Legislative Scrutiny: Justice and Security Bill
Oral Evidence HC370–i–iii

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David Anderson QC

Oral Evidence, 19 June 2012, Q 1–26

EVIDENCE SESSION NO. 1. HEARD IN PUBLIC

Members Present

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Baroness Berridge
Mike Crockart
Lord Faulks
Baroness Kennedy of The Shaws
Baroness Lister of Burtersett
Lord Lester of Herne Hill
Baroness O'Loan
Dominic Raab
Virendra Sharma
Richard Shepherd

Examination of Witnesses

Q1 Chair: Order, order. Welcome to the Joint Committee on Human Rights and this oral evidence session on the Justice and Security Bill. At the outset I should announce that the session will end shortly before 3 pm in order that Peers who are on the Committee may be present at the Second Reading of the Bill. For the record, please introduce yourself.
David Anderson QC: I am David Anderson, the independent reviewer of terrorism legislation.

Q2 Chair: Thank you very much. Before we ask you detailed questions about specific aspects of the Bill, perhaps you could outline briefly and in broad terms whether there is anything that you welcome in the Bill and also whether there is anything that particularly concerns you.
David Anderson QC: There are some things that I welcome. The Bill is more modest in its scope than the Green Paper. In particular, it is mostly limited to matters of national security, which is an improvement on the previous broad category of sensitive information. Inquests have been removed from its scope, as you know. The exclusion of intercept evidence will not apply in closed material procedures. We have each recommended that, and I welcome it. I see from the accompanying documents that the closed judgment database is well advanced.
All that said, there remain two distinct elements of the proposal with which I think you are chiefly concerned. One is the extension of the closed material procedure. The other is the limitation on the Norwich Pharmacal jurisdiction. In a nutshell, my position on each of those elements is the same. They address what I consider to be a genuine problem, but they do so in a way that is disproportionate. There is an element of overkill that I have no doubt will be the subject of debate, both in relation to Clauses 6 and 7 on closed material procedures, and to Clause 13 on Norwich Pharmacal. On Norwich Pharmacal, I propose to test that theory in the United States. I am going there tomorrow, partly to talk to the relevant people about intelligence sharing and about the impact on them of the Binyam Mohamed judgment.

Q3 Mr Raab: Mr Anderson, you said in relation to the extension of CMP that you were satisfied that it was there to deal with a problem. Do you think at a general level that the problem is based on operational experience to date having produced evidence, or on an extrapolation of future trends in a more speculative and hypothetical sense?

David Anderson QC: I hope I am not presuming, but I think that probably we all agree that there is a problem to some extent. I was shown seven cases on 14 March. Three were naturalisation and exclusion judicial reviews. It was made clear to me that that category of case was the larger of the two categories that it was envisaged would be affected by this proposal. I think that we have each suggested that closed material procedures may be justified in such cases. We have each gone further and suggested that they should be brought within the umbrella of SIAC, which already hears a lot of other immigration cases that could be held in accordance with a closed material procedure. That is the first part of the answer.

The second and I suspect more controversial element relates to civil actions that are liable to concern the activities of the security and intelligence services. You asked whether we were looking at existing actions or simply at future actions. All I can say—I worded this very carefully in my supplementary memorandum—is that I was introduced to three of those cases. I did not just see the evidence in those cases but was privy to the advice that counsel gave in them. That persuaded me that in some cases there is already a problem. It would be very nice to believe that the number of cases is very small and that they will soon go away because any indecent enthusiasm we may have had for going along with legal excesses in the first decade of the century is now long in the past. I suspect that that is not the case and that we are already beginning to see the start of a second wave of cases concerning alleged complicity in the targeting of drones. I can only imagine that those cases may raise similar sorts of issues. So I do not suggest that the number of cases is large. I was given only an unscientific sample of three to look at, but that persuaded me that there was a problem.

Q4 Baroness O'Loan: Do you see any reason why some special advocates should not be invited by the Government to view the material that you examined in those three cases to see if they agree with you that the cases can be fairly determined only by a CMP?

David Anderson QC: They certainly could be. That would be a matter for the Government if they wished to permit that. The thing to remember about special advocates is that, first, they are extremely trustworthy members of the Bar—they have all been security cleared—but also that they are advocates, just as counsel for the Home Secretary, whom I talked to, were advocates. They are retained by the solicitors for the people who are subject to control orders, TPIMs, immigration decisions or whatever, in order to promote their case. So if one had a situation in which the special advocate was there and counsel for the Home Office was there, too, it would be an adversarial proceeding. One would not set up the special advocate to be the judge. It would be for a special advocate to bring out those aspects of what the Home Secretary said that did not seem to be right. Certainly one could imagine such an adversarial way of doing things. But if one is going down that route, the most reliable way of doing it is with a real case in front of a real judge.

We saw that in the AHK case in front of Mr Justice Ouseley, which I think I mentioned when I came to see you in March. That was a naturalisation and exclusion case on judicial review. The judge was asked to give his opinion on whether these cases could be fairly tried without a closed material procedure. His opinion, when he had heard detailed argument and thought about the matter for some weeks, was that, "a CMP is the only realistic alternative to the Claimants simply losing; the cases in other language become untriable". The judge is neutral, impartial and in possession of all the facts. That was his conclusion in that case.

I accept that we do not have a similar conclusion that I am aware of in a civil action such as a damages claim, although my understanding is that in one of the drones cases Mr Justice Mitting indicated that there should be a two-day hearing in order to decide whether the case could be fairly tried without a closed material procedure. Last I heard that had not been set down—I do not know when it is likely to be argued. I would have thought that when it is, the judgment—like that of Mr Justice Ouseley in the naturalisation and exclusion field—is likely to be the best evidence of whether there is a problem. It will be better than my evidence and better, perhaps, than the evidence of special advocates who, like me, have already taken a position on some of these issues.

Q5 Baroness Berridge: Are you aware of any cases in which the Government have made a Carnduff v Rock application to strike out the claims because the national security material is so central to the claim that they cannot defend themselves without damaging disclosure of material?
David Anderson QC: No, I am not. I think I can understand why that is, certainly in relation to the naturalisation and exclusion judicial reviews. As you will know from the AHK judgment, the line the Government took on those cases was to argue that they were not covered by Al Rawi and that a closed material procedure was permissible even without a specific statute. That was the way they argued it. They have therefore not seen the need to apply for strike-out. I am not aware of a damages case in which the Government have applied for strike-out, either, although I refer you to what Mr Justice Mitting decided to do in the drones case, which was effectively on his own initiative to have a hearing on the issue of whether the case could be fairly tried. Why that is, I do not know. I would have thought that the Government might be as resistant as anybody to seeking to dispose of a case in circumstances where the court was not allowed to look at any of the evidence or come to any conclusion, which would be how it would work if there was a strike-out. Certainly in terms of perception—I have read material about secret justice and how terrible it is to sweep material into secret courts where the public cannot come in—of course closed material procedures are far from ideal, but at least the material gets an airing in a way that it does not when a strike-out application is made and succeeds.

Q6 Mr Sharma: Does Part 2 of the Bill contain the sorts of conditions that you had in mind to ensure that a CMP is resorted to only in cases of strict necessity?
David Anderson QC: How shall I be diplomatic about this? No, it does not. I said that I thought that a CMP could be tolerable in these sorts of cases—but only if certain conditions were satisfied. One was that a CMP should be a last resort to avoid cases being untriable, as Lord Kerr put it in the Al Rawi case. The second was that the decision to trigger a CMP must be for the court and not for the Government. I was thinking there of what Lord Hope said last year in the Supreme Court in the Tariq case: namely, that it was important that the decision should be taken by someone who was both impartial and independent of the Executive. Thirdly, I said that intercept evidence should be admissible in those closed material proceedings, as it is in all other closed material proceedings. On that I find comfort in Schedule 2 to the Bill. The fourth thing I said was that continuing efforts should be made to improve the closed material procedure, not least by setting up a committee under the chairmanship of a High Court judge to look at some of the ideas that special advocates come up with. I would not have expected that in the Bill, but I am not aware of any movement at this stage in that direction.

Q7 Lord Lester of Herne Hill: One of the ideas you put forward earlier was that one should try to have public interest immunity first as the normal procedure, with judicial balancing as explained by Lord Woolf in Wiley, and that the judge should then go on, having

decided whether that is an appropriate procedure, to consider CMP. The Bill seems in Clause 6(5) to give that task entirely to the Minister, who has to think about that balancing. Is it your evidence, in accordance with what you said before, that the judge rather than the Minister should do the initial PII balancing exercise before resorting to the CMP procedure?
David Anderson QC: Yes. I and many others said that the judge should have the last word. In fairness to the Government, under the procedure devised in the Bill the judge does have the last word. The only difficulty is that that word is dictated to the judge by the Secretary of State. First, the judge can make a decision only if the Secretary of State makes an application and has no other jurisdiction to consider it. Secondly, when the judge does come to consider it, it is not for him to weigh up the relative merits of PII or CMP, or to decide what the fairest way would be to decide the case. The judge's hands are effectively tied. If there is disclosable material that impacts on national security—as there obviously will be in any case in which an application is made—the judge is required to agree. The word "must" features in Clause 6. The judge "must" order a closed material procedure. It seems that the Government have given formal effect to the requirement that the judge should have the last word, but in substance the Secretary of State continues to pull the strings.

Q8 Mr Sharma: You have partly answered my question, but do you agree with the concerns expressed by special advocates about the extent to which the judge's hands are tied by Clause 6, which requires the judge to accede to the Secretary of State's application if the court considers that the proceedings will involve the disclosure of material that will be damaging to national security?
David Anderson QC: Yes, I think I agree with every word—and not only because they are generous enough to quote me in quite a few of their footnotes. The consequence in the way things will be done, if the clause becomes law, is that some cases will be tried by a closed material procedure that could have been fairly tried under PII. It may also be that some cases may be struck out that could more fairly have been tried by a closed material procedure. These would be cases where the Government, for whatever reason, chose not to apply for a closed material procedure. Of course, the judges have plenty of practice with terrorism legislation in smoothing the rough edges and making it operate as fairly as they can. But I would say that Clauses 6 and 7 are a pretty unpromising start for that exercise.

Q9 Baroness Lister of Burtersett: The special advocates in their note to us were very concerned about there being no definition of "national security". I wonder whether you have a view on that.
David Anderson QC: I am not immediately aware of any statute in which "national security" is defined. It may be one of those phrases for which one has to trust the good sense of judges to come up with a meaning. But I cannot pretend it is something that I have looked into in detail. If there is a well worn, well used definition that works in other contexts, I agree that it would make sense to apply it here.

