also, of course, the Lord Chancellor". This is not in our view an accurate account of the position. The Secretary of State and the Lord Chancellor are two distinct ministerial offices. They have recently been occupied by the same person but in law there is no requirement that this is so. Moreover, in law it is recognised that certain functions of the Lord Chancellor may not be transferred to other ministers by order in council in the normal way; they are protected by primary legislation.¹⁴
56. The second explanation for selecting Secretary of State rather than Lord Chancellor is that "the Secretary of State/Lord Chancellor is responsible for the law and policy relating to the current coroner system, although he has limited powers only with regard to the deployment of coroners, and none at all in relation to their selection and appointment". We accept that under the Coroners Act 1988, coroners are appointed and paid by local authorities. Under section 3 it is however the Lord Chancellor who has a power to remove any coroner from office for inability or misbehaviour in the discharge of his duty.
57. **In our view, it is the Lord Chancellor, not a Secretary of State, who should be responsible for appointing and revoking the appointment of "specially appointed coroners". Coroners are independent judicial officers. Under the Constitutional Reform Act 2005, the Lord Chancellor has special responsibilities in relation to the rule of law and a duty to defend the independence of the judiciary. The Lord Chancellor already has powers in relation to dismissal of coroners. We call upon the Government to think again (as they did in relation to the Legal Services Bill where the minister responsible was initially the Secretary of State before the Government conceded that the Lord Chancellor was the appropriate minister).**

¹⁴ Constitutional Reform Act 2005, section 20 and Schedule 7.

APPENDIX 1: CORRESPONDENCE ON THE COUNTER-TERRORISM BILL

Letter from Lord Goodlad to Lord West of Spithead, 25 June 2008

The Constitution Committee is currently scrutinising the Counter-Terrorism Bill. We plan to agree a report at our meeting on 9 July 2008 so that it is available to the House in time for the start of the bill's Committee Stage. **We will therefore require a response from you by 5pm on Thursday 3 July at the latest if we are to take into account your comments.**

Part 2 of the bill: Detention and questioning of suspects

We have several concerns about the respective roles of ministers, Parliament and the judiciary in decisions relating to the 42-day detention provisions.

When the Terrorism Act 2000 was enacted, there was a clear decision on the part of the Government that “it is right in principle that matters relating to the liberty of the individual should be in the hands of the judiciary”. Those were the words of Lord Bassam of Brighton to the House on 24 May 2000 (col 693), rejecting calls for the Secretary of State to retain power to authorise pre-charge detention. We take the view that the principle in the Terrorism Act 2000—that after an initial short period of detention authorised by police officers unconnected with the inquiry, any further authorisation should be exclusively a matter for the judiciary—is correct. That principle not only accords with the requirements of Article 5 of the European Convention but reflects the basic constitutional principle that individual liberty is to be protected by the courts.

It appears to us that the arrangements set out in the bill depart from that policy. In deciding to make a reserve powers order, the Home Secretary would in effect be making decisions about specific suspects detained as part of a particular police investigation. This is plain from the requirement that the DPP and chief police officer's report to the Home Secretary must state that they are “satisfied that the investigation in connection with which the detained person or persons is or are being detained is being conducted diligently and expeditiously” (clause 24(5)); and that the Home Secretary must satisfy herself that this is indeed so as a precondition to making the order.

Q1 Is the principle of transferring responsibility for authorising pre-charge detention from the executive to the judiciary, adopted in 2000, still correct?

Q2 (a) Are we right to think that the Home Secretary will, under the arrangements in the bill, be involved in assessing the conduct of a specific investigation and the detention of particular suspects? (b) If so, how does this sit with the principle set out in the 2000 Act?

We also have concerns about the proposed role of Parliament in the scheme envisaged by the bill. The provision in clause 26 for the sharing of confidential information with the chairmen of certain select committees on a “privy counsellor basis” is, so far as we are aware, a constitutional innovation. As the Explanatory Notes make clear, this information could not be discussed by the chairmen with other members of their committees; nor, we might add, would a chairman be able to seek advice from a committee's legal or specialist advisers. The Explanatory Notes go on to claim that “parliamentary scrutiny will be informed and

strengthened” by this arrangement (para 308 f). It is not however obvious to us how these arrangements are capable of enabling more effective parliamentary scrutiny of the Home Secretary’s decision.

