

Neither Just nor Secure

The Justice and Security Bill

ANTHONY PETO QC AND ANDREW TYRIE MP



THE AUTHORS

Andrew Tyrie has been the Conservative Member of Parliament for Chichester since 1997. He is Chairman of the House of Commons Treasury Select Committee. This publication reflects his personal views.

Anthony Peto QC is co-Head of Blackstone Chambers, a leading set of Chambers specialising in Commercial law, Public law and Human Rights. Prior to taking silk, he was Crown Counsel on the Attorney-General's "A" Panel. This publication reflects his personal views.

Acknowledgement

The Centre for Policy Studies would like to thank Richard Smith for his generous support for this paper.

The aim of the Centre for Policy Studies is to develop and promote policies that provide freedom and encouragement for individuals to pursue the aspirations they have for themselves and their families, within the security and obligations of a stable and law-abiding nation. The views expressed in our publications are, however, the sole responsibility of the authors. Contributions are chosen for their value in informing public debate and should not be taken as representing a corporate view of the CPS or of its Directors. The CPS values its independence and does not carry on activities with the intention of affecting public support for any registered political party or for candidates at election, or to influence voters in a referendum.

ISBN No. 978-1-908996-97-3

© Centre for Policy Studies, January 2013

Printed by 4 Print, 138 Molesey Avenue, Surrey

CONTENTS

Acknowledgements

Summary

1. Introduction	1
2. What is Needed	6
3. Extraordinary Rendition: the limits of disclosure	9
4. The Defective Bill: how did we get here?	20
5. Closed Material Proceedings	34
6. Blocking off Redress: the Norwich Pharmacal Restriction	60
7. The ISC: badly in need of reform	77
8. Conclusion	95

Appendices:

A. Some Government assurances about Extraordinary Rendition and the Bill that have turned out to be false or misleading	106
B. Background on Binyam Mohamed	112
C. Congressional Oversight of the Intelligence Community	117
Bibliography	120

ACKNOWLEDGEMENTS

Without Janice Lam, the coordinator of the All Party Parliamentary Group on Extraordinary Rendition, this paper could not have been written. It owes a great deal to her capacity for hard work, legal expertise and research skills.

We would also like to thank a large number of people who have come forward over the years to help in efforts to discover the truth about – and bring to an end – Britain’s involvement in kidnap and torture. Among these are Joanne Clement, Derek Craig, Joe Cyr, Paul Dacam, Deba Das, Roger Gough, Lord Hodgson of Astley Abbots, Paul Lomas, Stuart McCracken, Jamie Potter, Timothy Pitt-Payne QC, Cordelia Rayner, Stuart Wheeler and Baroness Williams of Crosby. We would like to thank David Anderson QC, Damian Hind, Ann Marsh, Ravi Mehta, Chris Mullin, Jesse Norman MP, Shane Sibel, Lindsay Symmes and Lord Tyler for their comments on various parts of this paper. All of them have influenced the contents of this paper, directly or indirectly, the responsibility for which remains the authors.

SUMMARY

- The Justice and Security Bill, in its current form, risks damaging Britain's system of open justice and the reputation and effectiveness of the security agencies in the struggle against terrorism.
- There are three major areas of concern in the Bill:
 - The expansion of “secret justice” through the introduction of Closed Material Procedures (CMPs) to civil cases. This would enable the Government to present its evidence in secret session in the absence of the other party, his or her lawyers, the press and the public.
 - Blocking the use of the information-gathering principle known as *Norwich Pharmacal* in cases deemed to be “sensitive”. This would make it harder to uncover official wrongdoing in matters such as extraordinary rendition (the kidnap and torture of individuals by the state).
 - Inadequate proposals to strengthen the Intelligence and Security Committee (ISC), which is supposed to oversee the intelligence services but which failed to uncover the truth about rendition. The Bill will not give the ISC the visible independence from the executive that it needs.

- The involvement of British security services in, *inter alia*, the return of dissidents to Libya, where they were tortured and imprisoned by Colonel Gaddafi, illustrates the need for better oversight.
- Yet the Justice and Security Bill would open Britain to charges that it practices “secret justice” and make it more difficult to uncover the truth.
- The Bill is now at a critical stage in Parliament. The House of Lords has voted for major amendments introducing more discretion for judges and making the use of CMPs more of a last resort. These valuable changes are, however, not sufficient.
- The Government has not yet provided adequate justification for much of this legislation. If it were to press on, the Bill now needs further amendment:
 - CMPs must be a last resort; a judge should have to exhaust the possible use of “Public Interest Immunity” before considering the use of a CMP.
 - Even where a CMP is approved, the judge should be able to balance the interests of justice against those of national security in deciding if information should be disclosed.
 - Where CMP is used, summaries of the national security sensitive information should be provided to the excluded party and his or her legal representatives.
 - The definition of “sensitive information” to block application of *Norwich Pharmacal* disclosures should be narrowed.
 - Proposals to reform the ISC should be strengthened, and its Chairman should be elected, subject to safeguards, by secret ballot by Parliament, as recommended by the Wright Committee in 2009.
 - A five year sunset clause should be incorporated.
- The House of Lords’ amendments have given Ministers a second chance. They should take it.

1. INTRODUCTION

“Sunlight is said to be the best of disinfectants.”

Justice Louis Brandeis

That Britain allowed itself to be dragged into complicity in “extraordinary rendition” – the kidnap and torture of individuals as a matter of policy – is a disgrace. That, nearly a decade later, the extent and limits of Britain’s involvement are still unknown is almost as shocking.

A great deal of disinfectant is needed. So far, very little has found its way to the right places. The All Party Parliamentary Group on Extraordinary Rendition, which was founded to get to the truth, will persist in this task. Unfortunately, another obstruction, in the form of the Justice and Security Bill, may now be put in the way of its work.

In advanced democracies with an independent judiciary, this sort of activity comes to light sooner or later. It has begun to do so in this case. This Bill will black out more sunlight. Too many features of the Bill appear designed to address the awkward consequences of disclosure of wrongdoing; too little is being done to ensure that Britain closes the chapter on extraordinary rendition.

The intelligence services do a vital job. They are doing it, at the moment, in very difficult circumstances. They deserve our full support. Effective security services are essential to protect the UK from the threat of dangerous extremism. Much of what they do must necessarily remain a secret. The services themselves believe that the practice of extraordinary rendition is counter-productive for intelligence gathering, serves as a recruiting sergeant for terrorism and, in any case, saps their morale.¹ The services want and need the public to have confidence in them. This will be secured when the public can have confidence that they have got to the truth about Britain's past involvement. They also need to have confidence that the UK Government could not facilitate this sort of activity in the future.

The public cannot have that confidence at the moment. Far from bolstering that confidence, the Justice and Security Bill, introduced by the Government into the House of Lords on 28 May 2012, would weaken it. The effect of the Government's proposals would make it more difficult to establish the truth about Britain's complicity in kidnap and torture. The Bill would provide a route neither more just nor more secure.

First, it would allow the Government to introduce secret evidence in court, which would be heard in the absence of one party, his or her lawyers, the press and the public. It was the Government's intention (now somewhat thwarted by the Lords' amendments) that this should happen on the application of a Government minister, if disclosure would damage "national security" – no matter how trivial the damage. "National security" is not defined by the Bill. Notwithstanding Government claims to the contrary, if disclosure of a document would damage

¹ See Footnote 5.

national security, the judge would have no discretion to disclose it. In practice, a Government minister would decide what constituted “national security”. The current practice in sensitive cases, whereby a judge balances that national security risk against the risk to justice, would be swept away.

Second, the Bill would prevent the courts from ordering disclosure of any information deemed “sensitive”, even if that information provided evidence of serious crimes by government officials. As a result, claimants would have great difficulty in obtaining evidence that would prove allegations of government involvement in torture.

Third, it would give the public no assurance that the chairman of the Intelligence and Security Committee (ISC) would remain anything other than a tool of Prime Ministerial patronage. The Committee’s credibility has been severely tarnished by its failure to get to the truth on extraordinary rendition and by a revolving door between senior ministerial office and its chairmanship over the past fifteen years. The Bill would not restore it.

The Government has stated that “protecting the public should not come at the expense of our freedoms.”² This is a laudable aim. However, freedom is precisely the cost that the Government could inadvertently exact in the name of greater security. In fact, the Bill does little to provide the public with greater security, whilst giving an unnecessarily high level of protection to the Security and Intelligence Services from the civil courts in relation to their alleged wrongdoing. Recently, British involvement in the rendition of Gaddafi opponent Abdul Hakim Belhadj to Libya,

² Lord Wallace of Tankerness, Second Reading of the Justice and Security Bill. Hansard, 19 June 2012, col. 1660.

where he was imprisoned and tortured, came to light when documents were discovered in 2011 in the headquarters of Gaddafi's intelligence chief, which had been bombed by NATO. A strong case can be made that the documents related to Mr Belhadj's rendition should be put in the public domain. As it happens, such documents were discovered by Human Rights Watch staff and later released.³ Mr Belhadj has now brought a civil case for damages against the British Government for his rendition. In December 2012, Britain paid £2.2 million to settle a case brought by another Libyan dissident, Sami al-Saadi, who was rendered in 2004, along with his family, to the Gaddafi regime in Libya, where he was tortured.⁴

Rather than shut down legal pathways to information, the goal of the Government should be to disclose the nature and scale of British involvement in rendition. It is only by disclosure that the Government can achieve closure on the allegations of rendition. The slow unravelling of revelations has been hugely damaging, not only to public trust in Government, but also to Britain's credibility abroad. Senior members of the intelligence services believe this to have been damaging to their work, too.⁵

³ BBC, "Rendition Apology Demanded From MI6 and CIA by Libyan", 6 September 2011.

⁴ *Daily Telegraph*, "Britain Pays Out £2 million to Illegal Rendition Libyan", 13 December 2012.

⁵ Former Director of the Security Service, Lady Manningham-Buller, among others, has alluded to this point on a number of occasions. In a speech entitled 'Reflections on Intelligence' given on 9 March 2010 in the House of Lords, she stated that "the allegations of collusion in torture and lack of respect for human rights will wound them personally and collectively and, in some respects, whether proven or not, will make it harder for [the Intelligence Services] to do their job."

The main long-term beneficiaries of this disclosure would probably be the intelligence services themselves. This is why David Cameron's decision to initiate a judge-led inquiry into extraordinary rendition was not only morally right but expedient on grounds of national security. It is why the stalling of that inquiry, led by Sir Peter Gibson, a judge and former Intelligence Services Commissioner, has been so regrettable.⁶

Reckoning with the past would enable the country to learn from its mistakes and restore trust, particularly in the communities at home and abroad on whom we most rely to bolster our security. Implementing the provisions of the Bill as currently presented, on the other hand, would damage public confidence in British justice and could tarnish Britain's reputation abroad.

The House of Lords has amended the Bill in an attempt to redress some of its most glaring inadequacies. The effects of the Bill, as presented to the Commons on 28 November 2012, are therefore somewhat less pernicious than they were. But the Government has, so far, been unable to put together an adequate justification for this legislation and, until it does so, it should be withdrawn. Nonetheless, the Government will no doubt press on, in which case the authors consider that the amendments set out below are essential to mitigate the Bill's weaknesses.

⁶ See pages 15 to 17.

2. WHAT IS NEEDED

At Second Reading in the House of Commons on 18 December 2012, the Government accepted several of the amendments proposed by the House of Lords.⁷ First, the Government has finally conceded that a judge, rather than the Government itself, should decide whether to hold a Closed Material Procedure (CMP).⁸ The Government agreed that a judge *may*, rather than *must*, order a CMP upon an application by the Secretary of State. Second, either party, not just the Government, may ask for a CMP.

The Government's commitment to the introduction of judicial discretion is lukewarm. The Government has clarified that it "would not give a blanket assurance that we will accept all the House of Lords amendments, that is, the amendments which give discretion to a judge rather than a Government minister."⁹

⁷ Justice and Security Bill, Second Reading in the House of Commons. Hansard, 18 December 2012, cols 721-722.

⁸ See Footnote 33.

⁹ *Id.*, at col 724.

Several further amendments to the Bill are still necessary

1. The judge should exhaust Public Interest Immunity (PII) before considering the use of a CMP.
2. The Bill should contain a sunset clause to limit the life of the legislation to five years, unless new legislation is passed to renew it.
3. The judge should, whenever possible, require that a summary of the national security-sensitive material is provided to the excluded party (and his legal representative) and contains sufficient information to enable the excluded party to give effective instructions to his or her lawyer and special advocate to enable the evidence to be challenged.
4. The Bill should set out procedural rules by way of primary legislation to mitigate in some way the incurable unfairness of CMPs.
5. Once a court has approved a CMP in a given case, the judge should retain the discretion to balance the interests of justice against the interests of national security in determining whether evidence should be disclosed.
6. The definition of “sensitive information” in section 14 of the amended Bill must be greatly narrowed to provide a more proportionate response to the Government’s concerns that a court may order the disclosure of national security sensitive information obtained in confidence from a foreign power. The Bill would need to provide for a bar on the disclosure of information obtained from foreign intelligence partners or UK intelligence information which would reveal the identity of UK intelligence officers, their sources, or their capabilities. The

bar should not extend to *all* information relating to or held by an intelligence service. Nor should the control principle be made absolute.

7. The process for appointment of the Chairmanship of the ISC should be reformed to reflect the recommendations of the Select Committee on Reform of the House of Commons.¹⁰

The shortcomings of the Bill are examined in more detail in Chapter 4. First, Chapter 3 sets out what is known – and just as important, some of what is still not known – about Britain’s involvement in extraordinary rendition. The Bill, even after amendment by the Lords, will make getting to the truth more difficult, and makes its further improvement all the more essential.

¹⁰ See pages 90 to 94.

3. EXTRAORDINARY RENDITION: THE LIMITS OF DISCLOSURE¹¹

In response to the September 11, 2001 terrorist attacks, Western countries overhauled their counter-terrorism policies and increased international co-operation in intelligence sharing.¹² Huge amounts of time and resources were concentrated on preventing any further immediate terrorist attacks.

US foreign policy also changed substantially under President Bush after 9/11. The National Security Strategy, which embodied what came to be known as the “Bush Doctrine,” presented a new and aggressive framework for combating terrorism. First, the US would support regime change. It would remove by force, if necessary, the leaders of so-called rogue states. Second, the

¹¹ In July 2011 the All-Party Parliamentary Group published its analysis, *Account Rendered: Extraordinary Rendition and Britain’s Role* by Andrew Tyrie, Roger Gough and Stuart McCracken (Biteback, 2011). This presents a comprehensive picture of Britain’s involvement in extraordinary rendition up to the point of publication, although further allegations regarding Libya have since surfaced.

¹² See, for example, United Nations Security Council Resolution 1373, approved and published 28 September 2001.

US would now embrace the policy of “preventive war,” taking action against hostile regimes that represented a potential or perceived threat to US security, even if the threat was not imminent.¹³ This proved the basis for intervention in Iraq.

The new foreign policy was highly controversial. In the UK, it was supported by Tony Blair, but opposed by many others, including former Foreign Secretary Robin Cook and one of the authors.¹⁴

As part of its new strategy to combat terrorism, the US established in early 2002 a detention camp at Guantánamo Bay to hold individuals captured in combat in Afghanistan with suspected links to al Qaeda or the Taliban. Since its opening, the detention facility has been embroiled in controversy and litigation, amidst allegations of torture by US forces, enforced disappearance and illegal detention, as well as debate over the applicability of international law to detainees. The limited access granted to the international community has made it

¹³ White House, *The National Security Strategy of the United States of America*, 17 September 2002, available at www.globalsecurity.org/military/library/policy/national/nss-020920.pdf.

¹⁴ Statement of Robin Cook, 17 March 2003 in resigning as Leader of the House of Commons: “I can't accept collective responsibility for the decision to commit Britain now to military action in Iraq without international agreement or domestic support.” Andrew Tyrie, *Mr Blair's Poodle Goes to War*, Centre for Policy Studies, 2004. These doctrines are inherently destabilising of international relations. The notion that a pre-emptive strike may be undertaken without clear evidence of an imminent attack undermines the most basic principle of the relations between states – that military action can generally be justified only in self-defence. The doctrine of regime change is equally corrosive. For who should decide when a country's leadership must be changed?

difficult to investigate the full extent of maltreatment of prisoners and hold to account those responsible. The UN, however, was able to gather specific evidence of the force-feeding of hunger strikers through nasal tubes, prolonged solitary confinement and exposure to extreme temperatures, noise and light. Confirmed reports of inmates suffering mental breakdowns and committing suicide brought further criticism upon the US Government.¹⁵

The counter-terrorism strategy of the US also included the employment of the policy of extraordinary rendition – that is, the international transfer of an individual without the legal protection afforded by extradition laws, treaties and due process, as part of its “war on terror.”¹⁶

This has involved the transfer of individuals for interrogation in countries known to use torture. The US has also acknowledged the existence and use of its own secret detention centres run by the Central Intelligence Agency (CIA), where many suspects – in particular, those identified as “high-value detainees” – were held,

¹⁵ On 22 January 2009, two days after his inauguration, President Obama pledged to close down the prison by the following year. President Obama has not fulfilled his pledge. His administration has pointed to logistical, domestic, political and national security obstacles as the explanation.

¹⁶ Rendition and extraordinary rendition are not terms defined by law. “Rendition” encompasses any extra-judicial transfer (outside normal legal processes – i.e. extradition, deportation, etc) of persons from one jurisdiction or State to another. “Extraordinary rendition” is the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman or degrading treatment.

mistreated and interrogated.¹⁷ The former US Secretary of State Condoleezza Rice denied any US involvement in torture, but this statement was later exposed as untrue when the CIA admitted subjecting several terrorist suspects to “waterboarding”, a practice generally regarded as torture.¹⁸

The secrecy of these operations made it difficult to monitor compliance with acceptable standards. Critics have also pointed to the unchecked authority of the US executive branch in its policy towards enemy combatants, both domestically and abroad. For example, detainees were, for a long time, denied any meaningful opportunity to challenge the lawfulness of their detention. The US Supreme Court decision of *Boumediene v Bush* in 2008 rectified this, holding that Guantánamo detainees have a constitutional right to file petitions for *habeas corpus* in US federal courts.¹⁹

Successive US administrations have admitted the use of rendition, although they deny the deliberate use of torture or deployment of “torture by proxy.”²⁰ They have since acknowledged, on the other hand, the use of “enhanced

¹⁷ The CIA confirmed using waterboarding on three Al-Qaeda suspects, Khalid Sheikh Mohammed, Abu Zubaydah, and Abd al-Rahim al-Nashiri, in 2002 and 2003. *The Guardian*, “CIA Admit ‘Waterboarding’ Prominent Al-Qaida Suspects”, 5 February 2008, available at <http://www.guardian.co.uk/world/2008/feb/05/india.terrorism>.

¹⁸ BBC, Rice Defends US Policy, 5 December 2005, available at <http://news.bbc.co.uk/1/hi/world/americas/4500630.stm>.

¹⁹ 553 U.S. 723 (2008).