Q10 Baroness Kennedy of The Shaws: I wanted to ask about the old human rights principle, equality of arms. Do you think that the Bill treats the parties to civil litigation on an equal basis, or is there a privileging of the Government?
David Anderson QC: No, it does not treat them on an equivalent basis. I almost wonder if there was an element of left hand and right hand here. I looked just before I came in at the Government's response to this Committee's report of last April. In that response the Government correctly cited the judgment of Lord Clarke in Al Rawi, which stated: "A closed

procedure might also be necessary in a case in which it is the non-state party which wishes to rely upon the material which would otherwise be subject to PII in order to defend itself in some way against the state". Similarly, Mr Justice Ouseley in the recent AHK case said: "I do not see that this procedure should only be available to the advantage of one party". So that seemed uncontroversial within the judiciary, and perhaps even within government. Yet under Clause 6 it is only the Secretary of State who may invite the court to embark on a closed material procedure. I am a little baffled by this. It is very much part of the Government's justification for the Green Paper and the Bill that a closed material procedure can achieve fairness for individuals whose claims would otherwise have been struck out. I do not understand where the incentive is for the Government to request a closed material procedure if they reckon that in the absence of such a procedure they might win a strike-out. As one sees from the judgment in AHK, it is not a fanciful possibility. Mr Justice Ouseley said in that case that if there is no closed material procedure, some of these cases will be struck out.

Q11 Lord Lester of Herne Hill: I wonder whether the Government might say that, if an individual wanted to apply for CMP and told the Government, they would have no alternative but to make the application on that person's behalf, even though it was against their interests in the litigation. Otherwise, they would clearly be judicially reviewed. I agreed with what you said, but that might be an answer that they would give.
David Anderson QC: It might be, and it might be very useful to have that answer in a form where it could be deployed in court. That goes back to what I was saying: judges have to be trusted. They have a very good record in this area of taking unclear or unpromising legislation and crafting out of it a procedure that seems to work fairly in practice. It might be done, perhaps in exactly the way that Lord Lester suggested. But if that is what one is aiming at, it is a strange place to begin.

Q12 Baroness Kennedy of The Shaws: Tom Hickman expressed concerns that Part 2 of the Bill does nothing to advance the fairness rationale, which of course was the justification in the Green Paper for the extension of these proceedings. I wonder whether you agree with him.
David Anderson QC: I am not sure whether I agree with every word: I would have to read his paper again. But I have read his blog, and very good it was, too. No—subject to ingenious interpretation of the sort suggested by Lord Lester, this plainly does not guarantee equality of arms or the equal treatment of the two parties to litigation.

Q13 Baroness Kennedy of The Shaws: On the equality of arms issue, there is a problem. I have done these cases. There is the difficulty that the special advocate is presented with a problem, for example of intercept material. I have done cases where the intercept material on the face of it seems incriminating. Then when you know facts about the material that are presented to you by your client, you discover that a very different interpretation can be placed on it that would not be available to a special advocate who did not have the opportunity of discussion with the defendant. I will give a good example. I represented somebody who was acquitted but who had been considered to be present during very incriminating conversations. It was only because of his contention that he was not in the room that we had the tapes listened to. You could hear the door opening and closing, which showed that he had left the room. That is the sort of thing that would not be possible to test—so from practical experience one's concerns about fairness are very alive.
David Anderson QC: I would agree. I never sought to describe special advocate procedures as perfectly fair. I think that few people who have participated in them would do so. For my last report on control orders—a sort of epitaph for control orders that was published in

March—I had found another example by chance in the law reports. It was of somebody who had not been present first time around, not because it was a closed material procedure but because he was not a party to the case. Evidence was given that this person was seen holding a gun in a photograph. The judge said that the photograph was from 2004. It was said to be compelling evidence of this person's involvement in terrorism. Subsequently the person was put on criminal trial. He had the opportunity to look at the photograph and explain that it had been taken in 2002, on a family holiday. The jury was directed that this had nothing whatever to do with terrorism and was indeed a holiday photograph taken two years earlier. That is another example of what you say, which is that without the ability to comment on every detail of all the evidence, you cannot guarantee a completely fair trial. That is what Lord Kerr said in Al Rawi. I would say that there is no perfectly fair solution to this conundrum. As long as you have a case in which national security evidence is central, there is no way of deploying it all in open court. You have an unpalatable choice. Either you have to do without parts of the case—to the extent that you can do that under PII—or you have to have everything in the case, including intercept evidence that would not normally be admissible in court, but withhold some of it from the person whose interests are directly affected. It is not a nice choice, but ultimately you have to try to make it work one way or the other.

Q14 Baroness Berridge: We are trying delicately to find a balance and what is least unjust. We might have cases that are untriable, which is not ideal, or we may have situations that end up behind closed doors. I want to take us out of each individual case and think about how this will be communicated to the public in the blogosphere or Twittersphere. People will appear with judgments in saturated material cases that say very little, as far as I can see. In other situations we may not have a trial at all. In that context, we have to communicate this and retain public confidence. Can you help me with that balance? How do we retain public confidence when we communicate these cases?
David Anderson QC: I agree that public confidence is terribly important. I certainly do not claim any expertise in that direction that the Committee does not have. I am no expert on how you sell legislation or ideas to people. In the context of the debate, one reads a lot about secrets being swept under the carpet. To my mind that submission has more resonance when one thinks about a case that is simply not examined at all because it is deemed untriable than one in which a judge will look at absolutely everything and, first, show as much as possible to the person affected, which is absolutely vital, and finally, come to a judgment—as much as possible of which, including any adverse conclusions that the judge might draw in relation to the security and intelligence services or anybody else, will be open.

Q15 Baroness Berridge: So you would balance the potential of a judgment in the situation that Baroness Kennedy outlined against no judgment at all—which is what a strike-out would be?
David Anderson QC: As you know, the way I have always approached the Bill—perhaps it is because I am a barrister, but I am certainly not the only one who takes this view—is that you have to trust the judges. We have terribly good judges. They are very good at balancing factors and deciding on the fairest way to decide a case. The way I have approached the Bill is that it is not to be resisted as a matter of principle. The closed material procedure is a weapon that could usefully be added to a judge's armoury, but it should be for the judge to decide on the fairest way to dispose of a case. Strike-out seems not at all fair. Public interest immunity is in a sense the ideal because at least everyone can come to court, and the person

concerned knows everything about the evidence that is deployed against them. But you could argue that that is not wholly fair, either, because the case that is argued ends up being slightly different from the case as it exists because there is a whole part of it that everyone has to pretend is not there because it cannot be disclosed. So it is a difficult exercise. I am not going to sit here and declare in advance that one of the three solutions is always going to be more just than the others, because I do not think that it is. I think the sensible thing is to let the judges make the decision, because they are very good at knowing what is fair and what is not.

Q16 Lord Lester of Herne Hill: Having taken the case of Binyam Mohamed to bits, in terms of public confidence what strikes me as bizarre is that after the American federal judge, in a very long judgment, had revealed in public the ill-treatment amounting to torture of Binyam Mohamed, it was still the position taken in our court that even a short version of evidence that had already been made public in the United States through a US court should not be made public. The second odd thing was that the evidence in that case was that the intelligence services on both sides of the Atlantic recognise that if a judge wishes to order disclosure in the interests of justice, it is well recognised by the intelligence service. When you visit the land of the free tomorrow and meet our allies, perhaps you could put that to them as part of your conversations. I cannot believe that the United States, which is a proud democracy, will take a different position from that taken in the case itself.
David Anderson QC: I certainly propose to make that point. Another point that I propose to make is 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. In relation to the issue that you raise, it was indeed extraordinary. One had paragraphs that were already in the public domain but about which it was none the less said on the highest authority from the United States that if released in the United Kingdom they would or could damage the intelligence relationship. There were witness statements. A minute was disclosed in which the Secretary of State, Hillary Clinton, said that it would damage that relationship. The CIA had expressed itself in similar terms. The Divisional Court said that it could not see any rational basis for that. I am not sure how that went down in the United States. Right or wrong, it seems that two or three years later, the problems persist. The Lord Chief Justice perhaps put his finger on it when he discussed it in the Court of Appeal. He stated in paragraph 53 that, "the issue is the control principle rather than the confidentiality of any information within the redacted paragraphs themselves". He said that by the end the case was not about protecting secret material—because it was not secret—but about ensuring that the control principle was upheld. What concerned the Americans more than the specific paragraphs in that case was the idea that an English court could say that something the Secretary of State had declared about the intelligence relationship was without rational basis, and proceed on the basis that they were going to disclose it anyway. In other words, it was the principle rather than the facts of the case that alarmed them.

Q17 Baroness O'Loan: Mr Anderson, in your comment on the Green Paper you said that it was preferable that the option of a CMP, for all its inadequacies, should exist. Given the fact that you have identified correctly the judicial integrity that has prevented any lapses of national security; given that you have also identified the fact that there is an impetus for government to choose not to put material into a closed material procedure where it would assist the claimant; and given that in some of these cases we may even be talking about the possibility of a death sentence, do you think that there is any way in which one could introduce some kind of Wiley balancing procedure into a closed material procedure?
David Anderson QC: Well, that is an interesting and difficult question. One area in which a sort of Wiley balance comes into a closed material procedure is when you look at whether

you can give a gist of what has been said to the individual in question. That is not exactly a public interest immunity exercise because you do not have to confront anything as extreme as showing a person the secret evidence against them that is being relied on. But you have to decide whether the interests of fairness require that they should at least know enough about the evidence to go and have a word with their special advocate, as Baroness Kennedy suggested, which might give an answer to the evidence that has been adduced against them. That is an issue that the Bill ducks. I must say I was one of those who encouraged the Government to duck the issue in legislation, partly because I did not relish what I thought they would probably say if they did start to legislate on the question of gisting. I am conscious as well that it is being litigated at the moment. The Court of Appeal and, I think, the Employment Appeal Tribunal in Tariq, said that there is an obligation to give people the gist in employment proceedings and presumably also in civil proceedings. Eight out of nine judges in the Supreme Court went the other way, and the case is now in Strasbourg. Goodness knows what they will say. It would not be unprecedented for them to follow the Court of Appeal rather than the Supreme Court. I suspect that that is something that the judges will have to work out—how far the Wiley balance is introduced through the device of gisting. It may be that Tariq is the case through which they can do it.

Q18 Baroness Lister of Burtersett: This follows on from what you were talking about, and you may in effect have answered it. In the past you emphasised the importance of gisting. As a matter of basic fairness, do you agree with those who argue that there should be a general obligation in a civil litigation CMP to disclose sufficient information to the excluded party to enable them to give effective instruction to their special advocate?