Q3 Please outline the precise purpose(s) of clause 26, in particular how the Government envisages that sharing information in this way will promote more effective scrutiny than might otherwise be the case.

Under the bill, each House of Parliament will debate the reserve powers order made by the Home Secretary. While we accept that in many situations parliamentary scrutiny of Government decisions in each House is essential or desirable, we foresee significant—and perhaps insuperable—difficulties in this particular context. We have noted the explanation given by the Home Secretary of the matters that would be debated (HC Hansard, 11 June, col 400), which include: (a) the general security threat; (b) the progress of the investigation; (c) the police numbers involved; (d) the number of suspects detained; (e) the outline of the plot; (f) the what, why and when; (g) the number of countries involved; (h) whether the Home Secretary’s decision was properly founded; and (i) whether she had indeed received reports from the police and the DPP.

Public debate of (b), (d), (e) and (f) in particular, during the early stages of a police investigation, appear to us to present very real difficulties. We do not understand how discussion and inevitable speculation about these matters can avoid the risk of prejudicing not only the continuing police investigation but also subsequent court proceedings. Even without high-profile debates in Parliament, last year the then Attorney General had cause to issue an advisory note warning the news media to exercise restraint in their reporting of a counter-terrorism operation in the Midlands and reminding editors of the terms of the Contempt of Court Act 1981 (“Counter Terrorism Operation in the West Midlands”, 31 January 2007). The practical problems that already exist are surely likely to be greatly exacerbated.

Q4 How do you respond to concerns that the parliamentary debates envisaged by the bill, and the consequent coverage in the media, may risk hindering the police investigation?

Q5 Is there a risk that the debates and media coverage may prejudice future legal proceedings, including (a) any application that the DPP may make under the reserve powers order for a warrant of detention and (b) any subsequent trial of the suspect(s)? How might the risks be minimised?

Q5a It would be helpful to know in more detail what matters would in the Government’s view be (a) appropriate and (b) inappropriate for debate in Parliament on a resolution to affirm a reserve powers order.

Part 6 of the bill: Inquests and inquiries

Part 6 of the bill proposes to empower the Secretary of State to issue a certificate ordering that a coroner’s inquest into a death be conducted without a jury where material will need to be considered that should not be made public “in the interests of national security, in the interests of the relationship between the United Kingdom and another country, or otherwise in the public interest” (clause 77 and clause 78, amending respectively the Coroners Act 1988 in England and Wales and the Coroners Act (Northern Ireland) 1959).

First, as to procedure, our view is that the Coroners and Death Certification Bill announced as part of the 2008–09 Draft Legislative Programme appears to be a

more appropriate vehicle for these provisions. As currently drafted, the certification powers of the Secretary of State are very broad and capable of extending far beyond cases related to terrorism and national security. The current proposals would receive more effective scrutiny in the context of wider reforms of the coronial process in the Coroners and Death Certification Bill.

Q6 Why are reforms on the use of juries in inquests being included in a Counter-Terrorism Bill rather than in the Coroners and Death Certification Bill next Session?

A second concern returns to questions about the proper allocation of functions between ministers and the judiciary. As currently drafted, the bill gives power to the executive to determine that a coroner hold an inquest without a jury. This strikes us as constitutionally inappropriate given that coroners are independent judicial officers and the inquests are judicial proceedings. These proceedings may of course call into question the conduct of government. A more constitutionally acceptable model might be to provide for the Secretary of State to apply for an order from a senior judge for an inquest to proceed without a jury where secret material has to be considered.

Q7 (a) How do you respond to the view that the decision to proceed without a jury ought to be a judicial rather than an executive function? (b) What other options have been considered and why were these rejected?

By clause 79 of the bill a new section 18A will be inserted into the Coroners Act 1988 providing that “the Secretary of State” may appoint specially appointed coroners and a new section 18C by which “the Secretary of State” may revoke the appointment. In both cases the concurrence of the Lord Chief Justice or another senior judge is required. Nonetheless, our provisional view is that the functions of appointing and revoking the appointment of special coroners ought to be in the hands of the Lord Chancellor rather than the Home Secretary. Under the Coroners Act 1988 it is the Lord Chancellor who has power to remove coroners from office. This is a constitutional arrangement that appears preferable as the Lord Chancellor has responsibilities for judiciary-related matters but also has special duties in relation to the rule of law.

Q8 Please explain why the Secretary of State rather than the Lord Chancellor is thought to be the appropriate minister.