²⁰ The Convention Against Torture protections apply where there is a substantial likelihood of a danger of torture that is greater than “mere suspicion,” but the likelihood does not have to rise to the level of “high probability.”

interrogation,” which includes prolonged sleep deprivation, forced stress positions, exposure to extreme heat and cold, and “waterboarding,” in which a person is strapped to a bench with his mouth and nose covered and water poured over his face to create the sensation of drowning.²¹

The prime mover of the policy of extraordinary rendition was and remains the US, but allegations increasingly surfaced that the British Government (in particular the security and intelligence services) also facilitated extraordinary rendition. In December 2005, Andrew Tyrie established the All Party Parliamentary Group on Extraordinary Rendition in an effort to get to the truth about these allegations. Over the succeeding years, as a result of parliamentary pressure, investigations and court cases, there has been a slow but steady flow of revelations:

- After constant denials by ministers that any renditions had taken place in UK-controlled airports or airspace, the then Foreign Secretary admitted to Parliament in February 2008 that a plane carrying two detainees refuelled on the British Indian Ocean Territory of Diego Garcia. Allegations that other flights transited via the territory continue.
- The then Defence Secretary confirmed in February 2009 that two detainees captured by UK Forces in Iraq and handed

²¹ After the Second World War, the US prosecuted several Japanese soldiers for the use of waterboarding against American and Allied prisoners of war, which it considered to be torture. *Washington Post*, “Waterboarding Used to be a Crime”, 4 November 2007.

over to US forces were subsequently rendered to Bagram Air Base.²²

- Revelations concerning the cases of a number of individual detainees (Bisher al-Rawi and Jamil el-Banna, Martin Mubanga, Omar Deghayes) have raised the question, which is still not fully answered, about the role played by the British Government and security services.
- In a series of judgments in 2009-10, the High Court and Court of Appeal determined that the British authorities had facilitated the rendition and maltreatment of the Ethiopian-born British resident Binyam Mohamed. The Court of Appeal expressed concern that the Security Services had falsely denied knowledge of Binyam Mohamed's ill-treatment.
- Documents discovered after the fall of the Gaddafi regime in Libya in 2011 indicated the involvement of the British Government and security services in the rendition of Gaddafi's opponents (including their children), to Libya, which allegedly resulted in the maltreatment of detainees. These cases are now the subject of a criminal investigation

²² In 2004, in response to a Parliamentary Question by Andrew Tyrie, the MOD denied that anyone captured by the UK and handed over to the US in Iraq had been transferred out of the country (see Written Answer, Adam Ingram MP, 9 September 2004, Hansard, col 1335-6W). The MOD maintained this position until 2009. On 26 February 2009 the Secretary of State was obliged to admit that in 2004 two detainees captured by UK forces in Iraq and handed over to the US had subsequently been rendered to Bagram (John Hutton MP, Records of Detention (Review Conclusions), 26 February 2009, Hansard, col 394). This admission followed persistent questioning from the APPG, and the Foreign Affairs and Defence Select Committees, following submissions from the APPG.

and of legal action against Jack Straw, the former Foreign Secretary. On 13 December 2012 it was announced that the Government had agreed to pay £2.2m in compensation to some of the Libyan detainees, but without admitting liability.²³

However, full public disclosure of the British role in rendition, required to draw a line under the matter, secure redress for wrongs and move on, has not been forthcoming. This was most clearly demonstrated by the history of the Gibson Inquiry.

The failings of the Gibson Inquiry

In opposition Andrew Tyrie urged on David Cameron and William Hague the necessity of a judge-led inquiry. For several years, the APPG, Amnesty International UK, Human Rights Watch, Liberty and Reprieve also called on the UK Government to establish an independent and public judge-led inquiry into the UK's involvement in extraordinary rendition and the mistreatment of detainees abroad. Both the APPG and the NGOs proposed that such an inquiry should examine, amongst other issues, the use of UK territory and airspace, the involvement of the intelligence agencies and the involvement of the Armed Forces.

On 6 July 2010, less than two months after the formation of the Coalition Government, David Cameron announced the establishment of a judge-led Detainee Inquiry, to be chaired by Sir Peter Gibson,²⁴ to investigate Britain's alleged role in the torture and rendition of detainees after 9/11.

²³ BBC, "UK Pays £2.2m to Settle Libyan Rendition Claim", 13 December 2012, available at <http://www.bbc.co.uk/news/uk-20715507>.

²⁴ Sir Peter Gibson is a retired British barrister and judge who served as the Intelligence Services Commissioner from 2006 to 2010.

The Gibson Inquiry was flawed almost from the start. It adopted a narrow approach to its remit (notably its refusal fully to address the issue of the transfer of “detainees in theatre”).²⁵ The need to include the issue of detainee transfers in theatre was illustrated by a recent High Court case. An injunction was granted against the MOD prohibiting the transfer of prisoners to the Afghan authorities after photographic evidence of torture was disclosed by the Government.²⁶

The APPG, among others, was also concerned over other aspects of the Gibson Inquiry. First, the Inquiry decided to take a relatively passive approach to information gathering – it decided not even to appoint an investigator, but to rely on information passed to it. In other words, those being investigated – the executive and particularly the security services – would have huge influence over what the Gibson Inquiry would, and would not, discover. Second, the terms of the Protocol, drafted by Sir Peter Gibson in conjunction with the Cabinet Office, gave the Cabinet Secretary the final determination as to what information would or would not be put into the public domain.

²⁵ In the House of Commons the Prime Minister confirmed that the Inquiry covered detainee transfers. Unfortunately, this was subsequently heavily qualified in the letter the Prime Minister sent to Sir Peter Gibson. As justification for not looking deeply at renditions subsequent to transfers of detainees in theatre, he cited the separate arrangements being made by the Ministry of Defence to address allegations relating to “military detention operations”, which did not address rendition.

²⁶ *R (Serdar Mohammed) v Secretary of State for Defence* (CO/3009/2012).

The Inquiry never enjoyed a significant level of public trust. Human rights groups, as well as torture victims and their lawyers, boycotted the Inquiry over concerns of lack of transparency and credibility after learning that much of it would be held in secret, upon the insistence of Government ministers and intelligence officials.

The opening of the Inquiry was initially delayed by police investigations into possible criminal proceedings. The discovery in September 2011 of documents that appeared to implicate the British intelligence services in renditions to Libya opened a new line of enquiry. When it became clear that this would result in further police investigations, the Government announced in January 2012 that the Gibson Inquiry would be stood down.²⁷

In a statement to the House of Commons, the then Justice Secretary Kenneth Clarke QC MP announced the closure of the Gibson Inquiry but indicated the Government's commitment to a new inquiry:²⁸

“The Government fully intends to hold an independent, judge-led inquiry, once all police investigations have concluded, to establish the full facts and draw a line under these issues.”

²⁷ On 27 June 2012, the Detainee Inquiry sent a report to the Prime Minister detailing its preparatory work and highlighting particular themes and issues for further examination. The Government has stated that it is committed to publishing as much of the report as possible.

²⁸ Statement on the Detainee Inquiry, Justice Secretary Kenneth Clarke QC MP. Hansard, 18 January 2012, col 752.

However, the proviso is the key part of the statement: the new inquiry will have to wait for the conclusion of a possibly lengthy police investigation.

Other investigative routes have had limited success. The ISC attempted to examine rendition but failed to get anywhere near the truth. The scale of the ISC's shortcomings was made embarrassingly clear by findings in subsequent court cases.²⁹ Applications under the Freedom of Information Act have achieved some further disclosure but in many cases have been rebuffed.

In 2008 and 2009 the APPG made a number of requests for information of the Foreign and Commonwealth Office (FCO) regarding the alleged renditions of Binyam Mohamed, as well as two other individuals, Bisher al-Rawi and Jamil el-Banna. The FCO claimed a variety of exemptions from the obligation to disclose the bulk of the relevant documents, which were largely upheld by the Information Commissioner.

The Commissioner did require the FCO to release some documents. The APPG appealed to the Information Tribunal, which found that there was "a very strong public interest in transparency and accountability" concerning the extent to which the Government and security services had carried out their stated policy of opposition to rendition.

However, the Tribunal concluded that national security considerations outweighed the public interest and largely dismissed the APPG's appeal. It did order the full or partial

²⁹ See Chapter 7.

disclosure of four documents. The APPG has been granted permission to appeal to the Upper Tribunal.³⁰

Under these circumstances, it might be expected that the Government's main concern would be to resolve the outstanding barriers to disclosure and bring the story of British involvement in extraordinary rendition to a close. Yet its response – expressed through the Justice and Security Bill – points in a different direction. The reasons for that, no doubt, lie in a number of legal cases that have discomfited ministers and intelligence services in recent years.

³⁰ In 2008, the APPG also requested information from the Ministry of Defence. The requests to the MOD followed concerns then that detainee handover arrangements in Iraq and Afghanistan were inadequate, and allegations by former SAS soldier Ben Griffin that UK forces working jointly with the US had captured people who were subsequently rendered or mistreated by the US. The Information Tribunal made forceful findings on the public interest and rejected the MOD's claim that to deal with the majority of the APPG's requests would be too costly. It ordered the release of further information.

4. THE DEFECTIVE BILL: HOW DID WE GET HERE?

The history of the Justice and Security Bill is scarcely an example of considered and balanced law making. Rather, it is the story of an executive forced to abandon wholly unacceptable proposals. Under intense pressure from the legal profession, those representing victims of rendition and other interest groups, Parliament, the press and the wider public, the Government has been obliged to make one concession after another.

Hard Cases: The Guantánamo Six and Binyam Mohamed

The first impetus behind the Green Paper was a number of civil cases. Noteworthy among them, and particularly awkward for the Government were those brought by six former Guantánamo detainees, alleging that Government intelligence and security agencies (MI6 and MI5) were complicit in their rendition and torture.³¹ This lifted the veil on some aspects of extraordinary rendition, to the considerable discomfort of the Government

³¹ See Justice and Security Green Paper, para. 1.32; *Al Rawi and Others v the Security Service and Others*, [2009] EWHC 2959 (QB).

and its agencies and also, in respect of one case, to the US Government. The Government and security agencies argued that because an important part of their defence rested on material which should not be made public on the grounds of national security, the Court should allow the Government to present evidence in secret to the judge. The judge would hear the Government's evidence in secret without the opposing party having the chance to contradict or challenge it.³² This is known as a Closed Material Procedure.³³

In May 2010, the Court of Appeal rejected the Government's argument. It ruled that a CMP could not be applied to the trial of an ordinary civil claim. It concluded that such a procedure would be a radical departure from the fundamental principles of open and natural justice:³⁴

“Under the common law, a trial is conducted on the basis that each party and his lawyer, sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair.”

In other words, a party should be able to see and respond to the other side's case and know the reasons why he won or lost his case in court. To any layman, this must be considered no more than common sense.

³² There is no jury in a CMP.

³³ CMPs have been used since 1997 in certain statutory procedures, many of which are designed to protect public safety. Further background is provided on the origins of CMPs in Chapter 5.

³⁴ *Al Rawi v Security Service*, [2010] EWCA 482, para. 14.

Furthermore, in an adversarial system such as the English one, the right to know and challenge the opposing case is not merely a feature of the system, it *is* the system. Judges do not have the resources or power to investigate the merits of the case themselves – they depend upon the process of both sides assembling and presenting their evidence and then challenging each other’s cases. They then judge which case is the stronger in the light of those mutual challenges. The judge is unlikely to be capable, in most instances, of assessing the reliability of one side’s case, unless he or she has heard it challenged by the other side.

In November 2010, the Government announced that it had reached a settlement with the former detainees, paying them compensation, reported to run into millions of pounds, without admitting culpability. Significantly, they settled the case before the UK Supreme Court had ruled out the availability of CMPs. Many concluded that the Government settled because they were likely to lose at least some of the cases, even with the benefit of a CMP.³⁵ At the time of the Government’s decision to pay compensation, the question of whether CMPs were available in civil cases was still unresolved.

In July 2011, the Supreme Court similarly rejected the introduction of CMPs into common law procedure, arguing that such a fundamental change would require “compelling evidence” which, in this instance, was lacking.³⁶

³⁵ BBC, “Compensation to Guantanamo Detainees ‘Was Necessary’ ”, 16 November 2010, available at <http://www.bbc.co.uk/news/uk-11769509>.

³⁶ *Al Rawi v Security Service*, [2011] UKSC 34, 48.

“It is not for the courts to extend something as controversial as the closed material procedure beyond the boundaries which Parliament has chosen to draw for its use. If this is to be done at all, it is better done by Parliament.”

The second driving factor behind the Green Paper was the high-profile legal case concerning the extraordinary rendition of Ethiopian-born British resident Binyam Mohamed. This triggered concern in the executive that the so-called “control principle” would be breached. This principle governs the relationship between intelligence agencies, whereby information shared between agencies cannot be disclosed without the consent of the original source of that information.³⁷ The Government cited its fear of damaging its intelligence-sharing relationship with the US, were British courts to order the disclosure of secret intelligence material.³⁸ The Government and intelligence agencies were particularly concerned in this case by the Court’s application of the so-called *Norwich Pharmacal* principle, under which those who are not parties to a case but who have been “mixed up in wrongdoing” can be required to provide information about the wrongdoing to the victim.

From the Green Paper to the Bill: one step forward, two steps backward

The Green Paper, like the subsequent Bill, contained three main elements: the introduction of CMPs into civil law; the removal of the courts’ power to order the disclosure of sensitive material relating to national security; and proposals to reform the ISC.

³⁷ This is a principle of conduct, not of law.

³⁸ Justice and Security Green Paper, para. 1.44.

The Green Paper met with robust opposition.³⁹ The proposed introduction of CMPs into common law actions was attacked as an extension of “secret courts”, and it was widely felt that the Government had failed to make the case that such an extension was necessary. The blanket ban on the disclosure of intelligence services material was rejected by many commentators, from the Joint Committee of Human Rights (JCHR) to the ISC, as too broad.⁴⁰

The JCHR took the unusual step of holding an inquiry into the Green Paper. It concluded that the Green Paper raised serious human rights concerns and laid out its recommendations. In a nutshell, it found that the Government had not shown that its stated concern of being able to defend itself in certain cases was a real and practical problem or that the extension of CMPs in civil trials would enhance procedural fairness.⁴¹

In response, the then Justice Secretary Ken Clarke conceded that:⁴²

³⁹ See e.g., *Daily Mail*, “Climbdown on secret justice: Victory for the Mail’s Campaign”, 29 May 2012. Liberty’s Response to the Justice and Security Green Paper, January 2012; JCHR; House of Lords Constitution Committee; Tom Hickman, “Where is the “justice” in the Justice and Security Bill?”, UK Constitutional Law Group blog, 5 June 2012; and Angela Patrick, “Justice and Security Bill – The Government is not for turning”, UK Human Rights blog, 29 May 2012.

⁴⁰ JCHR Report, para. 157; Sir Malcolm Rifkind MP, *Green Paper on Justice and Security: ISC Response*, 7 December 2011, pp.3-4.

⁴¹ JCHR Report, paras. 10 and 13.

⁴² Kenneth Clarke MP, “My secret justice plans were too broad and the Mail has done a public service in fighting them”, *Daily Mail*, 29 May 2012.

“The reaction to the consultation has persuaded me that some of the suggestions we made [in the Green Paper] for solving the undoubted problems were too broad.”

By the time the Bill was tabled in May 2012, the Government had made some limited concessions, accepting some of the JCHR’s recommendations. These concessions included:

1. Applying CMPs to cases where disclosure of material is damaging to “national security” rather than the “public interest”, as previously set out in the Green Paper.
2. Excluding inquests from the remit of CMPs.⁴³
3. Providing that the Secretary of State must apply to the court for a CMP, rather than allowing him or her to decide when a CMP should be imposed.

Notwithstanding these concessions, the Bill’s shortcomings soon became apparent, not least when submitted to preliminary Parliamentary scrutiny.

The Government apparently hoped to ease the passage of the Bill by suggesting first, that a judge, rather than a Minister, would have the final say in deciding whether a CMP should be

⁴³ Clause 11(2). It was not clear until Report stage, however, whether this would remain the case, as the Bill gives the Secretary of State the power to add courts and tribunals to the restricted list of courts that may hold CMPs. At Report Stage, the Government tabled an amendment to remove clauses 11(2) to 11(4) from the Bill. A civil action often follows an inquest which makes a finding of wrongdoing. Families of soldiers killed due to faulty equipment, for example, may still find themselves shut out under CMP of any civil action they take seeking compensation for negligence.

used; and, second, that CMPs would be available in only the most exceptional circumstances.⁴⁴

However, on close examination, it became apparent that the Bill did not secure either of these purposes. The reverse was the case. Clause 6(2) of the unamended Bill made it clear that a judge “must” make a declaration for a CMP if he or she considered that a party would disclose material that would be damaging to the interests of national security. Nor did any provision of the Bill introduced into the Lords require that a judge exhaust alternatives to CMPs to ensure that a case could not be heard by any other possible means. At Second Reading in the House of Commons, Sadiq Khan, the Shadow Justice Secretary, emphasised that despite all of the Government’s assertions to the contrary, the Bill did not secure the judicial discretion the Government promised.⁴⁵

“The reality is that, previously [in the Bill introduced into the Lords], the judge would have to order a CMP if the Minister said there were national security issues. There was no balancing exercise.”

The Government’s Bill contained very little to protect an individual’s right to a fair trial. The main supposed safeguard was clause 11(5)(c). This states that nothing in the bill should be read as requiring a court to act inconsistently with Article 6 of the Human Rights Convention (right to a fair and public

⁴⁴ *Daily Mail*, “Climbdown on secret justice: Victory for the Mail's campaign as Clarke says inquests WON'T be held behind closed doors but civil rights groups say changes still fall short”, 29 May 2012.

⁴⁵ Hansard, 18 December 2012, col 733.

hearing). However, that protection is not sufficient to remedy the problems created by the introduction of CMPs.⁴⁶ Indeed, the Joint Committee on Human Rights described clause 11(5)(c) as “otiose from a legal drafting point of view” because it adds nothing to the existing duty on courts in section 6 of the Human Rights Act.⁴⁷ It is inferior to the common law’s protections for the right to a fair trial, which are “both longer established and superior in content in many respects to Article 6 ECHR.”⁴⁸

Many, including the authors, would also argue that the ECHR is unlikely to be able to guarantee a fair civil trial to the same extent as three centuries of English common law. Some of the most senior opponents of CMPs argue that their use would make a fair civil proceeding impossible.⁴⁹

⁴⁶ In *Secretary of State for the Home Department v AF and Another* [2009] UKHL 28 (*AF (No 3)*), which concerned control order proceedings, the court held that Article 6 of the ECHR required that a conteree be given sufficient information about the allegations against him to enable him to give instructions in relation to those allegations. There is ongoing litigation about the reach of *AF (No 3)*. In the most recent case of *Tariq v Home Office* [2011] UKSC 35, the Supreme Court held that there was no absolute requirement under the ECHR that a claimant in a discrimination claim be provided with sufficient detail of the allegations against him to enable him to give instructions to his legal representative, where doing so would involve the disclosure of information which would damage national security. Thus, a court may still conclude that disclosure of information to the excluded party is not necessary to comply with his or her right to a fair hearing under Article 6.

⁴⁷ Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012-13, HL Paper 59, HC 370, 13 November 2012, para. 17.

⁴⁸ *Id.*

⁴⁹ See pages 49 and 50.

These concerns, among others, were addressed by the House of Lords in detail. The Government was defeated by massive majorities on a number of crucial issues, including that of judicial discretion.

The Bill in the House of Lords

The Bill had its First Reading in the House of Lords on 28 May 2012, and its Second Reading on 19 June, followed by four days in Committee before the summer recess. Between First and Second Reading, the House of Lords Constitution Committee issued a highly critical analysis, focused in particular on the proposed extension of CMPs to civil proceedings.

The report stage in the House of Lords was held on 19 and 21 November 2012.

The House of Lords on the Intelligence and Security Committee

An amendment tabled by Lord Hodgson of Astley Abbots and Baroness Williams of Crosby proposed the election of the chair of the ISC by secret ballot by the House of Commons.⁵⁰ The purpose of the amendment would be to ensure the independence of the committee and to make certain that he or she is directly accountable to Parliament, rather than to the Prime Minister. As expressed by Baroness Williams, the proposal takes into account:⁵¹

⁵⁰ Each candidate wishing to stand for election to the chair of the ISC would first have to obtain the formal approval and consent of the Prime Minister.

⁵¹ Hansard, 19 November 2012.

“...the needs for greater accountability... and the need for evolution of the committee to make it more accountable and democratic, in the broadest sense of the word.”

The amendment was withdrawn.

The House voted to reject an amendment that would have made the ISC a select committee of Parliament.⁵² The House also rejected a proposal to hold pre-appointment hearings for future heads of the MI5, MI6 or GCHQ.⁵³ Finally, the House rejected an amendment proposing that a decision to withhold information from the ISC should be taken only at the level of Secretary of State or equivalent.⁵⁴

The House of Lords on Closed Material Procedures

The House of Lords accepted three amendments on CMPs, recommended by the JCHR and tabled by Lord Pannick QC, by overwhelming votes in favour:

1. to provide that the claimant, in addition to the Secretary of State, could apply for a CMP,⁵⁵
2. to provide the judge with discretion as to whether to order a CMP if he considers that a party to the proceedings would be required to disclose material and that such a disclosure would be damaging to the interests of national security;⁵⁶ and,

⁵² Amendment 1 was defeated 247 votes to 162.

⁵³ Amendment 9 was defeated 200 votes to 170 votes.

⁵⁴ Amendment 15 was defeated 182 votes to 132 votes.

⁵⁵ Amendment 33.

⁵⁶ Amendment 35.