David Anderson QC: Since it is under litigation—not that probably anyone would pay attention to my views anyway—I will not express a direct answer to that. All I can say is that I can see the great attractions from a policy point of view of requiring gisting in all types of case. I know, through talking to open advocates, for example in SIAC, something of how it must feel when your client is confronted with a case about which they know almost nothing. That is the position in some of these SIAC cases.

The other thing that emboldens me is the whole saga of control orders, which I have looked at carefully in the exercise of my functions. As you know, the issue of whether a gist was required in a control order case went to the Supreme Court. It applied a judgment from Strasbourg in the case of A v United Kingdom. It was not a control order case but a Belmarsh case, but it said that the principles were the same and that in a control order case you had to give people enough information to allow them properly to instruct their special advocate. I should add that the Supreme Court—the House of Lords as it was in those days—did so with some reluctance, predicting in some quarters the demise of the control order regime. They said it might not be possible to keep it going. Well, in a sense their bluff was called because what happened after that was that two or three control orders had to be abandoned because the Government simply did not feel that they could give even a gist without jeopardising national security. It may be that other control orders were not made that could have been made. However, the control order system has survived.

If you can give the gist to these extremely dangerous people who are right at the top end of risk when it comes to terrorism, it is tempting at least from a policy perspective to say, "Well, why should we not give the gist to people who might be beginning a civil claim, or people who might have been sacked or refused promotion for security vetting reasons?" Of course, it is not up to the courts to decide policy. They are deciding whether Article 6 applies and looking at its requirements, and we will have to see what they say in Strasbourg.

On the thrust of your question, I could not agree more that the more information one can give the individual, the better it is from the point of view of the fairness of a closed material procedure.

Q19 Lord Faulks: Clause 13 provides for an absolute prohibition on the disclosure of material, on the Norwich Pharmacal jurisdiction. I think that probably you have already answered this question. Do you think that that is proportionate as a response to the undoubted problem that has been identified by the Government?
David Anderson QC: I agree that there is a problem, and it is very simply stated. If you share your most important secrets with an ally who uses them in ways that you are not happy with, it is likely that you will be more cautious about sharing information with them in future. You might say that that speaks in favour of an unconditional exclusion. Against that, as Lord Lester pointed out, my understanding from case law is that it has never been possible to give an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that it is necessary and in the interests of justice to do so. That was stated, in terms, by the Court of Appeal in paragraph 46. I know that there was evidence also before the Divisional Court from people who knew the scene in America and who were able to say, well, even British secrets are not guaranteed to be protected in America, where there is the possibility of an application under the federal Freedom of Information Act, from which foreign-sourced intelligence is not excluded.
So what I suggested when I first made submissions to the Committee was that a complete exclusion of all intelligence services material was disproportionate, and that in order to reassure our friends, principally in the United States, it might be possible to introduce a system of ministerial certificates whereby the Minister would certify that specific information could not be disclosed for reasons of national security or perhaps international relations, and that only on judicial review grounds could that certificate be set aside. I know that this Committee—perhaps, if I may say so, also motivated by the wish to reassure, because that word appears in your report—made an alternative suggestion very much along the same lines. It was that the Norwich Pharmacal law, as explained by the Court of Appeal in Binyam Mohamed, should be codified in a way that would satisfy everybody. It seems not to have satisfied everybody. I will ask people about this when I go to America. It is only when I have those answers that I will form my own view on what would be acceptable. Surely at least in one respect what is proposed is disproportionate, because it applies to all information within the possession of the intelligence agencies. Presumably that includes the bill from Tesco for their sandwiches, to which no security importance whatever attaches. It is very difficult to see how that could be proportionate, even if it does turn out to be necessary to have some sort of blanket exclusion, as suggested in the Bill.

Q20 Baroness Kennedy of The Shaws: I once did a case in which that kind of material was objected to on the basis that it would be possible to work out from the use of lavatory rolls how many people were in a particular operation.
David Anderson QC: It is because they are so ingenious that they look after us so well.

Q21 Lord Faulks: If an order is made that results in an obligation to disclose information, the Government do not have any choice, whereas they do have a choice under CMPs or the PII. They can say: we will settle the case. Do you think that that is a relevant factor in the approach to this legislation?
David Anderson QC: Yes, I entirely agree. In relation to closed material procedures, I hope that our intelligence partners and friends are reassured that whatever we decide about our internal procedures for dealing with these cases will not have the effect of forcing courts to disclose secrets that are protected under the control principle or anything of that kind. If I

may say so, this Committee rightly identified that under the closed material procedure the issue is fairness. The reason that I am very cautious about Norwich Pharmacal is that there is an issue. It is possible and conceivable that if a decision went the wrong way, secret information might be disclosed into a forum that it should not be disclosed into. That is why I have been quite cautious in what I have said about that.

Q22 Lord Lester of Herne Hill: It seems that Clause 13 goes further than the previous Government's position on the issue that we are talking about. If we are trying to make it a non-absolute affair, two possibilities occur. One would be at least to make sure that it did not cover all information but only information received in confidence from foreign intelligence services. Secondly, there must be an ability to balance the interests of national security against any competing public interest. Those are the suggested ways of doing it. What is your comment on them?
David Anderson QC: Well, if they could be achieved, I suggest that they should be. I think that this may have been debated. I suspect that there may be difficulties in distinguishing between intelligence derived from foreign sources and domestically derived intelligence, simply because in some respects intelligence gathering is so closely co-ordinated with that of other countries that it can be very difficult to disentangle the two. If you start looking at an intelligence product and asking whether it was derived in whole or in part from foreign-sourced intelligence, you will find that the answer is very often yes. It may even be that on the intelligence side of the debate there could be nervousness about having separate regimes for foreign-sourced intelligence and domestically sourced intelligence simply because by one's choice of regime one might signal to people who should not necessarily know whether we had the capability ourselves or whether we have had to rely on other people.

Q23 Lord Lester of Herne Hill: On the effect of Clause 13, Binyam Mohamed faced a capital charge. The then Foreign Secretary stated in his first public interest immunity certificate that if he were being tried by the military commission, he might well have come to a different conclusion, namely that the exculpatory intelligence material should be disclosed in order for him to have a fair trial. My reading of Clause 13 is that even in that situation—a capital charge in the United States—it would be impossible for a judge to order disclosure. That is why it seems to be regressive compared with the previous Government. Do you agree?
David Anderson QC: I think that that is undoubtedly right—and not just in relation to the judgment in Binyam Mohamed. The American authorities were involved at a very high level right through the period when the case was being decided. They were always being called on to say this, that or the other, and it sensitised them to the issue. I would have hoped that the judgment of the Court of Appeal, and in particular the judgment of the Lord Chief Justice in early 2010, which set out very clearly just how seriously we take the control principle, just how rarely it would be set aside and just how inconceivable it is that any of our judges would ever disclose anything of real operational secrecy, would have been sufficient to provide the reassurance that the Committee was seeking. If that is not the case, I want to know why not, and what would be acceptable, falling short of the blanket ban that we currently have in Clause 13.

Q24 Baroness Berridge: My question relates back to closed material procedures. I know that inquests are no longer part of this, but there were a number of inquests that involved very sensitive information. I refer not just to 7/7 but to a weapons inspector, Terry

Jupp, who tragically killed himself while developing weapons. Why is the Government's position that CMPs are needed in civil proceedings if it has been accepted that PII can do the job in those circumstances in inquests?
David Anderson QC: I suspect that we may be getting into politics here, which all of you are more expert at than I am.

Q25 Baroness Berridge: In terms of things to fear, is there anything in those situations that would distinguish them? I have spoken to people who were involved in those inquests. Very sensitive information was dealt with, and Lady Justice Hallett apparently did a brilliant job in 7/7 of achieving something that people did not think was achievable. In terms of principle, can you distinguish the two situations and say why we need CMPs in civil proceedings but not in inquests?
David Anderson QC: Well, I cannot give you an answer to that. It may be that in an inquest one is not examining with quite the same rigour whether a given legal standard has been met—whether it is the standard required to constrain someone under a TPIM or to say that somebody has committed a tort and somebody else has suffered loss as a result—and so there may be a little more leeway for managing without material that in a civil or TPIM-type case it might be necessary to deploy. I am quite sure that when the Green Paper was proposed, it was felt that it would be desirable to have closed material procedures in inquests. The fact that that ambition has been disclaimed is perhaps something that some would welcome. However, it is a little difficult to turn it round and say that that proves that we do not need it for anything else, either. Like you, I have hearsay to go on. I spoke to people involved in the 7/7 inquest. My impression was that barristers and judges are resourceful people. There is a lot of good will on both sides; one was not dealing with people who had great agendas or great campaigns to promote. Expedients were found and everybody just about muddled through to produce, as you say, an excellent job. It was thought that this would not necessarily always be the case, but for the time being there is a willingness to go ahead on the current basis.

Q26 Chair: Thank you very much for your evidence this afternoon; you have been most helpful. Everyone has been very disciplined and we have kept to time. If there are any additional questions we wish to ask you, may we send them in the form of a letter?
David Anderson QC: Of course.
Chair: Thank you very much.

Martin Chamberlain, Angus McCullough QC and Ben Jaffey

Oral Evidence, 26 2012, Q 27–66

EVIDENCE SESSION NO. 2. HEARD IN PUBLIC

Members Present

Dr Hywel Francis (Chair)
Mike Crockart
Baroness Kennedy of the Shaws
Lord Lester of Herne Hill
Baroness Lister of Burtersett
Baroness O'Loan
Dominic Raab
Virendra Sharma
Richard Shepherd

Examination of Witnesses

Martin Chamberlain and **Angus McCullough QC** Special Advocates, and **Ben Jaffey**, Barrister, Blackstone Chambers

Q27 The Chairman: Good afternoon and welcome to this second evidence session by the Joint Committee on Human Rights on the Justice and Security Bill. For the record, could you all introduce yourselves, please?
Angus McCullough: I am Angus McCullough. I am a barrister at One Crown Office Row and a Special Advocate.
Ben Jaffey: I am Ben Jaffey. I am a barrister at Blackstone Chambers and, in national security cases at least, I predominantly represent individuals and claimants.
Martin Chamberlain: I am Martin Chamberlain. I am a barrister at Brick Court Chambers and a Special Advocate.