RT. HON. LORD GOODLAD

Response from Lord West of Spithead, 2 July 2008

Thank you for your letter of 25 June 2008 on the Counter-Terrorism Bill. Please find below a response to the points raised in your letter.

Part 2 of the Bill: Detention and questioning of suspects

Q1 Is the principle of transferring responsibility for authorising pre-charge detention from the executive to the judiciary, adopted in 2000, still correct?

Q2 (a) Are we right to think that the Home Secretary will, under the arrangements in the bill, be involved in assessing the conduct of a specific investigation and the detention of particular suspects? (b) If so, how does this sit with the principle set out in the 2000 Act?

There is no change to the principle that the judiciary are responsible for authorising the continued detention of a suspect before charge.

Under the pre-charge detention proposals in Part 2 of the bill, the Home Secretary would have no involvement in deciding on the detention of individual suspects which will continue to be determined by a judge. Any application for an extension beyond 28 days in England and Wales must be made by the DPP (or by a senior crown prosecutor designated by the DPP). A judge could approve the continued detention of a suspect only if he were satisfied that there were reasonable grounds for believing that further detention was necessary to obtain relevant evidence or to preserve relevant evidence, and that the investigation in connection with which the person was detained was being conducted diligently and expeditiously. If this test were not met, the person would be released.

The Home Secretary's role under the proposed arrangements is to decide on whether to make the reserve power (that is the power allowing for detention to be extended by a judge for up to 42 days) exercisable for a limited period. If she does decide to make the power exercisable, she must then make a statement to Parliament stating she is satisfied that a grave exceptional terrorist threat has occurred or is occurring and that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible. The proposal on pre-charge detention that is now in the bill is substantially different from that originally proposed by the Government. The Government accepts that the reserve power must only be exercised in exceptional circumstances and that it must be only be available for a temporary period and that it should not, therefore, be exercisable by means of a normal commencement order made following Royal Assent.

The Home Secretary will not be involved in the conduct of a particular investigation or the detention of individual suspects. These are operational matters and it would be inappropriate for the Home Secretary to be directly involved. The report by the DPP and police will however form an important pre-condition to her decision to make the reserve power available for a limited period. It will provide the operational advice necessary for the Home Secretary to decide whether the reserve power is needed in the context of the circumstances set out in legislation. The Home Secretary's role is to decide if and when the 42 day higher limit should be made available as a matter of law. The detention of individual suspects therefore remains as stated in 2000 the sole responsibility of the courts.

Q3 Please outline the precise purpose(s) of clause 26, in particular how the Government envisages that sharing information in this way will promote more effective scrutiny than might otherwise be the case.

Clause 26 provides that when the Home Secretary makes an order under clause 23 she must immediately notify the chairman of the Home Affairs Committee, the chairman of the Joint Committee on Human Rights and the chairman of the Intelligence and Security Committee. It also provides that she must, as soon as reasonably practicable, provide each of those persons with a copy of the report from the police and the DPP on the operational need for an extension of the maximum period of detention and the unredacted independent legal advice.

This will ensure that these key individuals are aware of the circumstances leading to the Home Secretary's decision and are therefore able to participate fully in the subsequent debates on the issue. Parliament itself will not have access to the police/DPP report (which is likely to contain sensitive information and material which if made public might be prejudicial to criminal proceedings) or the

unredacted version of the legal advice (which will by definition contain information of a similar nature). Giving these documents to the chairs of these committees will therefore provide a level of reassurance to Parliamentarians and the public that the Home Secretary is acting properly and in accordance with the law. The chairmen also have particular and relevant expertise which will allow them, having had access to the police/DPP report and the full independent legal advice, to make informed and valuable contributions to the Parliamentary debates, while of course protecting any sensitive information.

Q4 How do you respond to concerns that the parliamentary debates envisaged by the bill, and the consequent coverage in the media, may risk hindering the police investigation?

Q5 Is there a risk that the debates and media coverage may prejudice future legal proceedings, including (a) any application that the DPP may make under the reserve powers order for a warrant of detention and (b) any subsequent trial of the suspect(s)? How might the risks be minimised?

Q5a It would be helpful to know in more detail what matters would in the Government's view be (a) appropriate and (b) inappropriate for debate in Parliament on a resolution to affirm a reserve powers order.