3. to re-insert the judicial balancing test when deciding whether to make a declaration of CMP. The judge weighs harm to national security if material is disclosed against the public interest in fair and open administration of justice.⁵⁷

These amendments would ensure that CMPs would only be used after the judge has considered whether a claim for Public Interest Immunity could have been made in relation to the sensitive material and a fair determination of the proceedings is not possible by other means.

The House subsequently rejected an amendment that would have removed Part 2 of the Bill in its entirety.⁵⁸ Lord Wallace of Tankerness urged the House not to remove the clauses altogether after having spent a great deal of time scrutinising and amending them.⁵⁹ The House voted also against Amendment 47 (somewhat illogically, since this amendment was designed to sit alongside Amendment 36, which was passed), which would have allowed the judge to engage in a balancing test to determine whether material relating to national security should be disclosed.⁶⁰

Significantly, in response to a recommendation of the JCHR, the Government tabled a last-minute amendment, Amendment 59,

⁵⁷ Amendment 36. Amendment 33 was accepted by 273 votes to 173. Amendment 35 was accepted by 264 votes to 159. Amendment 36 was accepted by 247 votes to 160.

⁵⁸ Amendment 45 was rejected by 25 votes to 164.

⁵⁹ Report Stage of the Justice and Security Bill, Hansard, col 1905, 21 November 2012.

⁶⁰ Amendment 47 was rejected by 87 votes to 123.

before Report stage to remove clauses 11(2) to 11(4).⁶¹ These provisions would have granted the Secretary of State power to extend the scope of the Act by order. The House agreed to this amendment.

The House of Lords on the Norwich Pharmacal Principle

The Lords had very little time to discuss amendments to restrict the scope of clause 13 and, in particular, the definition of “sensitive information” in national security cases. Apparently, due to the lateness of the hour of the debate, the House did not vote on the amendments, and they were withdrawn. The Government stated its opposition to these amendments and expressed its sentiment that it needed “to provide absolute exemption for intelligence services information and certification of other sensitive information.”⁶²

Third Reading in the House of Lords

At Third Reading, held on 28 November 2012, the Government stated that it would address and give “serious consideration” to the amendments passed in the House of Lords at Report stage.⁶³

In the Commons, the Prime Minister appeared to concede that judges, not ministers, should have the final say on whether CMPs are appropriate for a particular case.⁶⁴

⁶¹ JCHR, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012-13, p.3, 13 November 2012.

⁶² Hansard, cols 1924-25, 21 November 2012.

⁶³ Hansard, col 196, 28 November 2012.

⁶⁴ Hansard, col 288, 12 December 2012.

"The fundamental choice is to make sure that those proceedings [CMPs] are available to judges, and it is judges who should make the decision."

Nonetheless, it is unclear how much faith can be put in these remarks. They do not necessarily signal the Government's intention to accept the Lords' amendments for at least two reasons. First, the Government has claimed from the start that the Bill already allows for judicial discretion, an assertion refuted by the Lords' amendments.⁶⁵ Indeed, at Second Reading, the Minister without Portfolio claimed that Government had "given up that position months ago."⁶⁶ Second, the promised "serious consideration" falls well short of a commitment to implement the spirit of the Lords' amendments.

The Bill in the House of Commons

On 18 December 2012, the Bill had its Second Reading in the Commons.

At Second Reading, the Government agreed to accept two of the Lords' amendments. Specifically, the court "may", rather than "must", order a CMP upon an application, which is reflected in clause 6(2) of the amended Bill. The Government also agreed that any party, not just the Government, may apply for a CMP, which is reflected in clause 6(1) of the amended Bill.

⁶⁵ Minister without Portfolio Kenneth Clarke QC MP stated that "We have gone out of our way to make sure that it is the judge, in two separate stages, who has to decide whether to order that evidence should be heard in a closed court." *Guardian*, "Secret courts' plan is radical departure from open justice, says committee", 13 November 2012.

⁶⁶ Hansard, 18 December 2012, col 732.

As to the crucial Lords' amendments, including the requirement that the judge consider and exhaust alternatives to CMPs and requiring the judge to balance the interests of national security against the interest in the fair and open administration of justice once it has made a declaration for CMP, the Government expressed its misgivings, but averred that they should be further discussed at Committee stage.⁶⁷

The Opposition stated that it would not oppose the Bill at Second Reading, but that it would “oppose any attempts to water down the improvements that have already been made” and seek additional changes, such as narrowing the application of clause 14 on *Norwich Pharmacal*.⁶⁸

With respect to Part I of the Bill on the reforms of the ISC, the Minister without Portfolio stated that he was not “instantly attracted” by the Wright Committee Proposals, though the Government would consider the matter further.⁶⁹

⁶⁷ Id., at cols 724-725.

⁶⁸ Id., at cols 733-734.

⁶⁹ Id., at col 728.

5. CLOSED MATERIAL PROCEEDINGS

For many critics of the Bill, its most objectionable feature is the expansion of so-called “secret justice” and “secret courts” into the UK’s courts of common law. This refers to Part 2 of the Bill, which concerns the extension of Closed Material Procedures to civil cases.

The law of Public Interest Immunity (PII) is a set of judge-made principles which exempts from disclosure certain sensitive information. Whilst parties to litigation are under an obligation to disclose to the other side all relevant material, courts recognise that the disclosure of certain material may cause damage to the public interest, particularly in cases of national security, international relations and the prevention or detection of crime.

Traditionally, the protection of sensitive material in litigation, such as secret intelligence in court cases, has been governed solely by the system of PII. The system of PII balances the public interest in keeping sensitive material secret against the public interest in ensuring the due administration of justice. Under PII, a judge can grant an order preventing the disclosure of secret material, where disclosure would be more damaging to the public interest in national security than the damage caused to the public interest in the administration of justice if it were withheld. A Government

minister must present a certificate stating that the public interest would be damaged by disclosure and that this damage is greater than the damage caused by its concealment.

The judge can review this certificate and is required to perform an important “balancing exercise”. He or she assesses whether or not the harm to the public interest from disclosure of the document in question would exceed that done to the administration of justice by withholding it. If the public interest weighs against disclosure, the document is withheld.

But public interest immunity is “not an all-or-nothing matter.”⁷⁰ It does not operate to exclude entire categories of material. The flexibility of PII allows the judge to disclose as much as possible. For example, the judge may still consider whether it is possible to redact information, produce relevant extracts, order a summary of the relevant part, “partial disclosure”, would be appropriate, while still protecting confidential information. Ultimately, if none of these measures can be deployed, the judge can exclude the material and neither party nor the court may rely on that document. It then forms no part of the evidence in the case. The court cannot base its decision on what it has seen in that document.

An additional advantage of PII is that it provides for equal treatment of the parties in terms of access to evidence. Its disadvantage, according to the Government, is that it may be forced to discard evidence that, in its view, could be highly favourable to its case but too sensitive for disclosure, tipping the balance in favour of settling the case rather than pursuing or defending it.

⁷⁰ Lord Pannick, Report Stage of the Justice and Security Bill. Hansard, 21 November 2012, col 1816.

Erroneously, a number of proponents of CMPs have suggested that PII means that the material is excluded. Jack Straw, the Minister without Portfolio, and Stephen Phillips MP, among others, have claimed that PII operates to exclude evidence and must necessarily risk more unfairness than a CMP.

This is incorrect. As Lord Pannick has clarified:⁷¹

“[The Advocate General] wrongly presents PII as a mechanism which, when it applies, necessarily means that the material is excluded from the trial. It is on that premise – a wrong premise, with respect – that he suggests that a CMP is preferable because it will not reduce the amount of information which the other party will receive and it enables the judge to have more information available. The reality...is that the court has an ability applying PII to devise means by which security and fairness can be reconciled by the use of [other] mechanisms.”

PII does at least mean that both parties are able to hear and challenge the evidence against them. There is no ideal solution to the problems created by the use of secret evidence and PII has its critics. Most would agree, however, that great care is needed to limit the erosion of well-established legal protections. Among the most important of these is that a person can challenge evidence the opposing party puts to the judge.

The Government is proposing to rely instead on CMPs as a way of introducing evidence that could not be presented in open court due to its sensitive nature. The Government’s attempt to

⁷¹ Hansard, 19 June 2012, col 1694.

apply them to civil cases in *Al Rawi* was firmly rebuffed by the courts.⁷² The Bill now seeks to ensure that they are available to the Government in civil cases.

How CMPs currently work in certain Statutory Tribunals

CMPs were first introduced in 1997 as part of the establishment of the Special Immigration Appeals Commission (“SIAC”), a new Court to deal with foreign nationals who were to be deported as a risk to national security, and who wished to appeal against their deportation.⁷³ A person challenging a deportation order may have his or her case heard in secret by the Special Immigration Appeals Commission, during which secret intelligence assessments are made.

CMPs have subsequently been applied to several other areas, such as control orders and their successors, Terrorism Prevention and Investigation Measures (TPIMs), which are administrative restrictions used against terrorist suspects. In considering whether to impose TPIMs, the Government can rely on secret evidence to determine the threat posed by an individual and the need to impose controls on his movement. CMPs can also be used in asset freezing cases, in employment

⁷² In the case of *Al Rawi v Security Service*, former Guantánamo Bay detainees brought claims for damages, alleging government complicity in their unlawful detention and mistreatment. The Security Service argued that it should be able to rely on secret evidence in a CMP. The Supreme Court rejected the argument, concluding that extending CMPs to civil cases would constitute a fundamental departure from the basic principles which govern common law trials. The parties settled the claim on confidential terms before the Supreme Court heard the case on appeal.

⁷³ Special Immigration Appeals Commission Act 1997.

tribunals,⁷⁴ in appeals against the proscription of organisations and in certain parole-board hearings. These exceptional and limited statutory powers are almost all restricted to situations in which the physical safety of the public may be endangered and requires protection. No such justification exists – or is advanced – in support of CMPs in ordinary civil cases.

CMPs were and remain highly controversial. The JCHR concluded that:⁷⁵

“After listening to the evidence of the special advocates, we found it hard not to reach for well-worn descriptions of it as ‘Kafkaesque’ or like the Star Chamber. The special advocates agreed when it was put to them that, in the light of the concerns they had raised, ‘the public should be left in absolutely no doubt that what is happening... has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.’ Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.”

⁷⁴ In 2000, the Employment Tribunal was given the power to use secret evidence and special advocates in race discrimination claims involving issues of national security. See section 8 of the Race Relations (Amendment) Act 2000, amending section 67A(2) of the Race Relations Act 1976.

⁷⁵ JCHR, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, 19th Report of Session 2006-2007 (HL Paper 157/HC 394, 30 July 2007).

The current use of CMPs and the role of Special Advocates

CMPs would allow material relevant to a case to be considered in closed rather than open court proceedings where the disclosure of the material would harm national security. The Government would be able to introduce material that the other party and its legal representative (as well as the wider public) would be unable to see. The material would be seen by a Special Advocate, a specially trained and security-cleared lawyer who would act in the excluded party's interests in the closed proceedings, "although they do not act for the individual, nor is the individual their client."⁷⁶ Once they have seen the closed materials, Special Advocates would be unable to communicate with the party whose interests they represent (except to receive written instructions from them) unless the Court permitted them to do so.

Once the Court has granted a declaration that a CMP should be used, the applications for particular material to be "closed" would themselves be heard in closed session at which only the Special Advocate would participate. The Court would have to grant the application if it considered that the disclosure of the material would be damaging to national security.⁷⁷

At the conclusion of the case, the Court would deliver both an "open" judgment, which both the parties and the public could see, and a "closed" judgment, which only the Government and Special Advocate could see. The closed judgment would contain references to and analysis of the closed material, explaining how the material affected the Court's decision. The Special Advocates themselves strongly oppose the Bill's provisions on extending CMPs to civil cases.

⁷⁶ Justice and Security Green Paper, Appendix C, para. 5.

⁷⁷ *Id.*, at 7(1).

The Government's case for CMPs

In addition to its reliance on the *Al Rawi* case in support of CMPs, the Government cites the case of *Carnduff v Rock*⁷⁸ as evidence that a problem exists, whereby a court may strike out a claim if it cannot be litigated consistently with the public interest. The Government claims that this could occur on a scale significant enough to justify the introduction of CMPs on the basis that it is better for claimants to have a flawed proceeding against the Intelligence Services, rather than no proceeding at all.

Its reliance upon this case is difficult to sustain, as explained below. In that case, the Court of Appeal held by a two to one majority that it could (and would) strike out the claimant's claim where, from the pleadings in the case, it would be contrary to the public interest to allow the case to proceed.⁷⁹ The majority of the court held that there was "no sensible possibility" that the claim could be litigated without regard to a number of sensitive issues on which its outcome "wholly depended".⁸⁰ Apparently presuming that such information would all be excluded under the PII process (which had yet to be conducted in that case), the Court held that litigating the case on the basis of admissions from the police as to the utility of the information,

⁷⁸ [2001] EWCA Civ 680.

⁷⁹ The claim was brought by a police informer against a police inspector, alleging that the inspector had reneged on a contract between them, whereby he would be paid for the information he provided on the basis of how useful the information proved to be.

⁸⁰ Those issues included requiring the court to evaluate the utility of the claimant's information within the specialist and confidential context of tracking and catching serious professional criminals.

and on the remaining evidence, would render the trial unjust. The case was accordingly struck out.

In eleven years since *Carnduff*, there have been no other examples of such a strike-out and no precedents for such a strike-out were cited as authorities in *Carnduff* itself. It has never been either domestically challenged or applied. It is a case which was decided on its own peculiar facts, in the context of a contract claim (rather than a tort claim), and in advance of a standard disclosure or a consideration of PII. No application to strike out on that basis was brought in *Al Rawi*. *Carnduff* remains a controversial authority and it is far from clear whether it would be approved as good law if a similar case were fully argued before the Supreme Court.

The *Carnduff* decision might not survive a direct challenge to it. The Government's reliance on the *Carnduff* decision as a basis for extending CMPs is misplaced, on at least three grounds.

First, the Government provides no evidence to demonstrate why, after 11 years without application, *Carnduff* strike-outs are now likely to result. The conclusions of the JCHR on this point best summarise the dearth of evidence:⁸¹

“The hypothetical possibility of Public Interest Immunity preventing the fair determination of an issue clearly exists, but the critical question is whether evidence shows that this is a real practical problem at all, or one that exists on the scale suggested in the Green Paper, or on a scale sufficiently significant to warrant legislation”.

⁸¹ JCHR, *Justice and Security Green Paper*, 24th Report of Session, 27 March 2012, [9] to [11].

The lack of evidence proffered by the Government makes it impossible to determine whether the “*Carnduff* problem” really exists and, if it does, whether it is on a scale to justify legislative change.

Second, hard cases should not, of course, be used to make bad law. Even if there was evidence of a *Carnduff* problem, several judges in *Al Rawi* remained of the view that, as a matter of principle, it would be preferable to bear the consequences of strike-outs in such cases rather than allow the procedural fairness of the justice system to be subverted in all claims against the Government involving national security sensitive material.

Third, the current Bill goes far beyond its stated justification. Even if the *Carnduff* argument were to be accepted as requiring changes to civil litigation, there is nothing in the Bill that would ensure that only cases that would otherwise be struck out, and where a PII process has already been undertaken, should enjoy the availability of a CMP.

The Government’s – and other advocates’ – repeated reliance on the *Carnduff* case illustrates the fragility of the case for replacing PII with CMPs. It also suggests the importance of enabling judges to exhaust all other routes, including PII before concluding whether to resort to a CMP. The need for judicial discretion, and the Government’s reluctance to permit it, is discussed further on pages 50 and 51.

The unfairness of extending CMPs to civil cases

The application of CMPs to civil cases would directly affect actions brought by an individual against the state for human rights violations such as torture or other cruel, inhuman or degrading treatment, false imprisonment, illegal renditions, or complicity in such violations in other jurisdictions.

The focus of the promoters (and critics) of the Bill has been upon cases such as these – particularly actions brought by terrorist suspects who were subjected to extraordinary rendition. If a claimant’s case against the Government were heard through a CMP, injury would be compounded by injustice. As *The Times* pointed out:⁸²

“Those feeling that they had suffered a grave injustice at the hands of the Government would feel they had suffered another at the hands of the courts.”

The irony is that the Government’s proposed solution to use CMPs to remedy the unfairness caused by the Government’s inability to have its case fairly heard is to infringe upon the claimant’s ability to have his or her case fairly heard.

As discussed below, examples have already come to light where CMPs could undermine an individual’s right to a fair trial.

Some possible unintended consequences

The wider implications of introducing CMPs into civil cases have largely been neglected. If Part 2 of the Bill were enacted, any type of civil case could be subject to a CMP.

This can be illustrated by a recent case. An Afghan farmer, Serdar Mohammed, was allegedly tortured into giving a false confession that he was a member of the Taliban, after being transferred by British forces to the Afghan National Directorate of Security (NDS) facility at Lashkar Gah. At issue is whether UK forces should transfer detainees to Afghan authorities in the light of torture allegations arising from Afghan detention facilities. The applicant’s lawyers had applied to the High Court

⁸² *The Times*, “An Open and Shut Case”, 19 November 2012.

in civil proceedings for a temporary injunction to prohibit the Government from transferring its prisoners to the Afghan authorities. A week before the full judicial hearing was to take place, the Government applied to have the hearing adjourned to a later unspecified date and suggested the Court see newly obtained secret evidence in closed session, excluding Mohamed and his lawyers, as well as the public.⁸³

The judge ruled that the Court could not consider the secret document in a closed hearing. Mohamed's lawyer stressed the unwelcome consequences that could follow had the evidence been heard in a CMP:⁸⁴

"If the Bill had been law today, the Defence Secretary's application for an adjournment would have been heard in secret, and it is likely that the adjournment would have been granted without the claimant ever knowing why... The case could have disappeared for months – and possibly forever – and we would not have known the reasons why, even though there is already a large amount of material in the public domain which shows there are massive problems about allowing the transfer of Afghan prisoners."

⁸³ On 29 November 2012, the Defence Secretary decided to uphold the ban on the transfer of detainees captured by British troops to Afghan security forces in light of the secret new information he received.

⁸⁴ *Secret Information 'Found' one week before Afghan Torture Trial*, Leigh Day & Co, 22 November 2012, available at <http://www.leighday.co.uk/Secret-information-found-one-week-before-trial>.

This case illustrates two crucial points. First, civil proceedings are not “merely” available to recover compensation for past abuses. They are also available to protect us from potential future abuses – in this case torture. Second, the introduction of CMPs in such cases could remove this protection from us.

Some additional theoretical examples further illustrate the unfairness which may be created. Here are five:⁸⁵

1. A decorated NCO has his legs blown off in Afghanistan whilst using allegedly faulty MOD equipment. He sues the MOD for negligence. They claim that the design and safety record of the equipment is national security sensitive. The MOD applies for a secret hearing of the case. The judge is obliged to grant it. The NCO never knows why he is denied compensation. Illogically, if the NCO is killed, the inquest into his death will not be subject to a CMP under the Bill.

⁸⁵ Andrew Tyrie has had personal experience of the perception of unfairness that can be created by being shut out of a closed hearing. This was despite the best efforts of the Tribunal in question. When the APPG’s FOI requests were heard by a tribunal in November 2011 and January 2012 on appeal from the Information Commissioner, the hearings involved closed sessions in which the APPG was unable to participate. Much of the disputed information was discussed in closed session. Despite the Tribunal’s efforts to include the claimant and ensure as much of the hearing took place in open session as possible, it cannot be known whether Mr Tyrie or his counsel could have successfully challenged the other party’s evidence and argument. The Tribunal, likewise, cannot be certain whether a successful challenge could have been mounted to any evidence introduced in the closed session. An impression of unfairness has also been created – impairing justice – whether or not the evidence might have been challengeable.

2. A citizen sues the police for wrongful assault, false imprisonment and malicious prosecution. The police obtain a CMP secretly to show the judge national security sensitive intelligence obtained from MI5 to show that they had reasonable cause for the arrest. The citizen loses the case without knowing why.
3. The child of a vulnerable MI5 source is serially abused by the MI5 officer assigned to handle the source on visits to his safe house. When she is old enough she sues. MI5's defence is heard in secret.
4. Two children are kidnapped and rendered to Gaddafi's Libya with the active complicity of MI6. When they are old enough they sue for damages. MI6 defends in secret. The children never know why the judge tells them they have lost.⁸⁶
5. An individual is detained by the Government without trial under a power of detention provided for under future legislation. He brings a writ of *habeas corpus* to challenge the legality of his detention. This counts as a civil case. The Government will be able to deploy a CMP against him so as to keep him in prison for reasons he neither knows nor can challenge. (The applicability of CMPs to writs of *habeas corpus* was confirmed by Lord Wallace during the course of the Second Reading of the Bill in the House of Lords).