Q28 The Chairman: Thank you very much for that. Before we ask you some detailed questions about specific aspects of the Bill, can you tell us in broad terms what there is in the Bill that you particularly welcome and, on the other hand, what there is in the Bill that you are particularly concerned about?
Angus McCullough: I will have a go at that first. I think there are two features that are to be welcomed, the first being the restriction of its scope to national security cases, narrowing it from, as was originally proposed in the Green Paper, applying to sensitive evidence generally; and the second is the omission of inquests from the scope of the Bill.
I think both of those come with a rider that I would wish to add: firstly, there is the possibility that national security could be very broadly defined, unless some reassurance as to its scope were given. On one view at least, anything, or almost anything, involving international relations might be argued, and one could envisage being argued by the Government, as to have an impact on national security.

The second rider is in relation to the omission of inquests and is really to pose a rhetorical question: if it is no longer considered necessary to provide for Closed Material Procedures in inquests, which can involve evidence at least as sensitive as that which may be involved in civil claims for damages, I would question why it is still considered necessary to extend such procedures to damages claims. I noted that Baroness Berridge put a question very much along those lines to David Anderson QC, the Independent Reviewer, when he was giving evidence to you, and that his best attempt at an answer was that it may be political considerations. Of course, it is not for him, but rather for the Government, to explain the rationale, but I have not heard any principled justification for drawing the distinction which the Government clearly has seen fit to draw.

Ben Jaffey: I share what Angus has had to say about what has improved since the Green Paper, and I also agree with his comment about inquests. There have been a couple of very high-profile inquests in the last couple of years involving the security intelligence services that have successfully been dealt with under a traditional Public Interest Immunity procedure, so I think that is a workable approach.

My concerns about the Bill: I think I will just mention one thing, which relates to Closed Material Procedures, which is that, as someone who predominantly represents claimants in these procedures, I would encourage anyone who finds the idea of a Closed Material Procedure more attractive than the alternatives to come and watch one from the perspective of an individual before deciding that it is a better way of approaching things than traditional Public Interest Immunity. I have accompanied quite a lot of people who have sat behind me in court and they have undergone this process of slight realisation over the course of a day or so. Sometimes it happens very quickly.

The realisation happens when an individual asks the judge or asks the counsel for the Secretary of State exactly what they are meant to have done wrong, and the judge says, "I am very sorry but I can't tell you that," and then receives the judgment and asks me, "I don't understand why I've lost," and I am afraid I have to say, "Well, I don't either." Sometimes that process of realisation is quite quick but sometimes it happens much more slowly, and the realisation happens as the person who is watching one of these cases realises, "I'm in a court. There are barristers with wigs on, there are judges, there are formal legal procedures, but there is actually something missing," and what is missing is the testing of evidence on both sides, which is the basis of our adversarial system. It has many flaws but, in practice, it has tended to work quite well. That is why I have concerns about extending Closed Material Procedures to civil trials.

Martin Chamberlain: I would agree with both Angus and Ben in their comments. The one respect in which I think the Bill is problematic, even if, contrary to the view that we have expressed, you think it is a good idea to have Closed Material Procedures in civil litigation, is that the safeguards that it had been reported were present in this Bill are, on close analysis, in fact not present. The key safeguard is the ability of the judge to decide whether a Closed Material Procedure is needed. The way it was put by the Lord Chancellor in his foreword to the response to consultation representations was that the Bill will ensure that the decision to trigger a Closed Material Procedure "can only be taken where evidence a [CMP] is needed on national security grounds is found to be persuasive by a judge". But when one actually looks at the Bill, in fact the position is that the judge is required to accede to the Secretary of State's application for a Closed Material Procedure—the word "must" is used—if there is any evidence at all whose disclosure would be contrary to the interests of national security. So, there is no ability for a judge to say, "I think this is the type of case that could perfectly fairly be tried using normal Public Interest Immunity rules," and so, even if you think that there are some cases—perhaps a small minority—that cannot be fairly tried using established PII rules, this Bill does not enable the judge to identify that small category of cases and decide whether the one in front of him or her is in that category.

The Chairman: The next question is for the Special Advocates.

Q29 Baroness O'Loan: In the supplementary note commenting on the Independent Reviewer's supplementary memorandum to us on the Green Paper, you suggested that, had the Independent Reviewer had the benefit of the views of experienced Special Advocates, he might have reached a different view of whether a CMP was necessary in the three civil claims to which he referred. I wonder if you or any of the Special Advocates would be prepared to view the material that was shown to the Independent Reviewer, to see if you agree with his view that a CMP is necessary in those cases.
Angus McCullough: For my part, I would certainly be prepared to do it if asked to do so. The invitation, obviously, would have to come from the Government. Certainly, I have not been asked—and, as far as I am aware, no other Special Advocate has been asked—to perform that function.
Martin Chamberlain: So would I, in principle, although I think it would be important to select a Special Advocate who had experience in the type of case involved. But subject to that, I personally—and I am sure a number of our colleagues—would have no difficulty if called upon to do so.

Q30 Baroness O'Loan: Can you think of any other way of addressing the anxieties felt by this Committee and others about whether the Government really have shown that there exist actual cases that can only be determined by a CMP?
Angus McCullough: I think we, as we have indicated in our memorandum to the Committee, remain unconvinced that such a practical need has been shown. We can imagine the need in theory but, as far as we are aware, on the material that we have seen and have experience of, it is not apparent to us that cases exist where Public Interest Immunity, allied with the flexible approach and ancillary mechanisms that exist, which I gave evidence about in my last appearance before this Committee, have, in practice, proved unworkable.
I think I would point to two features in support of that view: the first really echoes the conclusions of this Committee in your report on the Green Paper, which is that a prime example put forward by the Government—that of the *Al Rawi* litigation, which, it is claimed, it was unable fairly to defend because of the absence of a closed procedure—simply does not bear the weight that the Government seek to put on it, firstly because the Government chose to settle the case before it was apparent whether or not they were going to be able to use a Closed Material Procedure, before the case had even been heard by the Supreme Court; and secondly, because, if it really could not have been fairly tried without a closed procedure, one could ask why it was that the Government did not seek to strike it out, because that would have been logical and, from the Government's point of view, sensible—in that it would have saved a very large sum of money—to do, if it really could not have been tried fairly using existing procedures and mechanisms. So, I would point to the past in that respect. No other case that has been determined in the national security field is said by the Government to have been impossible to have tried fairly.
As far as the future is concerned, I at least am in some confusion as to the size of the problem that the Government says exists. I think it is important to put on one side the category of cases in the immigration context—the naturalisation and exclusion cases—which this Committee has recognised and recommended should fall within the province of SIAC. One can see the logic of that: if SIAC exists to deal with such cases in the immigration context, then these naturalisation and citizenship cases would sensibly seem to fall within the same category.

Having put those on one side, what is left by way of civil damages claims? The Government initially seemed reluctant to identify any numbers at the time the Green Paper was published. Then a selection of three were shown to the Independent Reviewer on 14 March—a selection of three that had been, presumably, handpicked by the Government to prove their point and appeared to have done the trick as far as the Independent Reviewer, at least, was concerned, having heard only one side of the story. But since then, the Government's response to the Green Paper identifies six civil claims for damages—that response was, I think, published on 29 May—and I was, therefore, surprised to read the transcript of the debate in the House of Lords on the second reading, I think exactly three weeks later, when Lord Wallace was asserting that there were 15 such cases. So, there does seem to be some confusion on the part of the Government as to what the scope of the problem is, and it is very hard, from our perspective, to get any real idea as to that, and I think it is an issue with which this Committee struggled at the time that you were producing your last report.
The Chairman: Lord Lester, a supplementary.

Q31 Lord Lester of Herne Hill: Thank you. This is really for Ben Jaffey, since you were in *Binyam Mohamed* itself: am I right in understanding that the issue of Public Interest Immunity was never addressed because, although the court, having issued the *Norwich Pharmacal* order, reserved the PII consideration, that issue became irrelevant once he had been released from Guantánamo and brought to the UK, so the court never had the opportunity of using PII—is that right?
Ben Jaffey: Almost. What happened was that the Divisional Court decided that the *Norwich Pharmacal* claim should succeed, but reserved the issue of Public Interest Immunity to a later hearing. There was then a complicated to-ing and fro-ing, where some of the material in issue was then provided to Binyam Mohamed's security-cleared American lawyers. The claim was not for disclosure to the whole world; Binyam Mohamed only sought very narrow disclosure. He did not wish to cause any harm to either UK or US national security, so the application was only for disclosure to those security-cleared US lawyers, who would keep it within the circle of secrecy. They were provided with partial extracts from some of those documents. There were various complaints that were made on both sides of the Atlantic about that. They were then provided with the full documents and, shortly after that, Binyam Mohamed was released. The rest of the litigation that took place was all about the famous six or seven subparagraphs of the Divisional Court's judgment, and that was what went up to the Court of Appeal.

Q32 Lord Lester of Herne Hill: Those six or seven paragraphs were a summary of what had already been released in the District Court of Columbia.
Ben Jaffey: That is correct.
The Chairman: Mr Sharma, a question to the Special Advocates again.

Q33 Mr Sharma: Thank you. The Independent Reviewer suggested in his evidence that you are advocates retained by the solicitors for the people who are subject to control orders, TPIMs, damages actions or whatever in order to promote their case, and that you have already taken a position on some of these issues. Would you like to comment on this?
Angus McCullough: I think I would take issue with the term "retained". I do not think that is technically accurate. We are not retained by anyone. What we are is appointed by the Law Officers to perform a function. That function is expressly to act in the interests of the person who is being deprived of material that is sought to be relied upon against him—and it usually is a him. So, to that extent, certainly we are advocates and we are arguing in the interests of the person in respect of whom we are appointed. We are not retained advocates, and that is quite an important distinction.

We have, of course, given views, from our perspective of the conduct of closed proceedings, as to the proposals put forward in the Green Paper and, indeed, now in the Bill. So, to that extent, yes, we have taken a position, but it is a position that, speaking for myself and, I am confident, for others amongst the Special Advocates as well, would be reviewed if further information or matters that we had not previously considered came to light. So, I think it is a not unfair comment made by the Independent Reviewer, subject to the technical correction that we are not retained.

The Chairman: Mr Raab, a question to Mr Chamberlain.

Q34 Mr Raab: Mr Chamberlain, can I take you to the drone case to which the Independent Reviewer referred in his evidence to us? Did the Government argue that a CMP was the only possible way of determining the issues in the case fairly?

Martin Chamberlain: I need to be a little bit careful about what I say about that, because that case is ongoing and I am instructed as an advocate in that case, and there is a hearing scheduled before the Divisional Court in October over two days to determine the question of permission in that case. But I think it is a matter of public record that the Government has not, to date, made that argument.