Parliament can have a full and meaningful debate on whether the reserve power should be made exercisable without hindering a police investigation or prejudicing any subsequent prosecution. Although they will not be able to discuss the details of individual suspects, Parliament will be able to fully discuss and, if so minded, approve the order commencing the reserve power. It is not the case that Parliament will have little to debate. It is already the case that there are statements and debates in Parliament following major terrorist incidents (for example in relation to the alleged airline plot and following the incidents in London/Glasgow). Such statements can, and have, included details about scale and nature of the plot being investigated and the police response. Although these occasions do not deal with details that would be prejudicial to the ongoing investigations, they provide a very real and important opportunity for Parliament to question the Government about events and the response to them from law enforcement agencies and others, and to evaluate for themselves the seriousness of the plot or situation. Under the proposals in the Bill, the debates would provide Parliament an important opportunity to scrutinise the Home Secretary's decision to make the order in the light of what she has to say about the grave exceptional terrorist threat and to decide whether or not the reserve power should remain exercisable beyond 7 days from it being laid.

Furthermore, there are express provisions in the Bill to ensure that nothing released to Parliament shall include either the name of anyone detained under the powers or anything that might prejudice any prosecution.

Part 6 of the Bill: Inquests and inquiries

Q6 Why are reforms on the use of juries in inquests being included in a Counter-Terrorism Bill rather than in the Coroners and Death Certification Bill next Session?

The Government is aware of circumstances in which a coroner's inquest may need to consider material that cannot be disclosed publicly or shown to the jury, as the finders of fact, without harming the public interest (for example, for reasons of national security). This creates the potential for coroners' inquests to be

incompatible with Article 2 of the ECHR where the inquest must be held with a jury and the sensitive material is central to the inquest but by reason of its sensitivity cannot be disclosed to the jury.

Due to a delay to the introduction of the Coroners and Death Certification Bill, the Counter-Terrorism Bill is considered the most appropriate vehicle in the current session of Parliament to bring forward these proposals. There was simply no space for the Coroners and Death Certification Bill in this session's extremely busy Parliamentary programme. The Government remains committed to reform and a Bill will be brought before Parliament as soon as time allows. The draft programme for the next session, published on 14 May, included a Coroners and Death Certification Bill. Unfortunately, however, the Coroners and Death Certification Bill will not gain Royal Assent and come into force within a sufficiently short timescale to address the problems we are concerned about in relation to pending inquests which have brought this issue to our attention.

You will wish to note however, that we are considering the possibility of a sunset clause on the basis that Parliament will have a second chance to re-debate the relevant issues during the passage of the Coroners and Death Certification Bill whilst providing an interim solution to address the problem which has arisen.

Q7 (a) How do you respond to the view that the decision to proceed without a jury ought to be a judicial rather than an executive function? (b) What other options have been considered and why were these rejected?

(a) Should the decision to certify an inquest to sit without a jury become a judicial function, the judge, before granting the certificate, would undoubtedly need to see and thoroughly examine all the information claimed by the Secretary of State to be sensitive in order to properly consider the application and reach an informed decision as to whether section 8A(1)(a) to (c) applied.

I understand that members of the Committee may have concerns about the Executive's involvement in certifying inquests where the death may have been caused by the actions of agents of the state. The Secretary of State may be privy to information or material which may go to national security or the relationship between the United Kingdom and another country for example. Assessing the sensitivity of this material requires not simply evaluation of information that is available, but also (for example) evaluating the significance to be attached to the overall intelligence picture informed by a further appreciation of national and international conditions (relating to security matters, and otherwise). The Secretary of State would be in the best position to assess the requirements of national security and international relations and to determine, in any particular case, whether the public interest requires a certificate to be issued requiring an inquest to be held without a jury. Indeed, this has traditionally been a function for the Executive alone, with the judiciary giving due deference to the executive's role.

A decision to certify an inquest will be capable of challenge by way of judicial review, so there will still be an important element of judicial scrutiny of the Executive's function in determining the sensitivity or otherwise of the material.

(b) The Government with the assistance of Counsel tried over several months to find a mechanism that permitted the protection of sensitive material whilst retaining the jury. The Government has also considered carefully suggestions made both by interest groups and in the Commons as to other possible options we could bring forward as a solution to the problem outlined briefly above (in answer to Q6). We are committed to ensuring that, where possible, investigations into deaths take place within the existing coronial system.