Some Further Possible Unintended Consequences

Furthermore, neither promoters nor critics of the Bill have considered that the Government would be entitled to deploy

⁸⁶ See for example the case of Sami al-Saadi. BBC, "Libyan Sami al-Saadi to sue UK over Rendition Claims", 7 October 2011, available at <http://www.bbc.co.uk/news/uk-15210856>.

CMPs when it is acting as a Claimant suing the citizen. Here are four more examples:

1. The Proceeds of Crime Act 2004 permits certain government bodies, such as the Serious Organised Crime Agency (SOCA), to sue citizens in the civil courts for the recovery of property if it can be proven on the balance of probabilities that such property constitutes proceeds of crime. It is not necessary for anyone to have been convicted of a crime for the Government to win such a case. As currently drafted, the Bill could enable CMPs to be used in such civil recovery actions by SOCA to deprive citizens of assets without them knowing the case against them.
2. The Government could obtain civil injunctions on the basis of secret evidence to prevent alleged trespasses, nuisances or obstruction by political protesters.
3. The Government could bring civil committal proceedings against such protesters for alleged breach of the injunctions. They could rely on secret evidence to prove breach of these orders in contempt of court. Contempt carries potential prison sentences. Such committal proceedings fall within the Bill because they are “civil proceedings”.
4. A journalist writes an article accusing retired and serving Ministers and civil servants of serious abuses in office, including bribery and corruption in connection with arms procurement. They sue for libel. The journalist pleads truth and fair comment and qualified privilege as a defence. The ministers and civil servants rebut that defence by adducing secret evidence of falsity and malice. The journalist loses and is subject to a gagging injunction on the basis of evidence he has not seen and for reasons the judge cannot tell him.

There is no evidence that the Government intends outcomes such as the nine examples above. Nor, given that the law is untested, can it be certain that these would be the outcomes. The fact that such cases might occur is, nonetheless, extremely concerning. They illustrate the risks attending the extension of CMPs to civil cases. That such cases could arise mainly derives from the crucial point that, in a civil case with a CMP, the claimant would be prevented from knowing the evidence against him. He or she could not respond to it or cross-examine witnesses on it, while journalists and members of the public would be barred from witnessing proceedings in court. This is what most concerns those who have examined the Bill in detail.

Fundamental constitutional principles at risk

The nine examples above also illustrate how, even by accident, fundamental principles of law and a free society can be put at risk by ill-thought out legislation. The House of Lords Constitution Committee concluded that the extension of CMPs conflicts with two fundamental and constitutional principles of the common law justice system: *natural justice* and *open justice*.⁸⁷ It is worth setting these arguments out more fully.

Natural Justice

The principle of natural justice, or the right to a fair hearing, means that a party has a right to know the case against him and the evidence on which it is based. Each party has a right to see the other parties' evidence and challenge it (for example through cross-examination of the other parties' witnesses).

⁸⁷ House of Lords Select Committee on the Constitution, *Justice and Security Bill*, 3rd Report of Session 2012-13, 15 June 2012, para. 10.

A CMP effectively shuts the claimant out of court, leaving him or her unable to challenge the Government's evidence. Legal experts have warned of the dangers inherent in unchallenged evidence. As Lord Kerr said in the Supreme Court's judgment in *Al-Rawi*:⁸⁸

"To be truly valuable, evidence must be capable of withstanding challenge... Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial."

At Report Stage, Lord Macdonald of River Glaven drew upon his extensive experience as former Director of Public Prosecutions to stress this point and highlight the risk of a miscarriage of justice:⁸⁹

"I have spent many years in criminal courts watching evidence that at first sight seemed persuasive, truthful and accurate disintegrating under cross-examination conducted upon the instructions of one of the parties...That is the risk that we are facing, that we are introducing into civil justice – in the most sensitive and controversial cases, where deeply serious allegations are made against the Government and the security services – a process that expels the claimant and gives him a form of justice that is not better than nothing. It is worse than nothing because it may be justice that is based on entirely misleading evidence."

⁸⁸ *Al-Rawi v Security Service*, [2011] UKSC 34, 93.

⁸⁹ Hansard, 21 November 2012, cols 1899-1900.

The use of security-cleared Special Advocates to represent the interests of the claimant in the CMP fails to remedy the inherent unfairness of the proceeding. The Special Advocate cannot normally tell the claimant anything about the evidence introduced in secret or hear his response to it. Therefore, Special Advocates cannot take meaningful instructions from the excluded party or respond effectively on his behalf. It should come as no surprise that all 57 of the 69 Special Advocates who responded to the consultation on the Justice and Security Green Paper have stated that CMPs are “inherently unfair.”⁹⁰

Without the amendments introduced by the House of Lords, the Bill would also strip judges of discretion, notwithstanding claims by the Government to the contrary. This is a crucial issue. The Bill in this form would not permit a judge to balance any competing public interests in any application for CMP. If there is potential damage to national security, however insignificant, the judge must make the declaration. A judge would have no discretion to allow disclosure in the public interest or in the interests of justice or fairness.⁹¹

⁹⁰ *Justice and Security Green Paper: Response to Consultation from Special Advocates*, 16 December 2011, para. 15. The Special Advocates’ response was endorsed by almost every Special Advocate with substantial experience in the role. Of those Special Advocates whose names did not appear in support of the response, none expressed active disagreement with its contents except one who was unwilling to sign on the basis that “*whilst he agreed with much of the analysis, he was of the view that there will be significant cases where existing procedural devices will not suffice.*” The Special Advocates felt that it “represented an overwhelming consensus.”

⁹¹ Justice and Security Bill, Clause 6(2).

As Lord Pannick remarked in the Second Reading debate, it is:⁹²

“...quite extraordinary that none of this fair balance is included ... How can that be said to be sensible or proportionate?”

In addition, in taking its decision, without the amendments approved by the House of Lords, the Court would have to ignore whether the trial could be heard fairly without a CMP.⁹³ Nor could the Court consider alternative ways to protect national security, such as redaction, anonymity orders, “confidentiality rings” (where the material is disclosable to parties or their lawyers on the basis of confidentiality undertakings, but not to outsiders), or public interest immunity (where sensitive material is excluded altogether).⁹⁴ The Secretary of State must consider whether to make an application for PII instead of taking the CMP route, but is not required to exhaust PII before CMP will be available. These are presented by the Bill as alternative options entirely at the disposal of the Secretary of State.

Open Justice

The second essential feature of the common law justice system undermined by CMPs is that of open justice: the principle that cases be heard and decided in public. The general public has a right to follow the trial and know the outcome. A judge will give detailed reasons for the decision and judgments are made publicly in open court. If a party is not satisfied with the outcome, it has a right to appeal. This principle of openness

⁹² Hansard, 19 June 2012, col 1695.

⁹³ Justice and Security Bill, Clause 6(3).

⁹⁴ *Id.*

lends judicial decisions their legitimacy. A system of closed hearings and closed verdicts, even if affecting only part of the case, contradicts this. It was Jeremy Bentham, the eighteenth century philosopher and jurist, who said, “Where there is no publicity, there is no justice.”

Extraordinary Rendition and CMPs

With the erosion of open justice comes the fear that the effect of the Bill will be to undermine the public’s ability to know what truly happened regarding British involvement in rendition. In the steady flow of revelations about British complicity in rendition over recent years, court cases – and their use by investigative journalists – have played a significant role. Documents disclosed in litigation have been relied upon by journalists “either to corroborate allegations of wrongdoing which had been heard elsewhere, or to contradict assurances or denials,” as well as to piece together government involvement in certain actions since 9/11.⁹⁵

One of the foremost reporters on the issue, Ian Cobain of *The Guardian*, told the JCHR that his work on rendition would have been fatally undermined by the Green Paper’s (and subsequent Bill’s) introduction of CMPs: “we would not learn these matters if the proposals were adopted.”⁹⁶

Under a CMP, any allegations of wrongdoing against the Government would not be heard by the public. If the court’s judgment is closed, the public would also be shut out of its findings. For example, had a CMP been used in the *Al Rawi* case, the public would have continued to believe assurances

⁹⁵ JCHR, *Justice and Security Green Paper*, para. 199.

⁹⁶ *Id.*, at para. 201.

from Government ministers that Britain was not involved in rendition. It was only through court proceedings that documents were disclosed which showed that the Government had decided that British nationals detained in Afghanistan could be sent to Guantanamo.⁹⁷

In the Binyam Mohamed case, had the proceedings been closed the public would not have learned about the role British security agents played in facilitating his rendition and maltreatment and, in particular, the Security Service's awareness of the treatment Mr Mohamed had received before he was interrogated by UK officials.⁹⁸ Accountability and oversight of the intelligence community would suffer greatly.

The potential reputational damage of CMPs to the UK

There could be damage to the UK's reputation as well as to justice. This is the opposite of the Government's intention. It argues that CMPs are necessary to prevent the reputational damage suffered by the intelligence and security agencies when they are forced to settle civil claims out of court, allegedly because they could not defend themselves without disclosing sensitive evidence.

However, the reputational risk is at least as great with CMPs if the intelligence and security agencies win cases under the proposals. A victory by the Government in a secret session, where no public reasons can be given for their victory, would be less likely to command respect. The public may feel that justice has not been done. So would the claimant. If the court reached a decision unfavourable to the party bringing the claim, that

⁹⁷ Id., at para. 200.

⁹⁸ Id., at para. 201.

party would never know how or why the court came to its decision. As Lord Thomas of Gresford pointed out in the Second Reading debate in the House of Lords, a judge saying to a claimant, “I will find against you but I can’t say why” will do nothing to rescue the standing of the British Government or the intelligence services.⁹⁹ Even where the Government scores a legitimate victory in a CMP, there will be a cry of “fix”.

The risk that secret proceedings could be used to cover up wrongdoing by British intelligence services would make any decision liable to be discredited. As with rendition itself, it would erode some of the moral capital that is an important element in Britain’s (and the West’s) struggle to win widespread consent to fight terrorism and to export democratic values. Britain’s detractors abroad would be able to say that when it comes to justice and security matters, the UK fails to live up to the standards that it seeks to export. Indeed, it is ironic that the Foreign Secretary should have argued against the Leveson proposals on the ground that the statutory underpinnings it would provide for the press could be misinterpreted abroad and limit Britain’s ability to promote free speech around the world.¹⁰⁰

CMPs, which will be branded as “secret courts”, make the risk of damage to Britain’s reputation far more likely and severe. The fact, with respect to rendition, that this allegation can already be

⁹⁹ Hansard, 19 June 2012, col 1679.

¹⁰⁰ He warned that other countries with poor records of promoting democratic values would “throw it back in our faces.” *Guardian*, “Leveson Law Would Undermine Britain on World Stage, Says William Hague”, 1 December 2012. The authors express no view on the merits, or otherwise, of Leveson’s substantive proposals.

made has deeply concerned many of those in the intelligence communities on both sides of the Atlantic.¹⁰¹

The Government does not deny that CMPs are a departure from these fundamental principles of justice, but claims they provide a fairer outcome than not having them at all; and that there are strong and urgent grounds for change. How far can these arguments be sustained?

The Special Advocates' and JCHR opposition to the extension of CMPs

There could be no more telling group of critics of CMPs than the Special Advocates. These are the lawyers who best understand how the CMPs currently work. They strongly oppose the Bill and have roundly criticised as unnecessary and unfair the proposed introduction of CMPs in civil cases.¹⁰²

“The introduction of such a sweeping power could only be justified by the most compelling reasons and, in our view, none exists.”

Indeed, they concluded that:¹⁰³

¹⁰¹ *Extraordinary Rendition in US Counter-Terrorism Policy: the Impact on Transatlantic Relations*, Joint Hearing before the Subcommittee on International Organizations, Human Rights and Oversight and the Subcommittee on Europe of the Committee on Foreign Affairs, 17 April 2007, Serial No. 110-28, Statement of William Delahunt, p.2; House of Commons Debate on Annual Report of the Intelligence and Security Committee for 2008-09, Hansard, 18 March 2010, col 1017.

¹⁰² Special Advocates' response to Justice and Security Green Paper, p. 2.

¹⁰³ Note from Angus McCullough QC, Martin Chamberlain, Jeremy Johnson QC, Tom de la Mare, Charlie Cory-Wright QC and Martin Goudie, Special Advocates, on the Supplementary Memorandum from the Independent Reviewer of Terrorism Legislation submitted to the JCHR (JS 27), para 7 (p 232).

“There is as yet no example of a civil claim involving national security that has proved untriable using PII and flexible and imaginative use of ancillary procedure.”

They strongly disagree with the Government’s contention that the claimants are properly represented and have access to the information necessary to ensure a fair resolution of the issues. From their experience, they have concluded that the cases in which CMPs are already used have not proved that they are “capable of delivering procedural fairness”.¹⁰⁴

The Special Advocates also believe that the PII system and wide range of other safeguards would prove adequate to protect sensitive information.¹⁰⁵ Their response to the Green Paper reads as a fulsome condemnation of the proposal to extend CMPs.

The JCHR’s criticisms are also noteworthy. The Committee has repeatedly expressed its view that the Government has failed to make its case for extending CMPs to civil cases. After the publication of the Green Paper, the JCHR acknowledged that there was a theoretical possibility of cases arising in which existing PII procedures would be inadequate for ensuring a fair trial, but that such a possibility was so remote that the Government’s proposals could not be justified.¹⁰⁶

¹⁰⁴ *Id.*

¹⁰⁵ JCHR, *Justice and Security Green Paper*, paras. 72, 80.

¹⁰⁶ *Id.*, at para. 62: “We have found it very hard to reach an evidence-based view as to the likelihood of this theoretical possibility materialising, and therefore of the scale of the problem to which this part of the Green Paper is said to be a response.”

The JCHR added that it was:¹⁰⁷

“...surprised by the vagueness of the Government’s evidence on what we regard as the critical factual question at the heart of their case for extending CMP in civil proceedings. The only actual case cited by the Government is the Al Rawi litigation itself, and that case simply cannot bear the weight being placed upon it by the Government.”

In its most recent report, published just before Report stage, the JCHR further reiterated its dissatisfaction with the Government’s failure to produce evidence to back up its claim for the need of CMPs in civil cases.¹⁰⁸ In the absence of this evidence, the JCHR has concluded that the Government has simply not met the burden of proving the necessity of Part 2 of the Bill.

¹⁰⁷ *Id.*, at para. 68. The JCHR felt that *Al Rawi* was an inadequate case to justify the CMP proposals because the Government had settled out of court before the PII process had been exhausted. The Committee felt that it was in fact a case “in which the Government would have preferred to have a CMP rather than the usual PII process” – a very different proposition.

¹⁰⁸ JCHR, *Legislative Scrutiny: Justice and Security Bill*, p.34, para. 7: “It is unsatisfactory that the Government at the time of agreeing our Report has still not been able to provide us with the data we had requested on the number of civil damages claims pending in which sensitive national security information is centrally relevant. Pending receipt of a response to our latest attempt to clarify the evidential basis for the Government’s case for the provisions in Part 2 of the Bill, we remain unpersuaded that the Government has demonstrated by reference to evidence that there might exist a significant and growing number of civil cases in which a CMP is “essential... This test of necessity is the appropriate test to apply to the evidence, not the lower standing of whether there are cases in which it would be ‘preferable’ to have CMP as a procedural option.”

27 cases in the pipeline?

The Government has claimed that approximately 27 cases in the pipeline could serve to illustrate the problems that would justify the use of CMP.¹⁰⁹ This claim has a somewhat chequered history, to put it mildly. When David Anderson QC first asked to see the papers in those cases, his request was refused. He was, apparently, never given an explanation for that lack of co-operation. After considerable pressure, the Government let him examine some papers relating to only three damages cases (and four judicial review cases).¹¹⁰

Mr Anderson observed that the cases he examined had probably been selected by the Government to illustrate the Government's point of view.¹¹¹ He had no assistance from Special Advocates, nor, apparently, had he the benefit of hearing the point of view of the other side to that litigation. Nevertheless, from his limited examination of what could be construed as a self-serving sample, Mr Anderson expressed his personal opinion that there might be a small category of

¹⁰⁹ Justice and Security Green Paper, Appendix J, para. 11. However, the JCHR concluded that these 27 cases turn out on closer inspection not to be cases in which the Government has identified that there is a real risk that the Government will be unable to defend them without a CMP, but a very much broader category of cases "where we could have a situation where sensitive information of relevance to the safety of the public and the state... could become relevant." JCHR, para. 69, quoting evidence of Kenneth Clarke QC MP from 6 March 2012.

¹¹⁰ David Anderson QC, *Supplementary Memorandum for the Joint Committee on Human Rights*, 19 March 2012.

¹¹¹ *Id.*, at para. 16.

national-security claims, where there should be an option of using a CMP.¹¹²

This conclusion is challenged by the lawyers on whom any extension of CMPs will most depend – the Special Advocates.¹¹³ All 57 out of the 69 Special Advocates who expressed an opinion were unpersuaded by the Independent Reviewer’s conclusion that CMPs should be available, even in a small number of cases.¹¹⁴ Furthermore, the Home Secretary refused to allow the Special Advocates to see the material shown to the Independent Reviewer, leaving them unable to verify independently Mr Anderson’s conclusion in favour of the need for CMPs.¹¹⁵ This would have “provided the best evidence that could be made available to Parliament as to whether there really exists a practical need for the provisions on closed material procedures in Part 2 of the Bill.”¹¹⁶ Parliament has been denied that evidence.

¹¹² David Anderson QC, *Memorandum for the Joint Committee on Human Rights*, para. 8, 26 January 2012.

¹¹³ The sceptically-minded might conclude that Special Advocates would have a substantial interest in this type of closed court because they make a living from it. This, however, has not inhibited them from roundly criticising the Government’s approach.

¹¹⁴ JCHR, *Justice and Security Green Paper*, para. 78.

¹¹⁵ JCHR, *Legislative Scrutiny: Justice and Security Bill*, p.34, referring to Written Evidence, 3 July 2012, Letter from the Chair to Theresa May MP, Home Secretary, 17 July 2012.

¹¹⁶ *Id.*, at p. 34, para. 7.

6. BLOCKING OFF REDRESS: THE “NORWICH PHARMACAL” RESTRICTION

Arguably even more important and concerning for those seeking the truth about rendition is the government’s decision to close off the so-called *Norwich Pharmacal* jurisdiction. A lot now rests on the Commons’ ability to amend and improve the Government’s proposal. This is because the Lords, having rightly and exhaustively examined aspects of CMPs, did not have enough time to consider comprehensively or to amend the Bill’s *Norwich Pharmacal* provisions.

Over the last 40 years, a legal principle has developed, enabling a party who has suffered damage to obtain information from a third party. This may be required from the third party even if he or she is not directly involved in the case, but has been “mixed up in wrongdoing”, whether innocently or not.¹¹⁷ In extreme cases, it might mean that a person would be able to extract information in a civil court from a third party to defend himself

¹¹⁷ *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

against a capital charge. This is not a theoretical example. It is what happened in the case of Binyam Mohamed.¹¹⁸

The Government has now decided to close down this avenue to information – even if it relates to the Government’s involvement in torture and kidnap – on the grounds that it would both encourage endless “fishing expeditions” and force the disclosure of intelligence information shared by international partners, “seriously undermining confidence among our key allies, including the US.”¹¹⁹

Background to the *Norwich Pharmacal* Principle

A *Norwich Pharmacal* application enables a party to request the court to order the disclosure of information held by a respondent where there has been or may have been wrongdoing by a third party and where the information held by a respondent is required in order to seek justice in respect of that wrongdoing. The jurisdiction originates in the field of patent law¹²⁰ and was relied upon in the context of national security in the *Binyam Mohamed* case, as discussed below.

In order to obtain disclosure under this jurisdiction, the claimant must demonstrate a reasonably arguable case that:

- the respondent has become “mixed up” in wrongdoing;

¹¹⁸ Mohamed’s lawyers brought an action against the British Government seeking documents in their possession which contained evidence of the complicity of British intelligence agents in his maltreatment.