Q35 Mr Raab: Thank you. Do you agree with the position taken by the Independent Reviewer that the judgment in that case is likely to be the best evidence of whether or not there is a problem in claims for civil damages?

Martin Chamberlain: There are a number of issues in that case and, until the judgment comes out, I do not think one can know what issues exactly it will cover, but I think I would inject a note of caution and say that is a complicated case on many fronts. I do not think the Committee or Parliament should take a view that you wait for the judgment in particular cases to see whether the case has been made out for closed procedures; what you look at is the evidence that you have in front of you about the way that cases that have concluded have been decided, and you look at the evidence about cases that are ongoing. Our view, as expressed in our memorandum to this Committee at the Green Paper stage, is that we were not convinced that there were cases that could be pointed to that could not be tried without a Closed Material Procedure. We simply have not seen the evidence of those cases. As to whether some may emerge in the future, in future cases, I simply do not know.

The Chairman: Lord Faulks, a question for Mr Jaffey, I think.

Q36 Lord Faulks: Yes. We have heard what your colleagues have said, but are you aware of any civil claim to date in which the application of PII has resulted in it being impossible for a court to determine the issue in a way that is fair to both parties?

Ben Jaffey: The only case I know of where that has happened is *Carnduff v Rock*, which I am sure the Committee know about. I think it is at least doubtful whether that case was rightly decided.

Q37 Lord Faulks: Mr Chairman, can I ask a supplementary question? Can you conceive of the possibility of there being such a case?

Ben Jaffey: A case that could not be fairly decided under a Public Interest Immunity procedure? It is possible to come up with a factual scenario where that could happen, although I have yet to see one, because the important thing about Public Interest Immunity in particular is it is not an all-or-nothing process; it is a process where the court can act very creatively to find solutions to the national security problems that present themselves. When

the courts have to do so, they do so quite well, by various sets of procedures that they have put in place; for example, gisting documents, redacting documents, providing a summary, insisting on confidentiality to a small group of people and so on. So the problems that have arisen in practice have also been resolved in practice, in my experience.
The Chairman: Mr Sharma, again, for Mr Jaffey.

Q38 Mr Sharma: Although you briefly touched my question, still I put it to you: why do you think the Government has not made a *Carnduff v Rock* application to strike out the claims in those cases in which it says national security material is so central to the claims that it cannot defend itself without damaging disclosure of that material?
Ben Jaffey: It is very difficult for me to say because, obviously, I do not know any of the secret material and I have never seen any, because of the side on which I do the cases. But the suspicion has to be that the applications have not been made because, ultimately, either the Government does not think that *Carnduff v Rock* would survive a challenge in the Supreme Court, or the Government does not think the court would actually strike out a claim and the court would find a way to try it using some of the Public Interest Immunity redaction and gisting procedures in order to solve the problem without taking the extreme step of a strike-out. Some of the cases where that might happen, for example, are the Guantánamo civil claims, which the Government chose to settle rather than to make a *Carnduff v Rock* application.
What happened in those cases is that the Government had lost in the Court of Appeal as to whether or not a Closed Material Procedure was, in principle, available. The Government then appealed that point to the Supreme Court, but, before it got to the Supreme Court, the Government settled all the cases. It had not even been finally decided whether a Closed Material Procedure was available, let alone a PII process having been carried out. Those cases are not an example of a PII process having been tried and failed; they are an example of where the Government decided they were not even prepared to undergo that PII process in the first place. I mention that because it is an often-repeated canard about the Guantánamo civil claims: that those were cases that the courts found could not be tried, and the courts were never asked to consider that issue.

Q39 Mike Crockart: I would like to return, if I may, to a subject referred to by Mr Chamberlain in his opening remarks, looking particularly at whether a CMP is necessary in particular cases. In your written evidence, you say that the Bill does not really provide for a judge to decide whether a CMP is needed, but Clause 6 of the Bill does clearly say that it is for the court to decide whether to permit a Closed Material Procedure to take place. Perhaps I could get you to just flesh out a little bit and explain, by reference to the Bill, why you say it is not really a decision for the judge.
Martin Chamberlain: You are right to say that Clause 6 provides that the Secretary of State can make the application, and it is the judge who decides whether there will be a Closed Material Procedure or not, but the key clause in the Bill is Clause 6(2), which says that the court must, on an application under Subsection 1, make such a declaration—and that is that the proceedings will be dealt with subject to a CMP—if it considers that a party to the proceedings would be required to disclose material and such a disclosure would be damaging to the interests of national security.
If you imagine, for the moment, that there is a spectrum of cases, the majority of those cases can be perfectly fairly tried using PII. Assume against us for the moment that there is a small minority—whether it is three, six, 15 or whatever; it is a small minority—that cannot be fairly tried using PII and, therefore, on the Government's argument, again assuming that argument is correct, a Closed Material Procedure is needed for that category of cases. What I—and, I think, David Anderson and a number of others—had expected when we heard that

it was to be a judge who would decide whether to trigger a Closed Material Procedure is that the judge would be empowered to say whether the case in front of him or her was one that fell into that 90% that can be perfectly fairly tried using existing procedures or that 10% or 5% or 1% or whatever it is that cannot. But the Bill does not provide for that; the Bill says that, if there is any document at all whose disclosure would be damaging to national security, the judge must accede to the application to order a Closed Material Procedure. He or she has no choice. That is why we have said that the Bill does not really give the judge the power to decide the key question.

Q40 Mike Crockart: If I may, your worry is that there could be a case where gisting, for example, could be used in order to allow the information to be used, but that the Government would apply, in that instance, for a Closed Material Procedure to happen and the judge would have to accede to that request.

Martin Chamberlain: I think gisting is perhaps a slightly different issue. In our response to the Green Paper, we made the point that there are a number of different mechanisms that you can use to ensure that a case can be fairly tried without disclosing sensitive material, and the courts have been doing that for a very long time. They have been devising mechanisms by which cases can be tried fairly, without using Closed Material Procedures but also without disclosing sensitive material. I think I had understood the position to be that even the Government accepts that most cases are in that category.

There may or may not be a small category of cases that cannot be fairly tried using existing procedures. If you assume against us that there is such a category, the question is who decides whether this case falls into that category. We had rather hoped it would be the judge, but this Bill makes absolutely clear it will not be the judge; it will be the Secretary of State.

Angus McCullough: Could I follow up on that? It is an important point, and I strongly echo and endorse all that Martin has said, because it is a major concern of the Special Advocates that the judge does not have this role to determine the best way, in any particular case, for that case to be tried. The role of the judge is liable to be misunderstood, and I say that because the Government itself appears to have misunderstood or misrepresented the role of the judge as provided for in Clause 6. We have quoted from the Lord Chancellor's own introduction to the response to this Committee's previous report, which we suggest misrepresents the role of the judge. The same point could be made in relation to a document headed "Mythbuster", and in "Mythbuster" it said "the courts will have the power to decide what type of hearing is needed" for different types of cases. If the Bill really did that, the concerns that we have expressed, that the Independent Reviewer has expressed and many others expressed in the debate in your Lordships' House, already at the second reading, would, to that degree, be allayed. But it is an important point that there is, in reality, no discretion provided for the role of the judge in relation to determining what the fairest way of determining any particular case is.

The Chairman: Lord Lester, do you wish to ask a supplementary?

Q41 Lord Lester of Herne Hill: It is such an important point that I hope I may just follow it up with another question. Is what you are saying really this, in another way: in *Conway v Rimmer*, our final court decided that there should always be a weighing of the interests of justice and the interests of national security, done by the courts and not by the Executive, so that, ever since *Conway v Rimmer*, it has been decided it is a judicial task to do that balancing and decide on appropriate procedure. I think what you are saying is that the

Bill is illusory in making it look as though that is a judicial decision, which it is not, and that, since this involves procedure and deciding what is the appropriate course, it should be for the judge to decide and not the Minister. Is that right?
Martin Chamberlain: That is right.
Angus McCullough: It is exactly right, with the added feature that I know David Anderson has already expressed concern about and we have in our memorandum: that it is a mechanism that is in the hands of one party only.
Lord Lester of Herne Hill: We will come to that.

Q42 Lord Faulks: At second reading, the former Lord Chancellor, Lord Mackay, in coming down in favour of CMPs in the small percentage of cases where it may be necessary, found considerable comfort by the provisions of Clause 7 of the Bill. I wonder if any of you found that persuasive.
Ben Jaffey: It is a safeguard, but, at least in my view, it is not a very sufficient safeguard. The particular type of case in which it will not be a sufficient safeguard is where the judge, seeing the closed evidence, and even with the assistance of Special Advocates, does not realise that the secret evidence is not entirely what it seems, because it does not solve the problem that has been identified—that evidence that is insulated from challenge may end up misleading the court.
Let me just give you perhaps a silly practical example: you have a photograph of a person firing a rifle in undergrowth, and it is found by the security services on their computer following a covert search. That will, on the status of the current Bill, go into a Closed Material Procedure. The security services will not want it disclosed that they have the capability to do such a search, or that such a search has taken place in that particular case. It does not look great if the allegation, for example, was that that person had attended a terrorist training camp. The photo does not look great, so what is to be done about it? The Special Advocates will not be able to do anything about it. They will look at the photo and decide it potentially looks quite bad, and they will not be able to make any submissions on it, because they do not have any instructions. If I were able to show that photograph to my client, he might tell me, for example, that he was on holiday at the time and that he had been hunting. If he was able to give that kind of explanation, that kind of explanation may well dispose of the point.
Of course, it is a silly example, but one of the things it took me, certainly, a while to learn in practice is that cases that look open and shut on the papers often become rather different once you have taken instructions from your client, and the cases that you think you are easily going to win are the ones that fall apart once the actual evidence is tested in the witness box. That is what Clause 7(3) does not deal with, and that is my primary concern about the use of Closed Material Procedures. So it is a safeguard but it is not a sufficient one.
Martin Chamberlain: I think there may be another point about Clause 7. Clause 7 requires the Government to give a summary of the closed case, but—and this is the key point—subject to an overriding requirement to ensure that the summary does not contain material whose disclosure would be damaging to the interests of national security. So there is nothing in Clause 7 to require the Government to give a summary or gist. If the material is all too sensitive to be disclosed, the affected person will not get any summary at all, and the provisions of Clause 7(3) in those circumstances will not apply. The reason for that is because Clause 7(3), which is the power to require one party not to rely on particular points or to make concessions in the case, only applies where the court has refused to allow the Government to withhold the closed material, but in a case where disclosure of even the summary would be contrary to the interests of national security, the court will not be able

to require the Government to disclose that material, so the provisions of Clause 7(3) will not apply.
There are cases that have been heard, in SIAC, for example, where there is not any Article 6 gisting requirement and where the individuals concerned have been told nothing of any substance about the reasons why they have lost their case. Ben mentioned earlier how it feels to be an appellant in such a case. There really are cases like that, where the individuals have been told nothing of any substance about the reasons why they have lost, and nothing in Clause 7 will stop that from occurring in some cases.