One suggestion considered was whether a model could be devised which would split the fact-finding functions between the coroner and the jury—with the coroner being the finder of fact on any issue that involved the sensitive material, and the jury being the finder of fact on all other issues. However, it soon became clear that such a model would not be capable of meeting Article 2 requirements in all cases and would be unworkable in practice. The split could also invite constant challenges as to whether something was for the coroner or for the jury to decide, thereby delaying the inquest (which would be very much to the detriment of the bereaved families who await the outcome of the inquest).

Another suggestion considered was the possibility of vetting juries. However, an inquest might have to consider material which could normally only be received by officials with the highest level of security clearance (“developed vetting”). But this involves a close examination of all aspects of a candidate’s life that could give rise to some sort of threat. It would clearly not be feasible or appropriate to apply this style of vetting to randomly chosen jurors.

Even if we could process jurors through “developed vetting” vetting is not a guarantee against leakage and in no other context do we disclose such sensitive material to members of the general public who are not subject to, for example, duties under the Official Secrets Act.

More limited jury vetting is also available but it is too limited to be effective in protecting the sensitivities that may attach to the material. There are random checks of the Criminal Records Bureau, and also “authorised jury checks” which take place with the Attorney General’s permission and involve checks with the Criminal Records Bureau, Special Branch and occasionally the Security Service. But these checks are far more limited than full “developed vetting” and would not provide sufficient reassurance for us to be certain that they could be shown all the material which might be relevant to an inquest.

‘Justice’ in their evidence session suggested seeking out members of the public to go through the process of security clearance. This would essentially mean that juries were self-selecting and would be confined to those who were willing to go through the process of “developed vetting”. Furthermore, there would be no guarantee that the individuals would necessarily be granted the clearance.

Q8 Please explain why the Secretary of State rather than the Lord Chancellor is thought to be the appropriate minister.

In this part of the Bill, Secretary of State refers to the Secretary of State for Justice who is also, of course, the Lord Chancellor. The Secretary of State for Justice/Lord Chancellor is responsible for the law and policy relating to the current coroner system, although he has limited powers only with regard to the deployment of coroners, and none at all in relation to their selection and appointment. The Lord Chief Justice similarly has no powers in respect of the deployment, selection and appointment of coroners. Although the selection of specially vetted coroners will be an administrative rather than judicial process, we amended the provisions in the Commons so that the Secretary of State will make appointments with the concurrence of the Lord Chief Justice.

I am copying this letter to the Lord Chancellor and the Attorney General.

LORD WEST

APPENDIX 2: DECISION-MAKING PROCESS RELATING TO DETENTION AND QUESTIONING BEFORE CHARGE

Sections in italics are the current arrangements.

The police arrest a person who is reasonably believed to be a terrorist, or a person is detained by a police constable, immigration officer or customs officer at a port. Under the Terrorism Act 2000, a person has a right to inform a friend or relative of where he is detained and to consult a solicitor privately as soon as is reasonably practicable, subject to the power of a senior officer to authorise delay in specified circumstances. A senior police officer may, however, direct that any consultation with a solicitor take place within the sight and hearing of a police officer. The person's detention is reviewed by a review officer—who is not directly involved in the investigation—at no more than 12 hourly intervals including oral or written representations from the detained person or his solicitor, though such a review may be postponed in specified circumstances.



After 48 hours in detention (or in the case of a person detained at a port, 48 hours after the start of his examination), the detained person must be charged or released, unless a Crown Prosecutor applies to a District Judge (Magistrates' Court) for a warrant of further detention for up to 7 days. The judge may authorise the warrant if satisfied that the investigation is being conducted diligently and expeditiously and that further extension is necessary to obtain or preserve evidence. The person detained may make oral or written representations to the judge and is entitled to be legally represented at the hearing. The judge may exclude the detained person and his legal representative from any part of the hearing.



A Crown Prosecutor may apply for an extension or further extension of the period specified in the warrant. Where the period of detention is less than 14 days from arrest, the application is heard by a District Judge (Magistrates' Court); where detention is sought beyond 14 days from arrest, the application is heard by a High Court judge. After 28 days from arrest, the detained person must be charged or released.



If a chief police officer and the DPP identify a need for pre-charge detention beyond 28 days, they make a report of operational need to the Home Secretary stating that there are reasonable grounds to believe that one or more suspects must be detained beyond 28 days to enable the police, carrying out a diligent and expeditious investigation, to obtain or preserve evidence relating to a serious terrorist offence carrying a life sentence (clause 24).