¹¹⁹ Justice Secretary, Letter to MPs on the Justice and Security Bill, May 2012.

¹²⁰ *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

- the respondent has, innocently or otherwise, facilitated the wrongdoing;
- the applicant must have a sufficient interest in bringing the application – usually satisfied by a showing of genuine intention to bring legal proceedings against the wrongdoers;
- the respondent has documents or information in his or her possession relating to the wrongdoing and provision of the documents or information must be necessary for the ends of justice and cannot be obtained by other means;
- the information sought must not be protected by privilege, public interest immunity, or state immunity.

The exercise of the jurisdiction is ultimately always a matter of discretion for the Court. It considers factors including proportionality, expense, time, intrusion, any public policy considerations, the needs of the case and its seriousness. This is a powerful restraint on fishing expeditions.

The Government's proposals

The Bill would bar a Court from ordering disclosure under a *Norwich Pharmacal* application of any “sensitive information,” broadly defined as information held by or relating to the security services.¹²¹ The Bill would remove the Court’s jurisdiction in respect of all information which is held by, or relates to, UK intelligence agencies, whether it originated from abroad or not.

The effect could be profound. UK agencies would be exempt from disclosing evidence of torture, even if that intelligence was home-grown and its disclosure would not affect any foreign intelligence service. This would effectively abolish the right of victims of

¹²¹ Justice and Security Bill, clause 13.

kidnap, rendition, torture and other unlawful abuse to obtain evidence from parts of the executive to help prove their case.

The Secretary of State could certify other information where he or she considers that disclosure would be damaging to national security or to the UK's international relations.¹²² The Secretary's decision to certify such information would be subject to limited judicial review – only on the ground that he “ought” not to have concluded that disclosure would be contrary to the public interest.¹²³ In practice, this leaves the judge with little oversight of the Secretary of State's decision. Furthermore, judicial review proceedings would be subject to a CMP.

Flaws in the Government's Argument

Public Interest Immunity and judicial deference

The Government's concern that *Norwich Pharmacal* cases lead to fishing expeditions and unacceptable levels of disclosure pays inadequate regard to the stance that the courts have taken over the years.

The Government places little confidence in judges, needlessly fearing that courts may order the disclosure of national security sensitive information in future. It contends that “we are no longer able to rely on the ability of the courts to find their own way through this difficult issue of disclosure [of sensitive information relating to national security]”.¹²⁴ The Government's position ignores

¹²² *Id.*, at clause 13(3)(e).

¹²³ *Id.*, at clause 14(2).

¹²⁴ Lord Wallace of Tankerness, Second Reading, col 1665, 19 June 2012. See also Justice and Security Green Paper, para. 1.18: “the lack of an effective framework in which the courts can securely consider sensitive material presents a very real challenge in proceedings in which sensitive material is centrally relevant.”

the success of PII in protecting sensitive information. It is, after all, generally accepted that the judiciary make every effort to accommodate arguments of national security put by the Government in PII applications. This judicial deference is evident in the opinions of both the Divisional Court and the Court of Appeal in the *Binyam Mohamed* case.¹²⁵

Numerous legal experts have pointed out that no PII cases have been identified where the Court has ordered the disclosure of intelligence secrets contrary to the wishes of the Government.¹²⁶ Indeed, the House of Lords Select Committee on the Constitution concluded that “there is no credible risk that the

¹²⁵ *R (Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2008] EWHC 2048 (Admin), 64, 160. In rejecting Mohamed’s challenge to the Foreign Secretary’s decision not to make information available on a voluntary basis prior to the proceedings, the Court deferred to the Government’s evaluation of national security: “On the materials before us, we are not persuaded that the decision was unreasonable or irrational. The Foreign Secretary was in all the circumstances entitled to give the highest weight to considerations of national security when deciding whether to provide voluntary disclosure.”

¹²⁶ Lord Pannick, Second Reading of the Justice and Security Bill, Hansard, 19 June 2012, Col 1696: “There is absolutely no material...to suggest that courts allow or order the disclosure of confidential information that has been supplied to the security services of this country by our allies. The courts have a record of recognising, rightly, the vital importance of protecting national security and the sources of information that go towards it.” In his evidence to the JCHR on 19 June 2012, David Anderson QC remarked (p. 13) that “to the best of my knowledge no United Kingdom court has ever let anything remotely secret out into the open in violation of the control principle.”

judiciary of this country would order the disclosure of secret intelligence material, wherever it emanates from.”¹²⁷

National Security and the “Control Principle”¹²⁸

The Government’s main concern, with respect to *Norwich Pharmacal*, is that the courts might force it to disclose sensitive intelligence information, in particular that originating from foreign intelligence sources. The Government is understandably concerned to uphold the “control principle” governing intelligence exchanges and, in particular, the UK’s intelligence sharing relationship with the US. But it has gone too far.

The Government has, at times, misrepresented important points. The Green Paper provided an incomplete and misleading summary of Binyam Mohamed’s application for the 42 documents critical to his defence, stating that “the Court in *Binyam Mohamed* acknowledged that PII applied to *Norwich Pharmacal* cases but concluded that disclosure was justified in the interests of justice. The US Government at the time expressed its disappointment with this finding.”¹²⁹

This ignored the fact that, while a *Norwich Pharmacal* application was accepted in theory, there was no order of disclosure because the Court never ruled on the PII application. Significantly, the Government’s summary of the case in the Green Paper omitted the crucial mention of the procedures in place which protect matters of national security: even if the conditions

¹²⁷ House of Lords, Select Committee on the Constitution, *Justice and Security Bill: Norwich Pharmacal Jurisdiction*, 4th Report of Session, 2010-2012, HL Paper 31, para. 26.

¹²⁸ See page 23 for a definition of the “control principle.”

¹²⁹ Justice and Security Green Paper, para. 1.41.

of *Norwich Pharmacal* are met, no order of disclosure may be made until the Secretary of State decides whether to invoke PII. If the PII claim is upheld, the information may not be disclosed. In Binyam Mohamed's case, this point was never tested.

The Government also objected to the Court of Appeal's decision to publish seven redacted paragraphs in the Divisional Court's judgment, which contain a description of Mohamed's maltreatment and conditions of detention. Regarding the seven redacted paragraphs, the Government has adopted the flawed analysis of the ISC which, in its Annual Report for 2010-2011, expressed concern that the Court of Appeal's decision resulted in the release of US intelligence material.¹³⁰

Yet the assertion that the control principle was breached on this occasion is bizarre.¹³¹ The information had already been published in the opinion of the US District Court. It was in the public domain and already easily accessible from the UK. For two of the three justices ruling on the case in the Court of Appeal, it was this disclosure that made continuing redaction of the seven paragraphs irrelevant.¹³²

¹³⁰ ISC, *Annual Report 2010-2011*, para. 226. Note that before the US District Court opinion was published, two of the judges of the Court of Appeal had concluded that the balancing test under PII weighed in favour of not disclosing the seven paragraphs. The judges concluded that substantial weight had to be accorded to the Foreign Secretary's view on the existence of a risk to national security.

¹³¹ Lord Butler, Second Reading of the Justice and Security Bill, Hansard, 19 June 2012, col. 1692.

¹³² *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, 2010 EWCA Civ 65, para. 295. Like Sir Anthony May, Lord Neuberger ruled on the basis that the US Divisional Court's opinion had made the redaction effectively redundant. The third Justice,

“In my view, the finding of the US District Court does make a difference because it changes what was an arguable case of torture into a case of torture which a US court has found to be true in proceedings in which the US Government had the opportunity to make a case that it was not true. In these circumstances, it would be quite absurd if the US Government itself decided to reduce intelligence sharing because a UK court had decided to publish summary material whose essential content has been publicly found to be true in a US court; and it would be fanciful to suppose that foreign partners would be concerned because the US Government had taken a stance in these proceedings which became untenable. I am not persuaded that court-ordered disclosure of publicly available material accepted in a US court to be true, one source of which was an intelligence source, could in any real sense properly be regarded as a breach of the control principle.” [emphasis added]

Legal Tourism?

The Government also alleges that the possibility of obtaining a *Norwich Pharmacal* order would increase the risk of “legal tourism”. It is particularly concerned that a person involved in a case outside the UK may apply to British courts using the *Norwich Pharmacal* jurisdiction to obtain information held by the British Government. The Green Paper asserted that, “the UK courts will remain a forum of choice for speculative applicants.”¹³³

Lord Judge (the Lord Chief Justice) was more minded in his opinion to favour release of the paragraphs on grounds of open justice.

¹³³ Justice and Security Green Paper, para. 2.96.

These fears appear to be overstated. Applicants must meet each of the five conditions of the application before a court will order disclosure.¹³⁴ This requires presenting *prima facie* evidence of the wrongdoing and the UK's involvement in it. If they can do so, this is scarcely "tourism" by a "speculative applicant." The JCHR rightly found that the Government had provided it with no evidence in support of its assertions on these points.¹³⁵

Is it proportionate?

The most objectionable aspect of the Government's proposals regarding *Norwich Pharmacal* is its sweeping nature. There are three particular concerns.

First, the Bill presents an excessively wide definition of the material that can be excluded. Virtually all legal commentators agree on this, including a former Lord Chancellor and some of the UK's most senior lawyers.¹³⁶ This includes *any information* held by or on behalf of an intelligence service (whether domestic or foreign), relating to an intelligence service, or specified or described in a certificate issued by the Secretary of State.

The Government has failed to provide any justification for the breadth of the definition, which will inevitably include material unrelated to national security interests. As the former Lord

¹³⁴ See pages 61 and 62.

¹³⁵ JCHR, *Justice and Security Green Paper*, para. 189.

¹³⁶ See, for example the comments of Lord Mackay of Clashfern, Lord Pannick, Lord Lester of Herne Hill, Baroness Berridge, Lord Macdonald of River Glaven; NGOs such as Liberty, Justice, and Reprieve also agree that the definition of "sensitive material" is unjustifiably broad.

Chancellor, Lord Mackay of Clashfern, put it in the Second Reading debate in the House of Lords:¹³⁷

“The description of ‘sensitive information’ seems extremely wide, and I have questioned whether it is necessary to have it anything like so wide.”

Second, as presently drafted, the ban on disclosure is not restricted to foreign originated intelligence which is subject to the control principle. It also bars disclosure of home-grown intelligence. On the Government’s own arguments, that is difficult to justify. It goes beyond the rationale of the Green Paper and the stated aims of the Government to protect foreign intelligence sharing.

Third, the curtailment of *Norwich Pharmacal* in national security cases may protect evidence which most people would conclude should be disclosed. The Government’s concerns about respecting the control principle and preventing the inappropriate disclosure of national security information are valid. But complete removal of the *Norwich Pharmacal* jurisdiction, on the other hand, goes too far. For example, evidence that would tend to prove allegations of torture or enforced disappearance should not be protected from disclosure.

The JCHR came to the same conclusion. Whilst it recognised that the Government had made the case for some legislative reform of the *Norwich Pharmacal* jurisdiction – effectively putting existing PII common law principles on a more transparent statutory basis – it also warned that the control

¹³⁷ Hansard, 19 June 2012, column 1676.

principle “can never be absolute in a legal system committed to the rule of law”.¹³⁸

The JCHR went on to point out that the Government’s proposal could, in principle, entirely remove consideration of such evidence from the most severe cases. The Green Paper notes that “the cases in which these issues have arisen have often occurred in circumstances where individuals are facing severe consequences for their liberty.”¹³⁹

This is an understatement to say the least. As discussed in Appendix B, Binyam Mohamed was fighting charges that carried the death penalty, and he sought disclosure of material in the possession of the UK Government which would help him to contest the charges.¹⁴⁰ The unconditional nature of the current Government stance is unacceptable. It is based on a desire to give our allies a degree of cast-iron commitment about secrecy and the control principle that is inconsistent both with principles of fairness and a commitment to prevent and detect serious crimes.

The Control Principle should not undermine the UK’s commitment to the rule of law

The rendition programme has thrown into relief a concerning imbalance in aspects of the UK-US intelligence sharing relationship. The Government is concerned that if it does not act to make the control principle absolute, the flow of intelligence

¹³⁸ JCHR, *Justice and Security Green Paper*, para. 164. In some cases, a court may conclude that public interest requires that a court order the disclosure of intelligence received from its foreign partners.

¹³⁹ Justice and Security Green Paper, para. 2.97.

¹⁴⁰ *Id.*, at para. 161.

information, particularly from the Americans, would be reduced. Indeed, the Independent Reviewer of Terrorism Legislation, David Anderson QC, noted the influence of the US in the Government's decision to introduce the Justice and Security Bill: "I am quite sure [the US] had something to do with it."¹⁴¹

US pressure may come from a mistaken belief that British courts are willing to disclose CIA intelligence without regard to its allies' wishes or interests of national security.¹⁴² There have, on the other hand, been instances where the US has revealed British intelligence. For example, in May 2012, the Americans leaked or revealed the fact that the intelligence agent involved in foiling a bomb plot in Yemen was a British citizen. In the wake of the revelation, Robert Grenier, former head of the CIA counter-terrorism centre, remarked:¹⁴³

"As for British Intelligence, I suppose, but do not know, that they must be very unhappy. They are often exasperated, quite reasonably, with their American friends, who are far more leak-prone than they."

¹⁴¹ *Guardian*, "US 'Influenced British Government's Decision to Introduce Secret Courts,'" 16 October 2012, available at <http://www.guardian.co.uk/law/2012/oct/16/us-influenced-decision-secret-courts/print>.

¹⁴² As previously discussed, the UK courts have not inadvertently disclosed any information which has endangered national security.

¹⁴³ *Guardian*, "Underwear bomb plot: British and US intelligence rattled over leaks", 11 May 2012.

The idea that the control principle should be absolute has been rejected by the UK's judiciary. In the Binyam Mohamed litigation, the Lord Chief Justice observed:¹⁴⁴

“It is nevertheless accepted by and on behalf of the Foreign Secretary in this litigation that in our country, which is governed by the rule of law, upheld by an independent judiciary, the confidentiality principle is indeed subject to the clear limitation that the Government and intelligence services can never provide the country which provides intelligence with an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that the interests of justice make it necessary and appropriate to do so.”

Similarly, it seems very unlikely that Congress would be prepared to pass laws to accommodate British intelligence sources and protect from disclosure sensitive material, without regard to the interests of justice in US courts. American courts have appeared to adopt a similar understanding of the control principle that currently pertains in UK courts.¹⁴⁵

¹⁴⁴ *R (Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65, 45.

¹⁴⁵ *R (Mohamed) v Foreign Secretary (No 2)*, [2009] 1 WLR, para. 69(iv): “The evidence of Mr Halperin [former Clinton administration official] was that it is well understood between the United States and the United Kingdom that, although intelligence provided would not be disclosed without the consent of the state supplying it, that principle could not be an absolute principle, but was subject to a court deciding to order disclosure. His evidence was that where requests for intelligence information provided by other states such as the United Kingdom were made under the provisions of US law, the commitment of the executive branch of the US Government was

Moreover, the intelligence-sharing relationship is not a one-way street. The US also benefits greatly from British co-operation in intelligence sharing. Indeed, the US is said to benefit from UK sources in places where it has none.¹⁴⁶ According to evidence presented to the Foreign Affairs Committee, some “foreign assets are more willing to talk to British intelligence rather than to the Americans for a variety of historical or other reasons.”¹⁴⁷ Former US presidential national security adviser Morton Halperin has described the intelligence relationship between the two countries as “unprecedented in its interdependence and depth” and “staked on mutual trust and commitment to open dialogue and communication” for more than 60 years.¹⁴⁸ He has emphasised the benefits to the US, as well as the UK, of this relationship.¹⁴⁹

The Government has claimed that.¹⁵⁰

to resist such requests, but that it was well understood that such efforts might not always be successful and that the US courts might order such information to be disclosed under the provisions of US law including the Federal Freedom of Information Act (United States Code, Title 5, section 552). The US Government recognized and accepted that a similar outcome could result under the laws of the United Kingdom.”

¹⁴⁶ Foreign Affairs Committee, *Global Security: UK-US Relations*, Sixth Report, 18 March 2010, para. 108.

¹⁴⁷ *Id.*

¹⁴⁸ *R (Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 (10 Feb 2010), para. 93.

¹⁴⁹ *Id.*

¹⁵⁰ Justice and Security Green Paper, para. 2.96.

“Norwich Pharmacal applications for sensitive material will continue to have a disproportionate impact on the Government, primarily in terms of the risk to national security caused by disclosure and the expenditure of diplomatic capital in minimising the damage caused to international relationships.”

Nor is it always the case that the American perception of what best protects their interests is always ours.¹⁵¹ As noted by the ISC in 2007, the UK and US work under “very different legal guidelines and ethical approaches.”¹⁵²

The differences in the legal systems and traditions of the two countries can be respected without resorting to a drastic measure barring the disclosure of information which may be important to the uncovering of wrongdoing. In evidence to the ISC, Lady Manningham-Buller, the former Director of the Security Services, underscored the agency’s ability to collaborate effectively with the Americans while both still working within the confines of their respective legal frameworks:¹⁵³

“We do a lot of exchange of highly sensitive intelligence in a very trusting way, but we now all of us, including the Americans, have a clear understanding of the legal

¹⁵¹ In the past, Britain has selectively reported intelligence to the US based on political considerations. For example, Britain did not pass all classified data on Northern Ireland to the US in the 1990s, suspecting Irish nationalist sympathies within the Clinton administration. See William Wallace and Christopher Phillips, “Reassessing the special relationship”, *International Affairs* 85: 2 (2009) 263-284, p. 274.

¹⁵² ISC, *Rendition*, para. 156.

¹⁵³ *Id.*, at para. 157.

constraints on that exchange... So when you are talking about sharing secret intelligence, we still trust them, but we have a better recognition that their standards, their laws, their approaches are different, and therefore we still have to work with them, but we work with them in a rather different fashion.”

The blanket ban on the disclosure of information proposed by the Bill – that is, the broad nature of the proposal to include all “sensitive” information – would sweep away even the minimum level of transparency expected by the public. This, in turn, will diminish respect for the intelligence services and make it harder for them to do their job. Respect will eventually be replaced by suspicions of bad faith.

The Government’s priority should be to ensure the judiciary can weigh justice and security, not to ensure that it always fully meets the approval of its foreign intelligence partners. Our allies – particularly the US – do the same.¹⁵⁴ The decision on whether to disclose sensitive information should rest with judges, not with American or British intelligence services.

Whatever the Government’s intentions in this Bill, there is also the risk of misuse of executive discretion. In 2009, *The Observer* alleged that the FCO, in an effort to force the Court to block the disclosure of information in the Binyam Mohamed case,

¹⁵⁴ Significantly, in its July 2007 report *Rendition*, the ISC observed that “What the rendition programme has shown is that in what it refers to as “the war on terror” the U.S. will take whatever action it deems necessary, within US law, to protect its national security from those it considers to pose a serious threat. Although the US may take note of UK protests and concerns, this does not appear materially to affect its strategy on rendition.” Para. Y, p.49.

solicited a letter from the US State Department stating that future intelligence sharing between the two countries would be damaged if the UK disclosed CIA files documenting Mohamed's torture.¹⁵⁵ A former senior State Department official said that it was the Foreign Office that initiated the "cover-up" by asking the State Department to send the letter, not the US claiming to reduce the flow of intelligence information to the UK.¹⁵⁶

¹⁵⁵ *Observer*, "Foreign Office Link to Guantanamo Bay Torture Cover Up", 15 February 2009, available at <http://www.guardian.co.uk/world/2009/feb/15/foreign-office-guantanamo-torture>.

¹⁵⁶ *Id.* According to the *Observer*, the official said: "Far from being a threat it was solicited [by the Foreign Office]. They said: 'Give us something in writing so that we can put it on the record.' If you give us a letter explaining you are opposed to this, then we can provide that to the court." In 2008, the APPG made Freedom of Information requests to the FCO concerning how the Foreign Office allegedly requested John Bellinger, then US State Department legal adviser, to substantiate its claims that the publication of a summary of Binyam Mohamed's treatment obtained from CIA intelligence would negatively impact the UK-US intelligence sharing relationship. The FCO refused the requests on grounds that the information related to national security and was therefore exempt from disclosure under the FOI Act, and the Information Commissioner upheld the FCO's decision. The APPG has appealed the Information Commissioner's decision to the Upper Tribunal.