Q43 Lord Faulks: Would you not expect, though, the judges—and perhaps your experience would help on this—to be particularly anxious to ensure that, so far as possible—even if they were restricted by what the Secretary of State had said was in the interests of national security—necessary information was provided to the litigant to enable him or her to comment on the evidence?
Martin Chamberlain: I would expect judges to do whatever they can within the statute to do that, but the problem is that you are going to be giving them a statutory straitjacket that requires them to ensure that nothing is disclosed contrary to the interests of national security. That formula has been very clearly interpreted in previous cases: there is to be no balance between national security on the one hand and fairness on the other. The moment the judge takes the view that disclosure of a particular piece of information would be contrary to the interests of national security, he or she is required by the statute to ensure that material is not disclosed, however unfair that may be. Judges do go out of their way to ensure that proceedings are fair, and they do it very conscientiously, but what they also do is they listen to what they are being told by Parliament, and what they are being told here, if this Bill is enacted, is, "You must never disclose material contrary to the interests of national security, however unfair that may be."

Q44 Mike Crockart: I have a question mainly for Mr Jaffey about what this means for PII. Could I ask you to explain, in a way that is as accessible as possible for non-lawyers like me, why some critics of the Bill say that its provisions mean the end of PII as we know it in any civil cases in which national security material is relevant?
Ben Jaffey: It is because the Government will have the option of going for a Closed Material Procedure. They will not have to go through the often difficult and time-consuming process of going in front of the judge, persuading a judge of their national security case, and agreeing with the judge, sometimes with the assistance of Special Advocates, how to gist the material to ensure that the individual has a fair trial. That is a process that, often, the Government would rather not go through, because it may mean, for example, that a limited summary of the national security material may have to be given. It will be phrased in a way to protect national security, but they would much rather not have to do it at all. So now there will be the option, if this Bill is passed and if the Government can show there is any risk to national security, as Martin has said, no matter how slight, to adopt a Closed Material Procedure instead. The provisions in the Bill, as currently drafted, only require the Government to consider whether to apply for Public Interest Immunity instead; it does not require them to do Public Interest Immunity first. I hope that makes sense to a non-lawyer.

Q45 Mike Crockart: So it basically gives them a simple and easy nuclear option.
Ben Jaffey: Yes, and it is an option that will prove irresistible in many cases. If that option were available, for example, in inquests, which we are told it is not going to be, it is an

option that, undoubtedly, would have been taken in 7/7 and in other recent inquests, and there was litigation about whether the courts had power to grant a Closed Material Procedure, because the Government wanted it, in inquests, and the courts said no and that is not going to be changed. The temptation to do it will be overwhelming.

Angus McCullough: I will try to illustrate the concern by reference to a practical example that happens or has happened on occasion within existing closed procedures where there has been inadvertent disclosure of sensitive material by Government to the open representatives—so, material that, if the Closed Material Procedure had been operating properly, would never have come to their attention. What then follows is a flexible and pragmatic approach to deal with the material so that it does not cause any harm to national security by resorting to precisely the traditional methods that the common law has used hitherto—in other words, requiring legal representatives to give undertakings as to the use of that material, requiring them to give undertakings as to how it should be kept, and undertakings as to not copying it and returning it and, indeed, on occasion, not disclosing it to their clients.

With all those, as far as I am aware, these inadvertent disclosures within the context of existing Closed Material Procedures have not been suggested to have caused any harm to national security, even though the procedures themselves have been breached, and that perhaps illustrates why it is that we say that these proposals go much too far and will lead to cases that could be more fairly tried under existing procedures being cast into the unsatisfactory category or repository of being tried under a Closed Material Procedure.

The Chairman: Baroness Lister, you wished to ask a supplementary.

Q46 Baroness Lister of Burtersett: Yes, thank you. Mr McCullough, in your answer to the opening question, you raised the point that you made in your memorandum about your concern about there being no definition of national security. As you will have seen, I put that to the Independent Reviewer last week and I would just remind you of what he said. He said, "I am not immediately aware of any statute in which national security is defined. It may be one of those phrases for which one has to trust the good sense of judges to come up with a meaning. If there is a well-worn, well-used definition that works in other contexts, I agree it would make sense to apply it here." Do you have a definition in mind that is this "well-worn, well-used" definition? What definition would you suggest should be in the Bill?

Angus McCullough: I confess that I do not, off the top of my head, have such a definition, but I think the concern would be met by distinguishing between international relations on the one hand as being the concern for the sensitivity and national security on the other. Obviously, there is scope for the two to overlap, but one is not a subset of the other, and that is the concern that I would have if there is leeway to adopt a very broad definition of national security: something to separate out general international relations cases as being distinct from national security cases.

Q47 Mr Raab: This is not aimed at anyone in particular, but you have, in general, talked about the judicial inadequacies in the Bill in terms of the process for deciding whether to move to a CMP. How do you think it might be amended to make sure that the decision as to the strict necessity of the CMP is really one taken roundly and squarely by a judge?

Martin Chamberlain: What we have suggested in our note is two points: firstly, that both parties—not just the Government—should have the ability to apply for a CMP. That is of particular importance given that part of the rationale for CMPs is that, without them, claimants may not be able to get a fair trial, and yet, when the Bill appeared, it could be seen that, in fact, claimants would not have the right to apply—only the Government. So, that is the first point.

The second point is that an amendment could be made to Clause 6 to say that a judge should be entitled to order a CMP only when he or she concludes that the case cannot be fairly tried using existing procedures. One could debate how exactly you would draft such an amendment, but I do not think it would be beyond the wit of man to draft an amendment that says that the trigger for CMP to be used is that the judge decides that the case cannot be fairly tried without one.

Q48 Mr Raab: I do not know whether you are aware of the proposal made by Lord Macdonald at second reading on this issue, a sort of exhaustive five-step process, and I wonder whether you would comment on that and whether that would be adequate.
Martin Chamberlain: Some of my colleagues may be able to comment on it. I am afraid I have not studied the five-step process in sufficient detail to want to venture a comment on it.
Angus McCullough: I have looked at the transcript, and that is a mechanism that would meet the concern. I think the Independent Reviewer at least would say it is not necessary to go through all of those formal steps; you could rely upon the judge to take a broad view of the case and the evidence in the case in determining whether or not a Closed Material Procedure was strictly required. That is an alternative, but, either way, the important point is that the judge should be deciding the fairest way to determine the proceedings and whether a closed procedure is strictly necessary.
Ben Jaffey: The other point I would add is it may well be possible that, if there are such cases where some of the case has to be dealt with under a Closed Material Procedure, it should only be that part of that case; it is not necessarily the whole case. So there might be a particular area of sensitivity that ought to be dealt with by a Closed Material Procedure, but all of the rest of the case, which might touch on national security very gently and would ordinarily be able to be dealt with perfectly well by a Public Interest Immunity gist or summary or redaction, ought to be dealt with that way, rather than shunting the entirety of the national security case into closed proceedings.

Q49 Lord Lester of Herne Hill: Given that the issues of judicial control and equality of arms are, as it were, linked, may I ask a double question about that? First of all, do you think that the principle of equality of arms is satisfied when only the Secretary of State may apply under Clause 6(1), rather than the applicant, whose interests may also be served by a Closed Material Procedure? That is the first part of my question, and the second is: what about the fact that Clause 6(5) seeks to require the Minister but not the judge to consider whether a claim for Public Interest Immunity would be an appropriate one?
Martin Chamberlain: I apologise for anticipating the question in my last answer, but I think it follows from what I have just said that I, at any rate, think that, if a power to hold Closed Material Procedures is to be introduced and the Government is to have the ability to apply for that procedure to be used in a particular case, the other side should have the ability to apply as well; otherwise, one has the prospect that the Government might choose, in a particular case, not to apply for a Closed Material Procedure because it thinks its own interests might be better served by, for example, applying to strike the case out under *Carnduff v Rock*. It would be more consistent with the rationale advanced by the Government for introducing Closed Material Procedures in the first place if both sides were equally able to apply to hold one.

Q50 Lord Lester of Herne Hill: And clause 6(5), where only the Minister has to consider it and not the court?
Martin Chamberlain: Yes, I think that is really bound up with our main objection, which is that the judge is not getting to decide whether this is a case that can be fairly tried using PII or whether it is a case that really has to be tried using a Closed Material Procedure. If the Government's answer to it is, "Don't worry, because the Secretary of State will be required by Clause 6(5) to consider making an application," I think we would say that obligation does not go far enough, because you could comply with it by considering it and then deciding not to, and there is nothing in this Bill that would then enable the judge to actually scrutinise that consideration and decide whether he or she would have taken the same decision.

Q51 Baroness Lister of Burtersett: Could you explain the significance of the requirement in Clause 7(e) of the Bill that the court must ensure that any summary given to the excluded party does not contain material whose disclosure would be contrary to national security? We have touched on this.
Angus McCullough: It is a core provision in the Bill. It reflects what already exists in other statutory procedures in which closed procedures are provided, but it is a one-way switch, as it were; there is no balance involved. If disclosure would cause harm, however small—however important that bit of evidence is to the fairness of the proceedings being determined and for the person who would otherwise not be aware of it to know it so that he could answer it—it falls out of account, with the Special Advocates left to do the best that we can with it. The best that we can, as we have previously given evidence to this Committee, is very limited indeed, particularly given the nature of intelligence material, which, very often, requires inferences to be drawn from circumstances that may have a sinister explanation—and that is the one that the Security Service or the Government seek to adopt and contend for—but equally may have an entirely plausible, innocent explanation. We, as the Special Advocates, are in great difficulties in displacing the sinister explanation if we cannot take instructions from the person who is in a position to provide the innocent explanation. So that is a fundamental difficulty that we are under and that this Bill will create in situations where Closed Material Procedures are provided for.
The Chairman: Could Lord Lester ask a supplementary?
Baroness Lister of Burtersett: Of course.