The Home Secretary obtains independent legal advice on whether he/she can properly be satisfied that there is a “grave exceptional terrorist threat”, that the reserve power is needed urgently, and that the reserve power is compatible with Convention rights (clause 25).



The Home Secretary by order (made by statutory instrument) declares the reserve power exercisable in order to extend from 28 to 42 days the maximum period of pre-charge detention (clause 23). An order lapses after 30 days but may be renewed (clause 30).

The Home Secretary must “forthwith” share the DPP and chief police officer’s report, and independent legal advice, with the chairmen of the House of Commons Home Affairs Committee, the Joint Committee on Human Rights and the Intelligence and Security Committee on a Privy Counsellor basis (clause 26).



The Home Secretary must as soon as practicable lay the reserve power order before Parliament (clause 28). Within two days of making the order or as soon as practicable, the Home Secretary lays statements before each House of Parliament saying she is satisfied that there is or has been a “grave exceptional terrorist threat” (as defined by clause 22), that the reserve power is needed urgently and that the reserve power is compatible with Convention rights (clause 27). The statement must **not** include the name of the detained person or material that might prejudice the prosecution of any person. The Home Secretary also lays before each House a copy of the independent legal advice obtained, redacted if necessary and the independent lawyer agrees to prevent disclosure that would be damaging to the public interest or might prejudice the prosecution of any person (clause 25(6)–(7)). If Parliament stands prorogued, Her Majesty by proclamation requires Parliament to meet on a specified day; if the House of Commons or House of Lords stands adjourned, the Speaker and the Lord Speaker recall the House (clause 29).



Debate in both Houses. The reserve power order lapses after seven days unless each House has passed a resolution approving it (clause 28).



Once the order has been approved, the DPP may apply to a High Court judge or nominated circuit judge for a warrant authorising detention beyond 28 days up to 42 days in respect of a person suspected of a serious terrorist offence. If the warrant is granted, the DPP informs the Home Secretary.



The Home Secretary lays a statement before Parliament as soon as practicable, informing Parliament of the extension, the court which heard the application, the place where the person is being detained but **not** any details of the person detained or material that might prejudice the prosecution of any person.



Before or at the end of the detention period authorised by the warrant, the person is either charged or released.



Within six months of the reserve power order ceasing to be in force, the independent reviewer of terrorism legislation reviews whether the Home Secretary’s decision to make the reserve power exercisable was reasonable, the case of every person detained, and whether procedural and other safeguards were complied with. He/she reports on these matters to the Home Secretary (clause 31).



The Home Secretary lays the independent reviewer’s report before Parliament as soon as practicable (clause 31(7)).

APPENDIX 3: THE PRACTICALITIES OF DECISION-MAKING ON CHARGING

Letter from the Director of Public Prosecutions, 4 June 2008

Thank you for your letter of 20 May 2008, requesting further information about the Threshold Test and how it operates in terrorism cases.

The Threshold Test was first included in the most recent edition of the Code for Crown Prosecutors (the Code) published in June 2004, and is intended for use in all types of case, not just terrorism. It might assist if I explain why it was thought necessary that the responsibility for charging to be transferred to the Crown Prosecution Service (CPS), and if I outline of the Threshold Test in detail.

As might be expected, there are a number of police investigations which do not produce sufficient evidence to satisfy the Code for Crown Prosecutors realistic prospect of conviction standard within the pre charge custody time limits, but there is clearly further significant evidence to be obtained. The dilemma facing the police and prosecutors in a limited number of these cases is that a proper risk assessment reveals a dangerous suspect or one that would, if released, flee the jurisdiction, interfere with witnesses or hinder the recovery of evidence.

The statutory framework provided by the Police and Criminal Evidence Act 1984 (PACE) does not provide for any specific interim assessment to justify charging in such circumstances. Prior to the changes brought about by the Criminal Justice Act 2003, PACE allowed the police to charge on a rather vague notion of there being 'sufficient evidence to *charge*'. This standard is not defined in the Act and bears no relation to other more objective standards such as 'a realistic prospect of conviction' or 'beyond reasonable doubt' as required to satisfy a jury. Rather it provided a standard that was as flexible as the circumstances required.

It is a matter of history and part of the methodology of police working, that their pre 2003 charging decisions were largely based on oral exchanges between the investigating and custody officer, occasionally supported by documentary evidence, but often with much of the key evidence that would now be necessary to satisfy the requirements of the Code still to be obtained. The low evidential standard demanded by 'sufficiency to charge' facilitated a generous interpretation and for the dangerous offender dilemma to be dealt with pragmatically.