7. THE ISC: BADLY IN NEED OF REFORM

The Government took the opportunity provided by the Justice and Security Green Paper, and the subsequent Bill, to propose reforms of the ISC. Its credibility has been badly tarnished by, among other things, its failure to make any progress with an investigation into rendition and by the high level of effective control exercised by the executive, and especially the Prime Minister, over appointments to it. It badly needs reform. The Bill's proposals represent some small steps in the right direction, but are inadequate to restore credibility.

The Story So Far

From 1994 to 2008

Established in 1994 by John Major under the Intelligence Services Act 1994, the ISC provides parliamentary oversight of the intelligence services. This group is, somewhat anomalously, a committee of Parliamentarians, but it is not a Parliamentary Committee. It is governed by legislation, rather than the standing orders of each House. It is responsible for examining the expenditure, administration and policy of the three main intelligence and security agencies: the Security Service (MI5), the Secret Intelligence Service (MI6), and the Government

Communications Headquarters (GCHQ). The ISC's remit does not include the operational aspects of the agencies' work.

The Committee comprises nine Parliamentarians from both Houses, appointed by the Prime Minister, after consultation with the Leader of the Opposition.¹⁵⁷ Current ministers of the Crown are legally barred from membership.¹⁵⁸ The Committee reports to the Prime Minister, rather than directly to the House. The Prime Minister has a duty to lay the report before the House, but may redact any information which may be prejudicial to the discharge of the agencies' functions.¹⁵⁹ Members are subject to section 1(1)(b) of the Official Secrets Act 1989 and have access to highly classified material in carrying out their duties.¹⁶⁰

The Committee, which is hosted by the Cabinet Office, meets in secret and is staffed by government employees rather than parliamentary staff.¹⁶¹ Unlike a parliamentary select committee, the ISC does not have the power to compel the attendance of witnesses, nor to require the production of papers.

If the ISC requests information from the heads of any of the three main intelligence and security agencies, the agencies must make it available or inform the ISC that it could not be disclosed, either because it is "sensitive" or because the Secretary of State had vetoed disclosure.¹⁶²

¹⁵⁷ Intelligence Services Act 1994, sections 10(3).

¹⁵⁸ *Id.*, at 10(2)(b).

¹⁵⁹ *Id.*, at 10(7).

¹⁶⁰ ISC, Annual Report for 2011-12, p. 1.

¹⁶¹ *Id.*

¹⁶² Intelligence Services Act 1994, Schedule 3, 3(1).

Over the years, the ISC's access to information – or lack of it – has generated considerable debate and criticism. In its 2006-07 Annual Report, the ISC itself expressed its discontent over the Government's refusal to provide it with certain documents related to an unspecified matter. It made clear that it found the executive's refusal unacceptable.¹⁶³

“Given the Prime Minister's expressed intention to strengthen the Committee, such refusal to grant access to documents relevant to our enquiries makes that position untenable.”

In response, the Government justified its position.¹⁶⁴ The following year, the Government did state that it was “committed to providing the Committee with the information it needs to fulfill its statutory remit... including evidence from the wider intelligence community.”¹⁶⁵

Since its establishment, the Committee's investigative capacity has been far from stable. In 1998, it was without an investigator, a deficiency which, it pointed out, directly impaired its capability and effectiveness in providing parliamentary oversight.¹⁶⁶ The Government acknowledged the concern and, by the following year, the ISC had in place an investigator, John Morrison, a former

¹⁶³ ISC, *Annual Report 2006-07*, January 2008, Annex B.

¹⁶⁴ Government Response to the ISC's Annual Report 2006-07, January 2008, p.5.

¹⁶⁵ Government Response to the ISC's Annual Report 2007-08, p.1. See also House of Commons Library Standard Note SN/HA 2178 *Intelligence and Security Committee*, 21 April 2009.

¹⁶⁶ ISC, *Annual Report 1997-98*, October 1998, para. 69.

Deputy Chief of Intelligence.¹⁶⁷ This welcome development would prove temporary. In 2004, Morrison's contract was prematurely terminated after he appeared on *Panorama* in which he publicly criticised the Government's assessment of Iraqi Weapons of Mass Destruction. The Prime Minister's official spokesman announced that the ISC had chosen not to renew the investigator's contract when it expired that year.¹⁶⁸ Others have suggested that his criticism of the Prime Minister led to pressure from Downing Street to sack him. The ISC appeared to have been coerced into sacking one of its own.¹⁶⁹

Reform in 2008

In response to widespread criticism of both the ineffectiveness and lack of independence of the ISC, the Government proposed several statutory measures to alter the ISC's appointment process and increase transparency. These were published in *The Governance of Britain* Green Paper in July 2007.

The paper also suggested that a number of changes could be made in the interim, without the need for legislation. These included:¹⁷⁰

- increasing transparency in the appointment process of Committee members by using similar processes of

¹⁶⁷ Government Response to the ISC's Annual Report, 1997-98, October 1998; Library Standard Note, *Intelligence and Security Committee*, p. 7.

¹⁶⁸ *Id.*, at p. 8.

¹⁶⁹ BBC, *What the Papers Say: a failure of intelligence*, 11 August 2004, at <http://news.bbc.co.uk/1/hi/programmes/panorama/3555880.stm>.

¹⁷⁰ Ministry of Justice, *The Governance of Britain*, July 2007, para. 93.

consultation between the major parties as those used (at that time) for select committee selection;

- giving the Committee the option to meet in public (including, if Parliament agreed, in the Houses of Parliament);
- allowing the Chair of the Committee to lead House of Commons debates on the Committee's reports, rather than a Government Minister;
- debating the Committee's reports in the House of Lords; and
- strengthening the Secretariat to the Committee, including through the appointment of an independent investigator, and making the Secretariat clearly separate from the staff of the Cabinet Office.

The Government implemented some of these proposals in its White Paper, published in March 2008. These included amending the appointments procedure to involve the Committee of Selection (see below); allowing the Chair of the Committee to open the debates on its reports; and debating ISC reports in the Lords, as well as in the Commons. It also proposed to reinstate the post of investigator.¹⁷¹

It rejected the proposals to adopt select committee arrangements and to hold its hearings in public. It similarly rejected the notion that the ISC's location within the Cabinet Office compromised its independence from the executive, though it agreed to explore alternative accommodation options. The Government did not propose any change to the production of reports.

¹⁷¹ The Stationery Office, *The Governance of Britain – Constitutional Renewal*, March 2008, para. 239.

The reform to the appointment process of committee members has, at least in principle, enabled Parliament to have some input in the outcome, where it previously had none. On 17 July 2008, the House of Commons passed a resolution endorsing the proposals for reform set out in the White Paper.¹⁷² Standing Order 152E was also adopted, which states that the Committee of Selection may propose that “certain Members be recommended to the Prime Minister for appointment to the Intelligence and Security Committee under section 10 of the Intelligence Services Act 1994.”¹⁷³

While the ISC members continue formally to be appointed by the Prime Minister, and the wording of section 10 of the 1994 Act has not changed, nominations can now be made by the Committee of Selection and receive the endorsement of the House. This is not a dramatic improvement: the Committee of Selection is dominated by the whips. Nonetheless, the possibility of the Committee of Selection bringing a Motion before the House does at least give Members the opportunity to object to nominees, and to create some, albeit very limited, opportunity for compromise and amendment.

Immediately prior to the 2010 election, the previous ISC put forward a number of proposals to give it some more independence.¹⁷⁴ These included distancing itself from the Cabinet Office, recruiting independent staff and separating out its budget.¹⁷⁵ The JCHR, among others, called for the far more

¹⁷² See House of Commons Debate, 17 July 2008, col 499 to 501.

¹⁷³ *Id.*, at col 502.

¹⁷⁴ ISC, *Annual Report 2009-10*, March 2010.

¹⁷⁵ *Id.*, Annex A.

robust reform of making the ISC a full select committee, with independent advice, and reporting to Parliament rather than the Prime Minister.¹⁷⁶

The Failure of the ISC

The need for reform to the ISC became even more glaring in the two years after the Government's White Paper proposals. As allegations of British complicity in rendition and torture surfaced over the past decade, the ISC was pressed, particularly by the APPG on Extraordinary Rendition, to uncover the truth.¹⁷⁷ Eventually, it tried to do so. An inquiry into rendition was held by a number of the ISC's members to be a first proper test of Parliament's new machinery for scrutiny of the agencies.¹⁷⁸

The ISC failed the test. In 2007, the ISC published its *Report on Rendition*, which examined whether the UK intelligence and security agencies had any knowledge of, or involvement in, rendition. The ISC found no evidence that the UK agencies were complicit in any extraordinary rendition operations and concluded that, during the critical period (from 2001 to 2003), the agencies had no knowledge of the possible consequences of US custody of detainees generally, or of Binyam Mohamed specifically.¹⁷⁹

¹⁷⁶ JCHR, *Allegations of UK Complicity in Torture*, 23rd Report, (2008-09), p.3.

¹⁷⁷ Letter from Andrew Tyrie to ISC Chairman Margaret Beckett MP, 17 July 2008; Letter to ISC Chairman Margaret Beckett MP, 24 July 2008; Letter to ISC Chairman Margaret Beckett MP, 28 August 2008; Letter to ISC Chairman Dr Kim Howells MP, 21 January 2009; Letter to ISC Chairman Dr Kim Howells MP, 5 February 2009; Letter to ISC Chairman Dr Kim Howells MP, 16 March 2009.

¹⁷⁸ Comment to Andrew Tyrie by a member of the ISC.

¹⁷⁹ ISC, *Rendition*, July 2007, p. 29.

The opposite was the case. Successive court judgments have now made clear that the UK “facilitated” the interrogation of Binyam Mohamed. Furthermore, High Court judgments in February and July 2009 concluded that crucial documents were not made available to the Committee by the Secret Intelligence Service, which led to the Committee’s Report on Rendition being inaccurate:¹⁸⁰

“It is now clear that the 42 documents disclosed as a result of these proceedings were not made available to the ISC. The evidence was that earlier searches made had not discovered them. The ISC Report could not have been made in such terms if the 42 documents had been made available to it.”

The Committee similarly failed to get to the bottom of credible allegations, made as early as 2002, about the use of Diego Garcia in extraordinary renditions and about detainee transfers in theatre.¹⁸¹

The then Chairman of the ISC Dr Kim Howells compounded the damage to the ISC’s credibility. He insisted that the Committee had “never been denied any evidence from any of the agencies, nor the Cabinet Office, nor any official in any Government department” and that it was confident that it knew what was

¹⁸⁰ *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin), para. 88.

¹⁸¹ Former Foreign Secretary David Miliband later issued an apology to the House of Commons and stated that contrary to “earlier explicit assurances” from the US, two American rendition flights landed at Diego Garcia to refuel in 2002. He said the flights had been mistakenly overlooked in previous US internal inquiries carried out at the UK’s behest.

going on.¹⁸² Whether unfair or not, a sceptical public would be forgiven for thinking that the ISC's Chairman had been unduly influenced by the Executive.

The ISC's credibility has also, at times, been undermined by the Government's treatment of it. For example, the Committee was assured by the previous Prime Minister that its recommendations on guidance to intelligence and service officers on detention and interviewing of detainees overseas would be published in good time for an important debate, but they were not.¹⁸³

All this has tarnished the ISC's standing as an effective tool of parliamentary scrutiny. In the 2009 report *Allegations of UK Complicity in Torture*, the JCHR unapologetically declared that the ISC had failed in its duties:¹⁸⁴

¹⁸² BBC, Today Programme, 10 August 2009, interview available at http://news.bbc.co.uk/today/hi/today/newsid__8192000/8192659.stm.

¹⁸³ On 18 March 2009, the then Prime Minister Gordon Brown issued a Written Statement on detainee policy, which provided, in part, that the ISC should update its two reports on detainees and extraordinary rendition. These would then be published and reviewed annually for compliance by the Intelligence Services Commissioner, Sir Peter Gibson. However, it was not until mid-November that the Government consolidated existing guidance and gave it to the ISC for review. The committee submitted its report to the Prime Minister on 5 March 2010, making clear its exasperation at the delays with the strong expectation that the report would be published promptly. That the report was not made available for the parliamentary debate on the ISC's annual report was another source of frustration. The debate on the ISC's annual report was held on 18 March 2010.

¹⁸⁴ Id., at para. 65.

“The missing element, which the ISC has failed to provide, is proper ministerial accountability to Parliament for the activities of the Security Services.”

The Committee is composed of senior colleagues, trying to do their best, but they face at least two obstacles. First, its independence has been compromised by its ties to the executive. The Chairmanship of the Committee is a matter of particular concern. In recent years, a string of appointees have come out of Government to chair the Committee only to return to the front bench afterwards. Indeed, until the June 2009 reshuffle all of the last three Chairmen of the Committee went straight back into senior Government posts (Ann Taylor, now Baroness Taylor of Bolton; Paul Murphy and Margaret Beckett). Despite Standing Order 152E, introduced under Gordon Brown, Kim Howells was appointed as chair by the Prime Minister in October 2008 without the involvement of the Committee of Selection.¹⁸⁵ Experience of Government is valuable, but the revolving door between the Chairmanship of the ISC and Government should be shut. It is damaging to the Committee’s credibility.

Second, the ISC has seemed unwilling to demonstrate that, where appropriate, it challenges the information it receives from the intelligence and security agencies. The JCHR found the ISC’s 2007 report on rendition to be “opaque” and too readily accepting of the accounts presented by the Agency heads without sufficient justification.¹⁸⁶

¹⁸⁵ Hansard, 28 October 2008, col 8WS.

¹⁸⁶ JCHR, *Allegations of UK Complicity in Torture*, 23rd Report, (2008-09), para. 60.

The Bill's proposals for reform of the ISC: appearance and reality

The Justice and Security Bill proposes a range of reforms to strengthen the standing and powers of the ISC. The question is whether they go far enough.

First, the Bill appears to propose that members of the Committee would be appointed by Parliament. However, a person is not eligible to be a member unless nominated for membership by the Prime Minister after consultation with the Leader of the Opposition.¹⁸⁷ In practice, the appointment of the members would remain under the control of the Prime Minister, who would pre-approve potential candidates, and not a matter for Parliament to decide independently. It seems unlikely that any role is envisaged for the Committee of Selection in putting names to the House. The motion is likely to be in the name of the Prime Minister. Members wishing to be considered for membership would therefore have to apply through their Whips rather than at least in theory offering themselves to the Committee of Selection. The Bill certainly does not offer a mechanism to either House to provide a meaningful role in deciding membership. It has all the characteristics of a rubber-stamp of the decisions of the executive.

Second, the Committee would be given the power to probe recent operations by the agencies. Until now, its remit has merely been for resources, policy and administration, although it has previously undertaken reviews of specific operational issues (including its ill-fated examination of rendition) at the Prime Minister's request. This aspect of its work will now be formalised

¹⁸⁷ Justice and Security Bill, Clauses 1(2) to 1(4). See also *Explanatory Notes on the Justice and Security Bill*, para. 20.

and this is a step forward. However, the ISC's oversight of operations would be retrospective and would require the agreement of the Prime Minister. The latter requirement could compromise the independence of the ISC, stripping it of the effective power to decide what to investigate. There is, in extreme situations, a case for such a Prime Ministerial safeguard. If so, its use should be formalised. At the very least, the ISC should be required, in appropriate terms, to report its use to Parliament.

Third, the power to withhold information from the ISC would move from the agency heads to the Secretary of State responsible for that agency. This also looks like a step forward. However, it offers less than appearances suggest. Ministers (the Secretary of State or Minister of the Crown) would be able to block the release of any information to the ISC deemed "sensitive."¹⁸⁸ Clearly, the ISC cannot be effective unless it has access to more information, the confidentiality of which they would, in any case, be required to respect. It is important to bear in mind that the Prime Minister will retain a veto on what is published by the ISC.

A comparison with the US is instructive: the position of the key congressional intelligence committees with respect to access to information is much stronger.¹⁸⁹ The two intelligence committees, the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI), have full access to classified information from the intelligence agencies and other sources.

¹⁸⁸ See Schedule 1(4) for definition of "sensitive information."

¹⁸⁹ See Appendix C, "Congressional Oversight of the Intelligence Community in the US".

The ISC's lack of access to evidence and information has seriously compromised its ability to carry out effective investigations. In addition to the 42 documents in the Binyam Mohamed litigation that were not disclosed to the ISC, evidence placed before the Butler Inquiry had not been seen by the ISC; evidence already provided to select committees had not been made available to the ISC; and the same was true of confidential reports to the Prime Minister from the oversight Commissioners.¹⁹⁰ None of the above inspires confidence in the ISC's effectiveness.

A Memorandum of Understanding regarding information-sharing between the agencies and the ISC, referred to in the Bill, is being developed. According to the ISC Chairman, Sir Malcolm Rifkind, this will strengthen the ability of ISC staff to see relevant files held by the intelligence agencies and to decide what material the Committee will want to see. As a result, the Committee will recruit additional staff to assist it. Given past problems, it will be important to review how these proposals work in practice and the capacity and seniority of the staff that the ISC adds.¹⁹¹

Fourth, the ISC will report to both Parliament and the Prime Minister. The current ISC reports only to the Prime Minister. This adds little. The existing safeguard – which probably has merit – will remain. Before a report is presented to Parliament, the Prime Minister reviews it and the ISC must exclude matters that the Prime Minister deems prejudicial to the responsibilities and operation of the security and intelligence services.¹⁹²

¹⁹⁰ Equality and Human Rights Commission, *Justice and Security Bill: House of Lords Equality and Human Rights Impact Statement, Report Stage and Third Reading*, October 2012, pp. 14-15.

¹⁹¹ Hansard, 18 December 2012, cols 736-7.

¹⁹² Justice and Security Bill, clause 3(4).

A case can be made for each of the above proposals and, collectively, they are steps in the right direction. Ultimately, however, these reforms will only carry conviction if the ISC is seen to be more independent of the executive and to be more accountable to Parliament. Power of appointment is crucial to securing this.

Why reform to the appointment of Chairman is essential

A key part of the Government's argument is that its proposals achieve an appropriate degree of independence for the ISC Chairman. As Ken Clarke put it in the Commons Second Reading debate:¹⁹³

"We are moving to a situation in which the Chairman of the ISC will be elected by the Committee and the Committee itself will be elected by the whole House on the nomination of the Prime Minister."

The current ISC Chairman, Sir Malcolm Rifkind, struck a similar note:¹⁹⁴

"For the first time, the last word on whether the proposed members of the Committee are acceptable will be with the members of the House of Commons and the House of Lords. As has been said, in future the Chairman of the Committee will be appointed not by the Prime Minister, as I was, but by the Committee itself."

Neither, in practice, is likely to occur. The provisions of the Bill are closer to, and perhaps more restrictive than, the pre-2010

¹⁹³ Hansard, 18 December 2012, col 728.

¹⁹⁴ Id., col 735.

Commons regime governing Select Committee membership and Chairmanships. Under the proposals in the Bill, each member of the ISC is to be appointed by the House of Parliament from which the member is to be drawn. But only members nominated by the Prime Minister will be eligible for appointment. There will be no real choice by the nominating House, as is the case at present. Should either House find the Prime Minister's list of members unsatisfactory, it would not be possible to put forward alternative candidates by way of amendment, as they would not have been nominated by the Prime Minister. Both Houses would be able to appoint only members who have been pre-approved by the Prime Minister.

The current arrangements, in place since 2008, at least brought the ISC nominations more closely into line with those for Select Committees, prior to the Wright reforms in 2010. In other words, although appointed by the Prime Minister, nominations to the ISC could be made by the Committee of Selection and receive approval of the House. Chairmen are then formally chosen by the relevant Select Committee.¹⁹⁵ This is worth something, but not a lot. The Committee of Selection is dominated by the whips and, when it comes to chairmanships, "it is common knowledge that the whips on all sides ensure that members of their own party are left in no doubt about the 'official' view as to the preferred candidate."¹⁹⁶ This system has usually, but not

¹⁹⁵ Indeed, in a number of Select Committees, the Chairman is now elected by its members.

¹⁹⁶ House of Commons Reform Committee (Wright Committee), *Rebuilding the House*, First report of Session (2008-09), HC1117, pp. 17-18.

invariably, been a rubber stamp.¹⁹⁷ As the preceding paragraph made clear, the Bill's proposals are even less satisfactory than that. Neither the 2008 arrangements nor the Government's latest proposals will restore public confidence in the ISC Chairmanship.