Q52 Lord Lester of Herne Hill: Following from that, as a further extension of the problem, suppose that the judgment cannot be released to the public because it contains closed material, so it is, as it were, a secret judgment, but suppose that the reasons for secrecy expire. Where is the requirement for the court to publish or for the Government in some way to make sure that what was secret but does not need to be can now be made public?
Angus McCullough: Of course, it is absent, and that is one of a number of respects in which, in practical terms, there are omissions, many others of which were highlighted during the debate on the second reading, but that is a significant one. It is not there.

Q53 Baroness Lister of Burtersett: In your memorandum to us, you argue very strongly there should be a general obligation in a civil litigation CMP to disclose sufficient information to the excluded party to enable them to give effective instructions to their Special Advocate. Do you have any thoughts as to how this could be achieved in the Bill?
Angus McCullough: It could, I think, fairly easily be achieved by making clear in the legislation—one can work out how to draft it—that the requirements identified by the House of Lords in *AF (No 3)* should apply. The legislative form of words would simply be that there is an obligation to give a minimum level of disclosure, which would enable the affected

person to give effective instructions to their own representatives or to their Special Advocate. It would not be difficult to draft, I am sure.

Q54 Baroness O'Loan: Can I ask you: from your experience of sifting through intelligence information as Special Advocates, do you agree with the Independent Reviewer that it is likely to be difficult to distinguish in practice between information received in confidence from foreign intelligence services and other intelligence information?
Angus McCullough: I am not sure I do agree. I am hesitant, though, to answer very fully, because I think it may create difficulties or I may go further than I really should, but I am not sure I do recognise that as a significant practical difficulty. One can usually identify the source of any particular piece of material.

Q55 Baroness O'Loan: The question, I think, is between information that has been received in confidence and, presumably, marked top secret or something like that in our classifications, and other intelligence information received from the same agencies.
Angus McCullough: Sorry, I may be being obtuse, but if there is material or information that is not sensitive embedded in a document that does contain sensitive material, the sensitivity of which has caused it to be labelled top secret, one can, of course, deal with that in a number of ways, such as by redacting the document so as to eliminate from sight the top-secret parts and leave available to be read those that are not sensitive, and that, of course, is routinely done in our disclosure function. There is also the possibility, if it is not possible to pick and choose from the document, to extract the key elements of information and put them into a statement—and we routinely argue that should be done so that the person affected is aware of the information that can be disclosed to them—notwithstanding the fact that it happens to be embedded in a document mixed up with other sensitive material.

Q56 Lord Lester of Herne Hill: The trouble is I think that you probably have not seen what David Anderson was saying. I think the problem is different. Suppose the CIA and our intelligence are pooling their information in one way or another. He was saying he thinks it is impractical and perhaps impossible to distinguish that which is UK and that which is US when they are all mixed up together.
Angus McCullough: That may very well be the case. Again, I do not want to get into too much detail, but one can readily imagine that, in a complex investigation involving agencies around the world, there is a pooling of information.

Q57 Lord Lester of Herne Hill: Can I then ask you a *Norwich Pharmacal* question? It is really how you consider the Bill could be amended to preserve the possibility of judicial weighing of potential harm to the applicant in an extreme case. You have probably seen what we recommended in our report. Have you anything to add to that so that the control principle is not absolute?
Angus McCullough: I think there are two possible options: the first, which does fall to be considered, we would suggest, is to leave things as they are; and the second is to go down the route proposed by the Committee, which is to put things on a statutory basis but preserve the ability of the judge to balance the interests at stake. For my part, I would regard either as acceptable. I say that the first can properly be contemplated because there is no instance in which there has been disclosure of sensitive material that breaches the control principle pursuant to a court order ever, as far as I am aware, in this country's

history. The *Binyam Mohamed* case seems to have been the subject of some major misunderstanding and misapprehension amongst our allies—in particular, the United States—because, on my reading of the Court of Appeal's judgment in Binyam Mohamed, it is a ringing endorsement of the control principle. The only reason—as, I think, one of Lord Lester's earlier questions indicated—that any material was ordered to be disclosed, contrary to the argument of the Government, was that it could not remotely be said to have been secret or sensitive because it had been deployed in an open judgment in the United States. So that is why I do question whether there is anything really wrong with the present system, if one understands it properly and explains it to our allies properly.

The Chairman: Wait a moment. You are getting your retaliation first, as ever, Lord Lester. Lord Faulks, let me come back to you.

Q58 Lord Faulks: I think Lord Lester took my question, but nonetheless perhaps I could ask you a question. You say that in no instance so far has there been any order of disclosure of material pursuant to the *Norwich Pharmacal* jurisdiction. If we leave the decision ultimately to a judge, and the Security Service consider that the material is sensitive material, under this jurisdiction they have no choice but to disclose that material. What you are suggesting is that a judge should be the arbiter of sensitive material.

Angus McCullough: The ultimate arbiter, yes, and the judges have shown themselves to be suitably respectful of the principle and have, as I have already indicated in *Binyam Mohamed*, shown great deference to the control principle. I said that no court had ever ordered disclosure of material, or you quoted that back to me. It is disclosure of secret material in breach of the control principle, because I appreciate that the Government would say, "The disclosure of the paragraphs of the judgment constituted a breach of the control principle," but they could not, on any view, be regarded as secret material or, indeed, sensitive material, given that they had already been deployed in open.

But to get back to your question, yes, the judge would be the ultimate arbiter and I do not shrink from that. It is appropriate in these circumstances for the judge to be the ultimate arbiter, when, on the one hand, you have very powerful—and I recognise that entirely—interests of national security, but, on the other hand, there may be a person who is, at the most extreme end, facing proceedings in which the death penalty is faced. So the judge is the best person to weigh those competing interests. It may very well be—and always has been thus far—that national security will win out, which is why I query whether the current system really is defective, but we will certainly contemplate a regime of the sort that this Committee recommended in its last report.

Q59 Lord Lester of Herne Hill: I apologise to my colleague through the Chair for taking his question. It was inadvertent. Surely the difficulty about your answer is that you are speaking as an advocate and a lawyer, not as a politician, and the problem is a political one, which is that our allies believe wrongly that our judges cannot be trusted. Is that not, therefore, a powerful reason for including something on the face of the Bill as providing that there is an exception for the capital cases and so on, which you referred to and Mr Miliband, in his Public Interest Immunity Certificate—the first one, in *Binyam Mohamed*—himself recognised?

Angus McCullough: Yes, I hope I was not seen to be advocating any particular mechanism. I was canvassing a number of alternatives that would incorporate a balance between the competing interests, and, under both of them, there is a role for the judge. Insofar as I trespassed into the realms of politics, I certainly should not have done so.

Q60 Lord Lester of Herne Hill: Is it not also the case that, even when a *Norwich Pharmacal* order is made, there is still PII that can then be considered afterwards, as would

have happened in *Binyam Mohamed*? So it is not simply a kind of light-switch situation, where it is either one or the other.

Angus McCullough: Absolutely, and PII is integral to *Norwich Pharmacal* in this context. In terms of the *Binyam Mohamed* example, the process had not finished. Part of it had been completed but an important second part of it—namely, PII and its impact on the material sought—simply had not been considered before the process was rendered academic.

Martin Chamberlain: Taking up your point about the difference between us as advocates and you as politicians, I think one of the things that struck us when we sent in our note following David Anderson's memorandum to you when you were looking at the Green Paper is that it would be unfortunate if Parliament were to legislate to cure a problem that arose as the result of a misunderstanding on the part of certain United States officials as to what exactly was the current state of our law. I understand that David Anderson is in the United States, and so it may be that he has embarked on a process of education of the relevant officials, but it would be an unfortunate, and one might go further and say rather abject, position if we were to be legislating on the basis of what we consider to be a misunderstanding on the part of some United States officials of the true legal position, which can be found in, as Angus as said, the very respectful judgments of, for example, the Lord Chief Justice in the *Binyam Mohamed* case.

Q61 Mr Shepherd: This Committee has accepted in a general sense that there are genuine concerns about national security that the authorities and the Crown have. We are confronted with the dilemma, as we have been presented all along, that we subscribe to that—there must be circumstances in which that is the case—but no evidence has been brought forward to indicate an undermining of the position that the Committee took in its report. We do not know the nature of secret intelligence; maybe you have a comment, perhaps, on Sir Malcolm Rifkind's committee. It welcomed that it will have access to greater material, but that is not necessarily available to the world at large. What I am really getting at is: our concern on this Committee, surely, must be the quality of justice, if we are doing balancing acts, not that of the relationship between great nations, because, in that, we lose the real thread of what our justice system is about, which is to procure or present an opportunity to defend the most grievous charges and know what the charges are. Isn't that really what this is about? You pointed to the fact that the United States has a misunderstanding about our procedures in respect of *Binyam Mohamed* and how the information was released and came into our courts' purview. That is what really worries me about this: that if we halve the measure—we give to this and accept that—we are not actually doing the thing that we are hoping to do, which is to achieve justice for every citizen within this competence.

Martin Chamberlain: I would certainly agree with that sentiment, but I think that we have tried our best in our response not to shut our eyes to the needs of national security, which we all understand very well, or to the needs to address real concerns that are put forward by our international partners. But one of the ways you can address those concerns, rather than by enacting legislation in circumstances where it is not actually required, is to try to explain, on a friendly basis, where the misunderstanding may have arisen. Anyone reading the judgment of the Lord Chief Justice in the *Binyam Mohamed* case would, I think, find it difficult, even if they were sitting in an office in Langley or somewhere on the other side of the Atlantic, to think that our judges were willy-nilly ordering disclosure of sensitive material obtained in confidence from our foreign partners.

Q62 Mr Shepherd: Just a follow-up, then: why do Special Advocates actually participate in this process? It cannot be just fees. It must be a bit more than that.
Martin Chamberlain: For my part, the reason I participate is because I think, if you are going to have a Closed Material Procedure, it is better to have a Special Advocate than not to have one, and it is better to have a conscientious one than a less conscientious one.

Q63 Mr Shepherd: But no Government could proceed without representation of some form. If you withdraw, how could you possibly have a proceeding other than that which is so arbitrary?
Martin Chamberlain: That point has been made by commentators on the system at various points. Early on in the system, there were a couple, I think, of Special Advocates who did resign their position on the basis that they did not feel they were making a meaningful contribution. I personally feel that Special Advocates can—
Mr Shepherd: I am not trying to do a personal thing. It was just general.
Martin Chamberlain: —on, occasion, make meaningful contributions, and I think it is better to have them than not have them. That does not mean that we are disabled from making points about the fairness of the proceedings as a whole or about particular proposals for legislation to change it.