The application of this standard to casework led to high levels of discontinuance and many aborted trials, even in cases where defendants had been held in custody. This was mostly due to the failure of the police to produce any additional necessary evidence or a failure to produce it within a timetable acceptable to the court and the interests of justice.

This was one of the reasons underlying Lord Justice Auld's recommendations for the transfer of responsibility for charging to the CPS. For this purpose, the Criminal Justice Act 2003 empowers the Director of Public Prosecutions (DPP) to issue guidance to enable custody officers (and prosecutors) to decide how persons should be dealt with when a custody officer believes there is sufficient evidence to charge a person.

Guidance for prosecutors has also been published by successive DPP as you are no doubt aware. The Code was published after wide public consultation, and since 2004 has included specific guidance on how prosecutors should determine whether and what to charge. The required standard to charge is set by the DPP

and can be changed should the circumstances demand it following consultation. The current standard is designed to protect potential defendants from being charged with weak cases where there is no prospect of a successful prosecution and to prevent the wasteful expenditure of public money.

As part of the strategy for dealing with the annual one and a half million prosecutions, the DPP decided that the CPS should charge the more serious and complex cases, with the police dealing with volume straight forward admitted lower level offences. It was clearly inappropriate for the police to charge on a different standard from prosecutors, and the DPP required that the police charge using the Full Code Test of there being a realistic prospect of conviction. Indeed the 2003 PACE Codes of Practice made this a requirement. This split of work naturally meant that crown prosecutors would make the charging decision for cases where the intention was to seek a remand into custody post charge.

The Code requires that assessments of cases to be charged are based on a proper review of the evidence. This requires the production to and assessment of statements or other evidence by prosecutors. This increased standard of scrutiny has led to dramatic reductions in the discontinuance of cases and the number of abandoned trials. It did however raise the issue of what to do in cases where the PACE or Terrorism Act detention clock, with extensions, defeated the ability of the police to produce sufficient evidence to charge to the Full Code Test standard.

In cases where the suspect was suitable to be released on bail, there was usually no issue since the suspect would be so released while the investigations were completed although one complication with arrests under the terrorism legislation is that bail is not available. The issue with an offender who is a bail risk or a risk to public safety is obviously much more difficult. Let me provide a hypothetical example of the dilemma facing the police and prosecution although recent examples of those who have allegedly killed while on bail is example enough of the tragic consequences that can arise.

Typically the profile which is often considered is that of an offender who presents as an alleged deranged axe murderer. The evidence at the critical time is not sufficient to pass the Full Code Test, as no forensic examination results have yet been received on blood and other items recovered from the scene. However, let us say that the suspicions are based on the recovery of an axe from an area associated with the defendant who provides a no comment interview. There is at present no further evidence. From the above, and from enquiries and other evidence yet to be obtained, there is now at least a reasonable suspicion that the police have arrested the right man. The police believe that these other enquiries and the laboratory results are highly likely to link the man to the scene of the crime. The retention in custody of this man in the meantime provides the opportunity to avoid the risk of the loss of further life or serious injury, which from the indications and risk assessment the police have made seem a distinct possibility.

The Threshold Test was developed to deal with this dilemma and is fully compliant with Article 5 of the European Convention. The effect of any charging is to bring a suspect who on reasonable suspicion has committed an offence promptly under the jurisdiction of a court. That court's sole or principal concern will be to determine whether the suspect should be bailed or remanded in custody. The Threshold Test goes beyond the Article 5 requirements by requiring that there is a future realistic prospect of conviction through the obtaining of further identified significant evidence within a reasonable time.

At any such hearing, the court and defence will receive at least an outline of the case and the reasons why the prosecution will be seeking a remand into custody. Case progression rules require an explanation for the delays being sought, which in the above case would be the need for further enquiries and examination of the laboratory results. The strength of the evidence is a factor the court would take into account under the Bail Act which the defence would be free, as they do, to exploit on their client's behalf. The court would then determine whether the prosecution's application could be sustained. There are in arguably more stringent safeguards in terrorism cases, as all cases are subject to a preliminary hearing where a detailed timetable and summary must be supplied, and they are closely monitored by a High Court Judge in accordance with the Terrorism Case Management Protocol.