The Wright Committee solution

A genuine reform is therefore badly needed, even if it needs to fall short of path-breaking reforms of most other select committees in place in 2010. Help is at hand in the unanimous proposals of the Wright Committee.

This concluded that the same reforms recommended to the system of election of members and Chairs of the House's select committees should be applied to the Intelligence and Security Committee. Thus, it proposed that the Chairman, instead of being chosen by members who have been nominated by the Prime Minister, should be elected by secret ballot of the House of Commons, along with chairs of most Commons select committees.¹⁹⁸ Candidates wishing to stand would need to seek in advance of the ballot the formal consent of the Prime Minister for their candidature, to be notified in writing. The Chairman

¹⁹⁷ The exceptions prove the rule, reflected in the Government's efforts to remove Gwyneth Dunwoody and Donald Anderson from Committee chairmanships and by occasions when, with a small government majority reflected in the balance of committee memberships, the opposition could coalesce around its preferred candidate from within the majority party. *Id.*, at p. 22.

¹⁹⁸ It also recommended that the ISC be regarded as one whose chair is held by convention by a Member from the majority party. All of the major recommendations of the Wright Committee have been adopted except for this one, and one other (House Business Committee).

would be accountable to his or her fellow MPs. Election would also reduce the risk, and the perception of the risk, that the incumbent would be influenced by Prime Ministerial patronage.¹⁹⁹ Only those with the pre-approval of the Prime Minister would be able to put their names forward.

Select Committee chairmen are widely held to have gained in authority as a result of the adoption of Wright's proposals. This has in turn strengthened Parliament's authority in holding the executive to account.²⁰⁰ The ISC can benefit from the same approach.

The Government's objections have been insubstantial. The Government asserted that a prime ministerial veto of a candidate deemed unsuitable could cause serious difficulty and embarrassment to the Prime Minister. This argument was put by Ken Clarke:²⁰¹ "it would be an Exocet that was hugely embarrassing to use... The idea that the Prime Minister must suddenly issue a veto on the result of an election carried out in this House is probably a step too far."

This is an absurd misrepresentation of the proposal, which (both in the Wright Committee report and in Lord Hodgson's recent Lords amendment) required prior Prime Ministerial approval for a candidate's name to go forward for election. In other words,

¹⁹⁹ Wright Committee, pp.20-21.

²⁰⁰ See for example, Institute for Government, *The Evolving Role of Select Committees*, available at <http://www.instituteforgovernment.org.uk/our-work/parliament-and-political-process/evolving-role-select-committees>.

²⁰¹ Hansard, 18 December 2012, col 728.

the Prime Minister would never be put in the position of vetoing a candidate who had already been elected.²⁰²

The Wright proposal does not involve any risk to national security. The Prime Minister would be left free to ensure that someone unsuitable cannot be appointed. Given the collapse of confidence in the ISC, after its failure on rendition, a reform of this kind is the minimum required. Without it, none of the other reforms proposed by the Government are likely to bolster much confidence.

²⁰² Wright Committee, p. 21; Lord Hodgson of Astley Abbotts, Report Stage of the Justice and Security Bill, col 1656, Hansard, 19 November 2012.

8. CONCLUSION

*“The price of freedom still is – and always will be –
eternal vigilance.”*

Margaret Thatcher²⁰³

In its most recent report, the JCHR concluded that the Bill’s proposals raised what they described as “serious concerns” and proposed trenchant amendments.²⁰⁴ The JCHR arrived at its conclusion after a year of close study.²⁰⁵ They are right to be concerned.

²⁰³ Concluding Lecture, “God and Man: Perspectives on Christianity in the 20th Century”, November 1994.

²⁰⁴ JCHR, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012-13, 13 November 2012, p.5.

²⁰⁵ This included receiving testimony and written evidence from numerous domestic and international experts, governmental and non-governmental organisations from a variety of fields. Some of the witnesses included David Anderson QC, Independent Reviewer of Terrorism, leading barristers, Special Advocates, professors and law firms. The JCHR also received written evidence and correspondence from government ministers and staff, legal experts and journalists and analysed judicial decisions.

The Bill sits uneasily with deeply entrenched and well-understood ways of providing justice in Britain. In its present form, a strong case can be made that it will do more harm than good, not just to interests of justice and freedom but also to security. The JCHR concluded that its proposals “constitute a radical departure from the UK’s constitutional tradition of open justice and fairness”.²⁰⁶ So far, the Government has not made a convincing case for the need for such a radical departure. The Government has attacked as “reckless” the amendment that would have removed Part 2 of the Bill, notwithstanding overwhelming support for its removal among the legal community.²⁰⁷

The Government claims that serious gaps in national security would be perpetuated, should the Bill not reach the statute book. The Government’s evidence to support its claim is thin. It has not been able to provide examples of cases where judges mistakenly put security at risk by disclosure.²⁰⁸ Parliament is being asked to accept the need for a curb on judicial discretion on trust, even though it is contradicted by the record of judges in sensitive cases. Furthermore, the Government’s claim that it had been forced to settle a growing number of civil cases to avoid disclosure, has turned out to be threadbare.²⁰⁹

The Prime Minister had clearly not yet been given an opportunity to hear all the arguments about this Bill when he

²⁰⁶ JCHR, p.3.

²⁰⁷ See for example, Ken Clarke, “If We Don’t Get the ‘Secret Courts Bill’ Right We Will Perpetuate Serious Gaps in National Security”, *Huffington Post*, 26 November 2012.

²⁰⁸ See page 64.

²⁰⁹ The JCHR has been refused access to these papers.

recently made this point. In exchanges at the Liaison Committee, he was unaware – even after prior notification of the area of cross-examination – that the Independent Reviewer of Terrorism Legislation was refused access to all but three civil damages cases.²¹⁰ The Reviewer subsequently concluded that the small number of cases that he was permitted to see were chosen for their ability to illustrate the Government’s point of view.²¹¹ The Bill would now benefit from direct engagement with the Prime Minister to remedy its defects. There is a lot at stake.

Disclosures about rendition have played a major part in triggering this Bill. These disclosures have shocked many people and eroded trust in ministerial assurances. It is scarcely likely that the Bill – which could make further disclosure much more difficult – could help rebuild that trust. The opposite is likely to be the case. Without the trust of those they seek to protect, the job of the security services will be more difficult and their work less effective, as a number of those working in the Security Services have, themselves, explained.²¹²

Most people recognise and support the need for the security services to protect our freedoms. They face huge difficulties. In dispute is whether this can best be accomplished by the extension of so-called “secret courts”, where one party is shut out of a case, and by the extension of restrictions on disclosure of information deemed by a Minister to be “sensitive.” Similarly, in dispute is whether it can be accomplished in the absence of credible parliamentary oversight of the security services.

²¹⁰ See page 58.

²¹¹ Id.

²¹² See Footnote 5 and page 4.

Balanced tools to enable disclosure, legal and parliamentary, accompanied by appropriate safeguards, are needed. They would help both to rebuild trust and to make us more secure. On the need for balance, the Bill is particularly neglectful. Ministerial justifications for its position are weak.²¹³

Nor is much foresight in evidence. It is important to think through how this legislation could come to be viewed after a period in operation. Any subsequent disclosure of Britain's involvement in rendition, if plausibly held to have been impeded by provisions of this Bill, would further erode the public's trust. Ministers, including the Prime Minister, would be subject to particular criticism for having put the legislation in place. The track record of revelations on rendition to date suggests that further such disclosures may well occur. Unless this Bill is further amended, this and future Governments could find themselves accused, not just of closing down access to justice, but access to the truth as well.

It is now up to Parliament to make the best of a bad job. Part 2 of the Bill should, preferably, be withdrawn, at least until the Government can come back with more balanced proposals, accompanied by a more rigorous explanation of the need for them.

The Lords have worked hard to remedy the most glaring defects of the Bill. Whilst far from ideal, if taken together and not watered down, the amendments offer a prospect of a more proportionate Bill. They would also be somewhat more consistent with the Government's stated purposes, as set out in the Green Paper.

²¹³ See pages 56 and 57.

Regrettably, it is likely that Part 2 in some form will be passed. The Government has already accepted an amendment to give the judge discretion to hold a CMP and to allow either party to apply for one. In addition to the Lords' amendments at Second Reading in the House of Commons, the following are needed:

- First, the judge should have discretion to order a CMP only after having considered whether a claim for PII could have been made in relation to the material and if, in his or her view, a fair determination of the proceedings is impossible by any other means. This was the intention of the House of Lords amendments in clause 6(2)(d) and 6(6). The Government has said that it will consider them.
- Second, the Bill should contain a sunset clause to limit the life of the legislation to five years. A review of the legislation will be needed. It should include hearings before both Houses to examine the operation of the legislation in practice and evidence of the continued need for it. This was a recommendation of the JCHR.²¹⁴
- Third, the judge should require, whenever possible, that a summary of the national security-sensitive material is provided to the excluded party (and his legal representative). This should contain sufficient information to enable the excluded party to give effective instructions to his or her lawyer and special advocate to enable the evidence to be properly challenged.

²¹⁴ JCHR, *Legislative Scrutiny: Justice and Security Bill*, November 2012, pp. 10, 33.

- Fourth, the Bill should do what it can to set out procedural rules by way of primary legislation to mitigate the incurable unfairness of CMPs. It is for consideration whether the burden of proof in the case should be on the Government if it opts for a CMP.²¹⁵
- Fifth, once a court has approved a CMP in a given case, the judge should retain his or her discretion to balance the interests of justice against the interests of national security in determining whether evidence should be disclosed. This was proposed by the JCHR.²¹⁶
- Sixth, the Government will need to provide for a bar on the disclosure of information obtained from foreign intelligence partners or UK intelligence information which would reveal the identity of UK intelligence officers, their sources, or their capabilities. But the bar should not extend to *all* information relating to or held by an intelligence service. Nor should the control principle be made absolute.

Judges should retain their current discretion to order the disclosure of information if it is overwhelmingly in the public interest, balancing the public interest in disclosure against the public interest in protecting national security. In accepting this, the Government should be reassured by the fact that judges will, in any case, undertake a so-called balancing exercise in assessing *Norwich Pharmacal*

²¹⁵ Such amendments were proposed in the House of Lords by Lord Hodgson of Astley Abbots.

²¹⁶ JCHR, *Legislative Scrutiny: Justice and Security Bill*, November 2012, p. 22.

applications. They have shown enormous respect for the concerns of national security in exercising it in the past.²¹⁷

- Seventh, an essential minimum to restore public confidence in the ISC is the implementation of the Wright Committee proposals.²¹⁸ Credibility cannot be restored while the ISC Chairmanship remains a tool of Prime Ministerial patronage. This would be the practical effect of the Government's proposals.²¹⁹

The Government does not appear concerned that the Bill could have a silencing effect on the disclosure of further information about British involvement in rendition. It should be. In the absence of a sufficiently independent ISC to oversee and hold to account the intelligence and security services, an independent inquiry into rendition remains essential. A highly effective ISC that had got to the truth about the country's involvement in matters such as rendition could have assuaged somewhat the concerns of many both about rendition and the Bill.

The Government must fulfil its commitment to establish a successor to the Gibson Inquiry once police investigations into the Libyan allegations are concluded. It should examine whether the Inquiry can make progress while those investigations continue. The Government should make clear that a successor inquiry will avoid the self-imposed limitations that appeared to cripple the Gibson Inquiry.²²⁰

²¹⁷ See Footnotes 130 and 132.

²¹⁸ See pages 92 to 94.

²¹⁹ See pages 90 to 92.

²²⁰ See pages 15 to 17.

THE APPG REMIT FOR A NEW INQUIRY INTO RENDITION.

To operate effectively, a new inquiry must:

1. Examine the issue of detainee transfers in Iraq and Afghanistan (i.e., whether anyone captured by the UK had been handed over to the control of the US or another country or transferred out of the country).^{*}
2. Obtain written certificates signed by Permanent Secretaries to ensure that all relevant information held by government departments had been supplied to it.
3. Use a high quality investigation Panel, to include members with an intimate understanding of the security services.
4. Have access to non-UK and non-government bodies to obtain information.
5. Allow the Inquiry Chairman to decide whether and in what form information is published, subject to a final determination by the Prime Minister.[†]

Without these five essential changes, any further inquiry – whether thorough or not – would be vulnerable to the charge that its work was incomplete, or a whitewash.

* The issue relates to whether the UK was involved in the mistreatment of detainees held by other countries in counter-terrorism operations overseas.

† Letter to the Prime Minister from Andrew Tyrie MP, 7 September 2011; Letter to the Prime Minister from Andrew Tyrie MP, 28 November 2011.

The most important benefit of an inquiry is that it can give confidence to those whose co-operation the UK most needs to keep itself secure, at home and abroad. Only if the UK is seen to have got to the bottom of extraordinary rendition and ended its involvement can that confidence be provided.

The Government is undoubtedly well-intentioned. But its efforts may have the opposite effect to those intended. They may make us less secure. Retired US generals Charles Krulak and Joseph Hoar understand this point well:²²¹

“This war will be won or lost not on the battlefield but in the minds of potential supporters who have not yet thrown in their lot with the enemy. If we forfeit our values by signalling that they are negotiable in situations of grave or imminent danger, we drive those undecideds into the arms of the enemy. This way lies defeat, and we are well down the road to it.”

The Bill provides reason for concern about the impact of the Government’s approach on those people and communities whose trust and confidence in the security services is essential for the provision of reliable intelligence information. Some of the most effective sources of intelligence are the communities and individuals who interact with suspected terrorists.²²² In its efforts to

²²¹ Washington Post, *It’s Our Cage Too*, 17 May 2007.

²²² For example, it was apparently a tip from a Muslim woman concerned about the suspicious behaviour of an acquaintance following the 7/7 terrorist attacks in London that enabled British authorities to investigate and uncover an intricate plot to bomb trans-Atlantic flights from the UK to the US. See *Guardian*, “Terror Plot: Pakistan and al-Qaida links revealed”, 12 August 2006; *Washington Post*, “Tip Followed ’05 Attack on London Transit”, 11 August 2006.

protect foreign intelligence sources, the Government may neglect the sources right at its doorstep. Individuals may be less willing to provide information to authorities in an environment characterised by distrust, “secret justice” and the risk of cover-ups of government wrongdoing.

The Bill also threatens to add to the damage that extraordinary rendition did to Britain’s, and the West’s credibility and moral standing. Britain is still reckoning with its mistakes: “a deeply regrettable pattern of misinformation” regarding the country’s involvement in extraordinary rendition which has “led to misleading statements being made to the public, to the claimants’ relatives, to the Intelligence and Security Committee, to the Courts and to Parliament.”²²³ Judicial findings of wrongdoing by the intelligence and security services in the case of Binyam Mohamed are a stark reminder of the need for greater accountability and transparency within the intelligence community. The restoration of credibility may be further hampered by this Bill. As the former Attorney General Lord Goldsmith put it:²²⁴

“Looking at the way the Bill would operate, I also think about how some of us might have to explain this procedure [CMP] to colleagues in other countries. They will ask, ‘Is it true that England, a country that we thought had such strong safeguards for liberty, can now have procedures in which evidence is relied on by the state

²²³ Tim Otty QC, “The Slow Creep of Complacency and the Soul of English Justice”, *European Human Rights Law Review*, 20 April 2012, 3 EHRLR 2012.

²²⁴ Lord Goldsmith, Committee Stage of the Bill, Hansard, 23 July 2012, col. 492.

against an individual without that individual seeing it? I have spent a lot of time overseas and I will find that difficult to justify.”

Engaging in so-called secret justice is a setback for efforts to spread better standards of justice around the world.

The Prime Minister has spoken, quite rightly, of the “stain” that allegations concerning complicity in rendition have put on Britain’s reputation and that of the intelligence and security services. That is why it is more important than ever, as Baroness Kennedy of the Shaws, said at the Report Stage of the Justice and Security Bill.²²⁵

“...for the good standing of our country in the world, but also for the standards that we normally set ourselves, that the history is placed before the public, and that we know that it happened so that it cannot happen again.”

The peculiarly one-sided focus of the Justice and Security Bill risks adding to it, opening the country to charges that “secret justice”, a narrowing of redress and inadequate reform of the ISC will undermine the ability to hold the Government and the intelligence services to account.

The Government can rescue this flawed bill and transform it into one that is less unacceptable. By sharply curtailing the scope for CMPs and by further amendment of other parts of the Bill, particularly to secure credible parliamentary oversight of the security services, ministers still have the scope to enhance, rather than diminish, Britain’s moral standing. They should take it.

²²⁵ Hansard, 21 November 2012 col 1890.

APPENDIX A

SOME GOVERNMENT ASSURANCES ABOUT EXTRAORDINARY RENDITION AND THE BILL THAT HAVE TURNED OUT TO BE FALSE OR MISLEADING

1. British Involvement in Extraordinary Rendition

False	True
<p>Britain was not involved in the CIA's programme of extraordinary rendition.</p> <p><i>On Diego Garcia</i> "Unless we all start to believe in conspiracy theories and that the officials are lying, that I am lying, that behind this there is some kind of secret state which is in league with some dark forces in the United States, and let me say, we believe that Secretary Rice is lying, there simply is no truth that the United Kingdom has been involved in rendition, full stop." <i>13 December 2005, Jack Straw MP, then Foreign Secretary</i></p> <p>"The US authorities have repeatedly given us assurances that no detainees, prisoners of war or any other persons in this category are being held on Diego Garcia, or have at any time passed in transit through Diego Garcia or its territorial waters or airspace." <i>11 October 2007, Meg Munn MP, then Foreign Office Minister for the Overseas Territories, Written Answer</i></p>	<p>Britain has been involved in extraordinary rendition.</p> <p>"I am very sorry indeed to have to report to the House the need to correct those and other statements on the subject." <i>21 February 2008, David Miliband MP, then Foreign Secretary</i></p>

<p>On the Transfer of Detainees “The UK has not handed over to the US any persons apprehended in Afghanistan.” <i>9 September 2004, Adam Ingram MP, Written Answer to Andrew Tyrie MP</i></p>	<p>“I regret that it is now clear that inaccurate information on this particular issue has been given to the House by my Department. I want to stress, however, that this was based upon the information available to Ministers and those who were briefing them at the time... Two individuals were captured by UK forces in and around Baghdad. They were transferred to US detention, in accordance with normal practice, and then moved subsequently to a US detention facility in Afghanistan.” <i>26 February 2009, John Hutton MP</i></p>
<p>On Binyam Mohamed “The Committee has therefore found no evidence that the UK Agencies were complicit in any “Extraordinary Rendition” operations.” <i>July 2007, Intelligence and Security Committee, Report on Rendition</i></p>	<p>“[The Security Services]...denied that [they] knew of any ill-treatment of detainees interviewed by them... Yet in this case, that does not seem to have been true; as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the treatment of Mr Mohamed when he was held at the behest of US officials... the Security Services have an interest in the suppression of such information”..” <i>26 February 2010, Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 158</i></p>

Exactly seven years after Jack Straw’s 2005 statement, on 13 December 2012, the Government announced that it would pay £2.2 million to settle a claim brought by Libyan dissident Sami al-Saadi and his family for Britain’s role in his unlawful rendition to Libya under Gaddafi’s regime in 2004, where he was tortured.

2. Judicial Discretion in CMPs

False	True
<p>The judge has always had discretion under the Bill to decide whether to use a CMP.</p> <p>“The final decision that a Closed Material Procedure could be used will be a judicial one.” [Emphasis added]</p> <p><i>Government’s Response to the Twenty-Fourth Report from the Joint Committee on Human Rights Session 2010-2012: The Justice and Security Green Paper, May 2012</i></p> <p>“We have gone out of our way to make sure that it is the judge, in two separate stages, who has to decide whether to order that evidence should be heard in a closed court.” [Emphasis added]</p> <p><i>Guardian, “ ‘Secret Courts’ Plan is Radical Departure from Open Justice, Says Committee”, 13 November 2012</i></p>	<p>The Bill, as introduced in the Lords, did not permit the judicial discretion that the Government claimed for it.</p> <ul style="list-style-type: none"> • Section 6(2): The court MUST make a declaration for CMP • Section 6(3)(a): The court MUST ignore the fact that the PII process might result in that material being withheld • Section 6(5): The Secretary of State need only consider the alternative of PII before applying for CMP <p>The amendments proposed by the House of Lords re-insert the judicial discretion that is missing. However, the Government has only indicated its acceptance of two of the four amendments proposed.²²⁶</p>

²²⁶ Specifically, Government stated that it would accept the amendments that a court “may”, rather than “must”, order a CMP upon an application, which is reflected in clause 6(2) of the amended Bill. The Government also agreed that any party, not just the Government, may apply for a CMP, which is reflected in clause 6(1) of the amended Bill. It has not accepted the amendments that would require a judge to consider and exhaust alternatives to CMPs and to balance the interests of national security against the interest in the fair and open administration of justice once it has made a declaration for CMP.

3. On the nature of CMPs

False	True
<p>CMPs are “not a massive departure” from the status quo. <i>Prime Minister, Evidence before the Liaison Committee, 11 December 2012.</i></p>	<p>This is a matter of interpretation, but numerous legal authorities disagree, arguing that it is a “constitutionally significant reform”²²⁷ and a “radical departure from the UK’s constitutional tradition of open justice and fairness.”²²⁸</p> <p>The following have expressed their vehement disagreement:</p> <ul style="list-style-type: none"> • The Former DPP, Lord Macdonald of River Glaven <i>Report Stage of the Justice and Security Bill, 21 November 2012, col 1900.</i> • Special Advocates • Joint Committee on Human Rights <i>JCHR, Legislative Scrutiny, p.3.</i> • Leading barristers

²²⁷ House of Lords Select Committee on the Constitution, *Justice and Security Bill*, HL Paper 18, 15 June 2012, para. 4.

²²⁸ JCHR, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session (2012-13), 13 November 2012, p.3.

4. On Procedural Fairness

False	True
<p>“CMPs have been shown to deliver procedural fairness and work effectively.”</p> <p><i>Justice and Security Green Paper, para. 13.</i></p>	<p>The Special Advocates have strongly declared that “the contexts in which CMPs are already used have not proved that they are capable of delivering procedural fairness.”</p> <p><i>Special Advocates’ response to Justice and Security Green Paper, p. 2.</i></p>

5. On the Need for CMPs

False	True
<p>The Bill is needed because the Government has to settle many cases which have no merit.</p> <p>Seven claims for damages involving highly sensitive national security evidence have been made in the past year. Three cases have been settled confidentially.</p> <p><i>Guardian, “Government Says Mounting Damages Claims Support Case for Secret Courts”, 12 November 2012.</i></p>	<p>The Government has provided evidence of very few such cases. The Government cited 27 cases in the Justice and Security Green Paper, as examples of those containing sensitive information, which the Government has been forced to settle even though they have no merit. The Independent Reviewer of Terrorism asked to see them. His request was refused. Eventually, he was allowed to see seven cases. Only three were damages claims. The other four were judicial review cases. He concluded that:</p> <p>“I assume they were chosen for their ability clearly to illustrate the Government’s point of view.”</p> <p><i>David Anderson QC, Supplementary Memorandum for the Joint Committee on Human Rights, 19 March 2012, para. 16.</i></p>

In the *Al Rawi* litigation, where Guantanamo Bay detainees alleged that the British Government was complicit in their extraordinary rendition, torture and unlawful detention, the Government settled the case at a relatively early stage and never relied on PII. The Government was not forced to settle this claim. In fact, they did so before the UK Supreme Court had decided the issue of whether to allow the use of a CMP in a civil case.

6. The effectiveness of the ISC

False	True
<p>“It is precisely because the Committee operates inside the so-called ring of secrecy that it can have access to material and question witnesses on very sensitive issues to a degree that makes its scrutiny effective.”</p> <p><i>David Miliband, then Foreign Secretary, 18 March 2010.</i></p> <p>The ISC has “never been denied any evidence from any of the agencies, nor the Cabinet Office, nor any official in any Government department.”</p> <p><i>Dr Kim Howells, then Chairman of the ISC, BBC, Today Programme, 10 August 2009</i></p>	<p>The ISC’s lack of access to evidence and information contributed to its failed inquiry into rendition.</p> <p>“It is now clear that the 42 documents disclosed as a result of these proceedings were not made available to the ISC...The ISC Report could not have been made in such terms if the 42 documents had been made available to it.”</p> <p><i>Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 152 (Admin), para. 87.</i></p>
<p>“The ISC was “confident” it knew what was going on with respect to Britain’s involvement in extraordinary rendition.”</p> <p><i>Dr Kim Howells, then Chairman of the ISC, BBC, Today Programme, 10 August 2009</i></p>	<p>The ISC failed to get to the truth on Britain’s involvement in extraordinary rendition. In its 2007 report <i>Rendition</i>, the ISC found no evidence that the UK intelligence and security agencies were complicit in extraordinary rendition or had knowledge of Binyam Mohamed.</p>

APPENDIX B

BACKGROUND ON BINYAM MOHAMED

In 2002, Ethiopian-born British resident Binyam Mohamed was arrested in Pakistan for alleged involvement in a “dirty bomb” plot. By his own account, later given some confirmation, he was maltreated while being held in Pakistan at the behest of the Americans. On 21 July, 2002, he was rendered to Morocco on a CIA plane. Between 2002 and 2004, he was beaten, scalded and had his genitals cut with a scalpel while held in a notorious prison in Morocco. He was then taken to Afghanistan where he spent three months in the so-called “dark prison” (reportedly near Kabul) before being sent to Bagram and finally to Guantánamo Bay in September 2004.

In late 2008, the United States brought charges against Mr Mohamed under the US Military Commissions Act 2006, for offences which carried the death penalty. In order to defend himself from these claims and establish that his alleged confessions had been obtained as a result of torture or mistreatment by American and British intelligence officials, he brought a *Norwich Pharmacal* action against the British Government. He sought to obtain disclosure of documents held by UK authorities containing evidence of Mohamed’s detention and treatment by British intelligence agents. The restricted nature of the application reflected the importance of maintaining a measurable level of secrecy: the material would have been kept within a secret security-cleared ring.

Timeline of Binyam Mohamed's Rendition

1994	Arrived in Britain seeking asylum.
2000	Given exceptional leave to remain in Britain for four years in 2000.
2001	Travelled to Pakistan and Afghanistan in 2001 after converting to Islam.
April 2002	Arrested by Pakistani immigration officials at Karachi airport after the US claimed he fought for the Taliban.
May 2002	Washington gives British security officials details of treatment – interviewed by MI5 officers sent from London.
July 2002	Rendered to Morocco on CIA plane; says his interrogators received questions from London.
Jan 2004	Transferred to Afghanistan and questioned by US agents.
Sept 2004	Taken to Guantánamo Bay detention centre; lawyers demand British documents to prove confession extracted during abuse.
Aug 2007	Britain asked for his return but the US refused.
6 May 2008	Mohamed's lawyers sought the release of evidence relating to his case after it became clear that the US was preparing to charge him.
Oct 2008	US charges against him were dropped.
Dec 2008	Informed by Obama administration that he would be released.
Feb 2009	Mohamed's lawyers claimed in the High Court that he had been tortured; arrived back in Britain.
Feb 2010	UK Court of Appeal rules Government must publish summary of what Washington told London about treatment in Pakistan – paragraph relating to MI5 shown to have been removed after lobbying from Government lawyer.
Nov 2010	Received compensation from British Government.

Sources: BBC, "MI5 Denies Cover-Up Over Binyam Mohamed Torture Affair", 12 February 2010; *Daily Telegraph*, Binyam Mohamed: A Timeline, 17 November 2010.

In analysing Mohamed's application, the Court examined the following questions and found the conditions of the application were satisfied:

- Was there arguable wrongdoing?
- Was the United Kingdom Government, however innocently, involved in the arguable wrongdoing?
- Was disclosure of the information held by the United Kingdom Government necessary in the interests of justice?
- Was the information sought within the scope of the available relief?
- Should the Court exercise its discretion in favour of granting relief?²²⁹

First, it found that Binyam Mohamed had established an arguable case of wrongdoing by the US authorities – that they had subjected him to torture and cruel, inhuman or degrading treatment in Pakistan and unlawfully rendered him to Morocco.

Second, the Court found that the UK had facilitated the wrongdoing, as MI5 had provided questions to his interrogators and had been aware of his inhuman and degrading treatment.

Third, the Court held that the information held by the Foreign Secretary was essential to Mr Mohamed if he was to have a fair trial in the US.

²²⁹ *R (Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2008] EWHC 2048 (Admin), 64.

Fourth, the conclusion that specific information relating to Mohamed (referred to as Type A documents) was subject to the exercise of the Court's discretion and within the scope of the request. By contrast, type B documents, which consisted of general information on rendition, the "dark prison" and the treatment of detainees generally in the war on terror, did not fall within the scope of available relief.

Fifth, on the final question of discretion, the Court gave great weight to:

- i) the fact that Mr Mohamed potentially faced the death penalty;
- ii) the longstanding opposition of the common law to torture and the use at trial of evidence obtained through torture; and,
- iii) the prohibition of torture in international law.

The Court also took into account that there would be little cost, delay or inconvenience to disclosure, where the searches had already been made by the Foreign Office and the documents were already available.

The Court, however, did not order disclosure of the documents. No order could be made pending determination, at a subsequent hearing, of whether PII could be asserted by the Secretary of State in respect of the 42 documents for which disclosure would be ordered. Also at issue was whether seven paragraphs, "redacted" from the initial judgment, should remain so.

The Secretary of State then invoked PII, on the grounds that to disclose it would breach the control principle, and that such a breach would be damaging to intelligence sharing and thereby national security. In his PII certificate, the Secretary of State

objected, not only to the disclosure of the documents, but also to the publication of seven redacted paragraphs in the Divisional Court's judgment. These documents were later revealed to contain a description of Mohamed's maltreatment and conditions of detention.

Before the Divisional Court could make a final ruling on whether to uphold the Secretary of State's PII certificate, the US Government provided the documents in question to Mohamed's lawyers. The Divisional Court therefore did not need to come to a decision on whether to order the Secretary of State to disclose the documents in the manner sought by Mohamed.

As for the seven redacted paragraphs, the Court of Appeal ultimately ordered their publication after a US District Court published, in an open judgment, its findings that Mohamed's evidence of torture was true. By the time of the Court of Appeal's judgment, the subject-matter of the redacted paragraphs had been publicly acknowledged in the US and could no longer be said to be confidential or in the control of the US Government.²³⁰

²³⁰ *Id.*, at 138.

APPENDIX C

OVERSIGHT OF THE INTELLIGENCE COMMUNITY IN THE UNITED STATES

In the US, congressional oversight of the intelligence community is primarily provided by the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI). Positions on the intelligence committees are assignments made by the leadership on each side in the House and Senate.

The two committees are charged with authorising funding for intelligence activities. The SSCI and HPSCI also have oversight of the Intelligence Community (IC), including the agencies and bureaus that provide information and analysis to executive and legislative branch leaders. Specifically, the SSCI and HPSCI annually review the intelligence budget submitted by the President, conduct periodic investigations, audits, and inspections of intelligence activities and programmes, and prepare legislation authorizing appropriations for the IC.

Both Committees have full access to classified information from the intelligence agencies and other sources.

The remit of the House and Senate intelligence panels for the intelligence community is nearly identical, except for two notable areas. The House panel's domain extends to "tactical intelligence and intelligence-related activities," which covers tactical military intelligence, and it has the authority to "review and study on an exclusive basis the sources and methods of entities" in the IC.²³¹

²³¹ E Halchin and F Kaiser, *Congressional Oversight of Intelligence: Current Structure and Alternatives*, 14 May 2012, p.6.

Senate Select Committee on Intelligence

The SSCI has 15 Senators: eight from the majority party and seven from the minority. The chairman of the Senate Select Committee is always selected from the majority party. The SSCI is a “select” rather than a “standing” Committee because its 15 members are chosen for eight-year terms by the Senate Majority and Minority leaders rather than by party caucuses before each new Congress. Eight members – including one majority and minority member – also serve on the Senate Appropriations, Armed Services, Foreign Relations, and Judiciary Standing Committees.²³²

Access to Classified Information

Intelligence Committee members have access to classified intelligence assessments, intelligence sources and methods, programmes and budgets. By law, the President is required to ensure that the Committee is kept “fully and currently informed” of intelligence activities – meaning that intelligence agencies are required, generally in writing, to notify the Committee of its activities and analysis. This includes keeping the Committee informed of covert actions and any significant intelligence failure.

Under certain circumstances, the President may restrict access to covert action activities to only the Chairman and Vice Chairman of the Committee, the Chairman and Ranking Member of the House Intelligence Committee, and the House and Senate leadership. By law, even in these rare cases, all Committee Members will be aware of such circumstances and be provided a “general description” of the covert action information that is fully briefed only to the leadership.

²³² Senate Select Committee on Intelligence, *Overview of the Senate Select Committee on Intelligence Responsibilities and Activities*.

House Permanent Select Committee on Intelligence

The House Permanent Select Committee on Intelligence (HPSCI) is a committee of 20 members, with a party ratio of 12 majority to 8 minority in the current Congress. HPSCI members serve eight-year terms. The House panel, unlike the Senate counterpart, has no position of vice chairman dedicated to a minority party member. Like the Senate Select Committee, the House Committee reserves seats for members from the chamber's committees on Appropriations, Armed Services, Foreign Affairs/Foreign Relations, and Judiciary, but only calls for one Member from each.

The HPSCI is charged with the oversight of the United States Intelligence Community, which includes the intelligence and intelligence-related activities of 17 elements of the US Government, and the Military Intelligence Program.

Access to Classified Information

All members of the House Committee have access to all classified papers and other material received by the Committee from any source. The members of the House Intelligence Committee must swear or affirm not to disclose classified information, except as authorized by the rules of the chamber.

BIBLIOGRAPHY

All Party Parliamentary Group on Extraordinary Rendition, *Extraordinary Rendition: Closing the Gap*, November 2009.

D Anderson, QC, *Memorandum for the Joint Committee on Human Rights*, 26 January 2012.

D Anderson, QC, *Supplementary Memorandum for the Joint Committee on Human Rights*, 19 March 2012.

Equality and Human Rights Commission, *Justice and Security Bill: House of Lords Equality and Human Rights Impact Statement, Report Stage and Third Reading*, October 2012.

Foreign Affairs Committee, *Global Security: UK-US Relations*, Sixth Report, 18 March 2010.

E Halchin and F Kaiser, *Congressional Oversight of Intelligence: Current Structure and Alternatives*, 14 May 2012.

HM Government, *The Governance of Britain*, January 2007.

HM Government, *The Governance of Britain – Constitutional Renewal*, March 2008.

HM Government, *Justice and Security Green Paper*, October 2011.

HM Government, Justice and Security Bill, May 2012.

House of Commons Library Standard Note SN/HA/2178, *Intelligence and Security Committee*.

House of Commons Reform Committee, *Rebuilding the House*, First Report of Session, (2008-09), HC 1117.

House of Lords, Select Committee on the Constitution, *Justice and Security Bill*, 3rd Report of Session, (2012-3), HL Paper 18, 15 June 2012.

House of Lords, Select Committee on the Constitution, *Justice and Security Bill: Norwich Pharmacal Jurisdiction*, 4th Report of Session, (2010-2012), HL Paper 31, 6 July 2012.

Intelligence and Security Committee, *Annual Report, 1997-1998*.

Intelligence and Security Committee, *Annual Report, 2006-2007*.

Intelligence and Security Committee, *Annual Report, 2009-2010*.

Intelligence and Security Committee, *Annual Report, 2010-2011*.

Intelligence and Security Committee, *Rendition*, July 2007.

Joint Committee on Human Rights, *Allegations of UK Complicity in Torture*, 23rd Report, (2008-09).

Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, 19th Report of Session (2006-2007) (HL Paper 157/HC 394, 30 July 2007).

Joint Committee on Human Rights, *The Justice and Security Green Paper*, 24th Report of Session, 4 April 2012.

Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session (2012-2013), 13 November 2012.

I Leigh, *Rebalancing Rights and National Security: Reforming UK Intelligence Oversight a Decade After 9/11* (2012) 27(5) *Intelligence and National Security* 721-37.

T Otty, *The Slow Creep of Complacency and the Soul of English Justice*, *European Human Rights Law Review*, 3 EHRLR 2012, 20 April 2012.

Special Advocates, *Justice and Security Green Paper: Response to Consultation from Special Advocates*, 16 December 2011.

A Tyrie, *Mr Blair's Poodle Goes to War*, CPS, 2004.

A Tyrie, R Gough and S McCracken, *Account Rendered: Extraordinary Rendition and Britain's Role*, Biteback, July 2011.

W Wallace and C Phillips, "Reassessing the special relationship", *International Affairs*, 2009.

White House, *National Security Strategy of the United States of America*, September 2002.



SOME RECENT PUBLICATIONS

Some reflections on freedom by Sir Martin Jacomb

Why a successful government must have a clear sense of purpose and direction – and that “freedom of the individual should be that ideology.

The UK and the EU: time to cut the knot by David Heathcoat Amory

“There is a way to end the drift of political events, the squabbling over trivia and the loss of purpose and drive: and that is to take on the great unresolved question of Britain’s relationship with the EU. There is now an opportunity, and here is a plan.” – *The Daily Telegraph*.

The progressivity of UK taxes and transfers by Ryan Bourne and Tim Knox

“This might sound like a technical read. Trust me on this: the message within it is the single most important fact in British politics.” – Stephen Pollard, *The Daily Express*

“A report of devastating clarity.” – *The Daily Mail*

The approaching cashflow crunch: why Coalition reforms to public sector pensions will not hold by Michael Johnson

“Each of Britain’s 26 million households will have to pay £1,230 to fill the [public sector pensions funding] gap.” – *The Daily Telegraph*



The case against Capital Gains Tax by Howard Flight and Oliver Latham

“Rich, dynamic economies such as Singapore, Switzerland and Hong Kong charge no capital gains tax, the report points out, and the UK’s 28% rate puts it near the top of the pack of developed nations.” – *CityAM*

A Distorted Debate: the need for clarity on debt, deficit and coalition aims by Ryan Bourne and Tim Knox

“A recent opinion poll for the Centre for Policy Studies revealed that 47% of British adults believe the Coalition is planning to reduce the national debt by £600 billion over the course of this parliament. In fact, the plan is for it to increase by £600 billion. With only 10% of those questioned getting this right, the implications for democracy are alarming” – Jeff Randall, *The Daily Telegraph*

After PFI by Jesse Norman MP

“How not to spend £250 billion of taxpayers’ cash” – headline, comment page article, *The Times*

After the Age of Abundance: it’s the economy by Andrew Tyrie MP

“In a paper for the Centre for Policy Studies, [Tyrie] says the government’s policies on growth are “piecemeal” and “incoherent, even inconsistent”. Britain, he says, needs a new plan A to boost the economy, alongside the existing plan A for cutting the deficit... He is right.” – leading article, *The Sunday Times*



BECOME AN ASSOCIATE OF THE CENTRE FOR POLICY STUDIES

The Centre for Policy Studies is one of Britain's best-known and most respected think tanks. Independent from all political parties and pressure groups, it consistently advocates a distinctive case for smaller, less intrusive government, with greater freedom and responsibility for individuals, families, business and the voluntary sector.

Through our Associate Membership scheme, we welcome supporters who take an interest in our work. Associate Membership is available for £100 a year. Becoming an Associate will entitle you to:

- all major CPS reports produced in a 12-month period
- invitations to lectures and conferences
- advance notice by e-mail of our publications, briefing papers and invitations to special events

For more details, please write or telephone to:

Jenny Nicholson, Deputy Director of Fundraising
Centre for Policy Studies
57 Tufton Street, London SW1P 3QL
Tel: 020 7222 4488
jenny@cps.org.uk
Website: www.cps.org.uk

A decade after Britain allowed itself to be dragged into complicity in “extraordinary rendition” – the kidnap and torture of individuals by the state – the extent and limits of our involvement are still unknown.

We need more sunlight, not less. Yet the Coalition is now introducing a Bill which will make it harder to uncover such official wrongdoing.

The Justice and Security Bill, in its current form, would damage Britain’s system of open justice and tarnish Britain’s reputation, at home and abroad. Without the trust of those they seek to protect, and of those with whom they need to co-operate, the vital work of our security services will be less effective, not more.

The Bill’s proposals to extend use of “secret courts” and to deny access to so much evidence deemed “sensitive” must be reversed. Similarly, in place of the weak measures proposed in the Bill to reform the Intelligence and Security Committee, we need far stronger parliamentary oversight of the intelligence agencies.

Price £10.00