The Threshold Test itself has already been explained; its precise wording can be found in the Code. It is applied objectively by the charging prosecutor and is based on the evidence produced by the investigator and the evidence to be obtained. It can never be founded on inadmissible evidence, mere intelligence or intercept material, for which in the latter case there is specific statutory exclusion. The onus on the prosecutor is always to apply the Full Code Test of the Code. If this cannot be done, then the suspect must be bailed while the required evidence is obtained if bail is available. Only exceptionally if the suspect on a proper risk assessment is not suitable to be bailed or cannot be bailed, even with conditions, and the objections to bail can be sustained at court will the Threshold Test be applied.

The Threshold Test itself was developed for the generality of casework and not for any specific cases such as those charged under the Terrorism Acts, which represent a very small percentage of the CPS's business. It is an open, transparent and accountable process, and the CPS is following its published policy set out in the Code. In every case, a copy of the evidence or a summary is disclosed to the defence. The reason for its application is as explained in this letter.

The PACE review currently taking place is to be asked to reassess the workings of Section 37 of the Act, which provides the current statutory standard of the evidence justifying charge, so that it and other drafting issues criticised by the judiciary can be clarified and improved in possible future legislation.

We do not keep specific data about which test was applied in every case since the test was introduced, but I am able to give you some information in relation to those who were held for more than 14 days under Schedule 8 of the Terrorism Act.

Eight individuals have been charged after being held for more than 14 days. The Threshold Test was used to charge four defendants. The full test was used to charge the other four.

CPS guidance requires prosecutors to set review dates in all Threshold Test cases as all cases must pass the Full Code Test within a reasonable period of time. The date for the first review is set at the time of charge and the main pieces of evidence required will be set out in an advice for the police. Thereafter there will be further regular reviews as and when necessary in each individual case. In terrorism cases, the prosecutor allocated to a case will be working on it consistently until the point that the case papers are served on the defence and the court, whether that is within 42 days (the time for most ordinary criminal cases) or a longer period set by the judge. Each prosecutor on the Counter Terrorism Division has only a few cases which will be at different stages of the investigative and prosecution process, and it

is not unusual in the very large cases for a prosecutor to be devoted almost exclusively to that case from the date of charge to the date of trial.

In the first eleven days the prosecutor looks at the available evidence, advises the police, and produces a preliminary summary and proposed timetable for service of evidence. These are both quite detailed documents which serve to inform the managing judge and the defence at an early stage about what evidence is then currently available, and what additional evidence will be available for service and when it will be available. On the fourteenth day there is a preliminary hearing, where the judge sets the timetable for the case, having been informed by the information provided by the prosecutor. This will inevitably involve staged service of distinct sections of the evidence and before each section is served the prosecutor will review it against the evidence so far. The evidential case inevitably continues to develop up until the date that the full case is served but often beyond that, as terrorism investigations are frequently very large and wide ranging.

There are also regular conferences to discuss and review the progress of the case and the gathering of evidence throughout that pre-service period. This continuous and dynamic process means that the whole of the prosecution's case against each defendant in every case is looked at very regularly. If the evidence is not developing as anticipated or if something is received that appears to be exculpatory, the prosecutor will reconsider the case against each defendant and either discontinue if it is clear that there is no longer a realistic prospect of conviction, or if felt more appropriate because further information is expected, in exceptional circumstances we might inform the court that bail is no longer opposed. This could occur at any stage, even before the formal review date or receipt of all the papers from the police.

In addition to the continuous review by the prosecutor, the regular conferences with the prosecution team to review progress, and the monitoring of the timetable by the court, all cases are closely supervised by me or my deputy throughout their lifetime. This includes regular updates on progress and monthly formal reporting.

I trust you will understand from this brief explanation, that there are procedures in place to ensure very close monitoring and supervision of all terrorism cases and especially those where the Threshold Test has been used. There are also procedures in place to ensure that every case that goes to trial reaches the appropriate standard.

I agree that it is vitally important that only proper cases go to trial and the possibility of miscarriages of justice is avoided.

The CPS has indeed supported post charge questioning accompanied by appropriate safeguards as a useful tool to help address some of the difficulties faced by those investigating and prosecuting terrorism.

I trust that this gives you a full explanation of how the Threshold Test operates, and gives you sufficient information to be reassured that no person will be tried without a case having passed the Full Code Test in the Code. I would, of course, be delighted to meet you at any time to discuss these issues further.

KEN MACDONALD QC