Q64 Baroness Kennedy of The Shaws: I wanted to take up Richard Shepherd's point, which is, rather than making it about you personally, has the Bar Council been approached by you to take this issue up as the professional body? Because you are right that if you were not doing it—lawyers of real exceptional skill—then the fear one would have is that people of lesser ability and lesser, perhaps, concern as to the duties and responsibilities that lie with playing this role would be the next thing that would happen—that you would step down but another perhaps less able group might fill your shoes. So it is a question of whether the professional body has ever really engaged with this. Have you taken your concerns to the Bar Council?
Martin Chamberlain: We have not taken our concerns to the Bar Council; we have taken them to this Committee and other committees. We have made our concerns known in the form of academic articles and submissions as part of the legislative process. That is, I think, so far where we have considered it appropriate to take our points. As far as I am aware, the ethical issue of whether it is appropriate for a barrister to act as a Special Advocate has not been addressed thus far by what I think would now be the Bar Standards Board.

Q65 Baroness Kennedy of The Shaws: I just wondered whether that is not another avenue that you, as professionals, should be addressing your concerns to, given that, normally, our role and function—I say this as another barrister—is to represent our clients, and usually that requires us, in order to fulfil our function as advocates, to know what their instructions are on legal matters. Are we playing the role really of advocate, given what the nature of advocacy is? I just wondered whether your professional body is not one to which you ought to be addressing some of these concerns, because perhaps the Bar Council should be taking a position on it.
Angus McCullough: I think it is difficult to answer these questions, other than from a personal perspective. For my part, I have asked myself precisely the question that Mr Shepherd put: why are we doing it? My answer is very similar to Martin's: however difficult it is and whatever the constraints we are put under, we can, at least in some cases, still make a difference.
I personally do not think participating within the system constitutes approval or endorsement of that system. It would be specious to draw any grandiose comparisons between our position and those representing people in really dangerous circumstances in

foreign countries, but the same principle applies in that, if you participate in a system, you are not necessarily approving of it. So long as you can make a difference and you are not a pure fig leaf, for my part I think it is appropriate to continue to operate within that system, whilst at the same time doing what we can to seek to improve it and to make clear to the outside world the difficulties that we operate under and make suggestions as to respects in which those could be alleviated, whilst still properly addressing the legitimate concerns of national security.

Baroness Kennedy of The Shaws: I should make it clear that I pay tribute to all three of you for your courage in stepping forward and publicly saying where you feel there are shortcomings in the steps that Government are taking. I want my tribute to you to be recorded.

Q66 Lord Lester of Herne Hill: By way of re-examination, do you not have a rather better case than you have made in answer to my colleagues, which is that your jurisdiction comes as a result of *Chahal* and *Tinnelly* and *McElduff*. In those cases, the problem was, in Strasbourg, how one could deal with the conflict between national security and individual justice, and the compromise, which was the SIAC jurisdiction, was to have Special Advocates the way that the Canadians do. Civil society called for it in *Chahal* as a way of securing this, so is it not right that your role comes directly out of an attempt to deal with a really difficult situation and a choice of evils?

Mr Shepherd: I think that is a leading question, isn't it?

Lord Lester of Herne Hill: Of course it is a leading question.

The Chairman: And that is a rhetorical question and that is where we can close. You have had more than enough supplementaries today. You have run out for the year, I think. Thank you very much for your evidence. It has been extremely helpful to us in the preparation of our report.

David Anderson QC

Oral Evidence, 16 October 2012, Q 67–86

EVIDENCE SESSION NO. 3. HEARD IN PUBLIC

Members Present

Dr Hywel Francis (Chair)
Baroness Berridge
Lord Faulks
Baroness Kennedy of the Shaws
Lord Lester of Herne Hill
Baroness Lister of Burtersett
Baroness O'Loan
Rehman Chishti
Mr Virendra Sharma

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Examination of Witnesses

David Anderson QC, Independent Reviewer of Terrorism Legislation
Q67 The Chairman: Good afternoon and welcome to the Joint Committee on Human Rights and this session on the Justice and Security Bill. Could you, for the record, introduce yourself, please?
David Anderson: I am David Anderson, the Independent Reviewer of Terrorism Legislation.

The Chairman: Thank you. I should say welcome back. When you were with us in June, you referred to "a second wave of cases concerning the alleged complicity in the targeting of drones". Do you know exactly how many such cases have been started?
David Anderson: I am aware of two and, having checked this morning with the principal legal adviser at the Foreign Office, I think I can say that he also is aware of just two, but I could briefly summarise what those are if it would help.
The first is the case of Noor Khan, who is seeking to judicially review what, he alleges, is a policy on the part of the Government to pass intelligence material to the United States for use in drone strikes. That allegation requires certain assumptions to be made as to military intelligence and security operations of the US and the UK and, as the Committee will know, these are matters that are conventionally neither confirmed nor denied by the Government. The matter has been listed by Mr Justice Mitting for a permission hearing on 23 and 24 October, so just next week. I asked both sides for their skeleton arguments in advance of coming to see you, but they are due apparently at four o'clock this afternoon and neither was prepared to give me a draft. So far as what the hearing will be about, there may well be issues of justiciability. I am not aware that either side will seek a closed material procedure, although I believe that the possibility was raised by the judge at an earlier stage.
The second case is the case of Malik Jalal, whose letter before action was given considerable publicity earlier this month. He is a resident of Waziristan who seeks judicial review of what he considers to be the ongoing failure of BIS, the Department for Business, Innovation and Skills, to prevent or restrict British companies from exporting parts, technology and technological assistance to the United States. Lawyers on the Committee will see the resemblance to the *Zagorski* case about the export of drugs for possible use in the death penalty. But the point is that these parts, technology and so on, are said to be for use in

drones that are going to launch missiles into the part of Waziristan where Malik Jalal lives. So far as I am aware, that claim has not yet been issued, although judging from the letter before action, which I have seen, the claim is imminent.

Q68 Baroness Berridge: Thank you, Mr Anderson. Would you like to comment on the Special Advocates' response to the Secretary of State's letter which declined to invite them to see the material which you were shown when you were given access? I presume you have seen their response.

David Anderson: I have seen their response. I consider this really a debate for the Home Secretary and the Special Advocates. I would have no objection to Special Advocates having the same access that I did, but plainly there are issues that were raised by the Home Secretary to which the Special Advocates responded.

I might just, since you invite me to do so, mention a couple of points that come out of that correspondence. One—and the Committee is probably well aware of this, though I am not sure I had entirely registered it until I read the Home Secretary's letter—is that the Intelligence and Security Committee is said to have looked at the papers on the same basis that I did and my understanding is that some of them adopted a probing and a critical attitude, just as I hope I did.

The second point that I would make is that I did not just look at the papers in the case. I looked at the advice given by Home Office counsel and I had the opportunity to discuss that with them. And I can see that the Home Office might reasonably have taken the view that Special Advocates who had seen that advice, as I did, might know too much about the Government's strategic approach in this very sensitive field to be able to act against the Government as a Special Advocate in cases raising the same problem. Of course, that is not a bar to them seeing the material and it is ultimately a decision the Special Advocate would need to take as to whether they are prepared to cut themselves out of those cases. But in general, as you know, I consider the experience of the Special Advocates to be extremely valuable and their views to be of equal weight to those of counsel instructed by the Home Office, the intelligence services and so on who, like the Special Advocates, are independent barristers with great experience of these procedures.

Baroness Berridge: Just one brief supplemental. The Lord Chancellor commented when he gave evidence that it was the view of the Special Advocates, I think he said, that caused him the most concern, because of their particular role. I was just wondering if you could outline for us whether you, in your previous professional career, acted in a closed material procedure situation and, if you did, who were you of the three people that are there as QCs? And also, how many closed material procedures have you seen from start to finish in this new role that you have? I am aware that you saw the closed part of a control order case back in February of this year. I went and saw the open part of it, so could you give us an outline of your own experience, please?

David Anderson: Yes. It does not compare to those of the Special Advocates or of counsel instructed by the Home Office or, of course, the judges who regularly hear these cases. I did an employment case, which was steeped in national security and most of which happened behind closed doors, a case called *Balfour* that subsequently went to the European Court of Human Rights. In commercial and competition litigation, I have commonly been part of confidentiality rings and so on. But so far as a full-blooded closed material procedure is concerned, I have talked at length to a large number of Special Advocates and to open counsel and to counsel instructed by the Government and, indeed, to judges, but the only

case that I have sat through, and I sat through only part of the closed procedure in it, was the case that you are referring to, I think, earlier this year.
I might, since we are on the Special Advocates, just recall something that Mr Justice Ouseley said, because of course the judges, very properly, do not generally make their views about this sort of thing public. But on the issue of how effective the Special Advocates are and how able they are to make a difference in these sort of cases, he said in the *AHK* case on 2 May this year, "I do not think," he says, "and I am not alone in this among the judges who hear these types of cases, that the views of the Special Advocates, as represented to a specific question put by the Joint Committee for Human Rights, and as recounted by Lord Dyson, at paragraph 37 in *Al-Rawi*, and perhaps qualified to a degree, are a true reflection of the effectiveness they bring." In other words, he is saying that he and other judges believe the Special Advocates to be more effective than they, modestly, suggested to this Committee that they were able to be.

Q69 Baroness O'Loan: I wonder, Mr Anderson, could you bring any clarity about the precise number of civil damages claims that have been started? Lord Wallace, in the Committee-stage debates on the Bill, referred to 15 civil damages claims. Elsewhere in Government documents we have seen references to six such claims, so I wonder whether you could bring any clarity. These are the cases in which, in your words, claims are likely to be "saturated in sensitive material".
David Anderson: I have always thought and said to this Committee that it is reasonable to expect there will be some civil cases, I think everybody hopes a small number, which are as saturated in secret material as some of the immigration cases, employment cases, TPIM cases and asset-freezing cases where closed material procedures are already part of life. It would be strange if merely by invoking a different procedure one somehow found oneself in a world where that degree of saturation could not take place, and that is so particularly when you look at the subject matter of some of the civil claims that have been started concerning torture, rendition and so on. But I entirely take your point and, indeed, it was a point also made by the Special Advocates that there has been some imprecision in the way that those cases have been enumerated and described.
I asked the Ministry of Justice about that and I have some more detailed explanations of those figures, which they kindly provided to me, but which, unfortunately, they told me this morning I am not at liberty to pass on to you now. I do not think it is because anyone says they are secret. I think it is because it is felt that the proper way for these figures to be passed on is from the Minister responsible for the Bill. I cannot see why if you were to write to him he should not give you the information that has been given to me. But the upshot, if I may paraphrase what I have been told, is that the number of civil cases to which sensitive national security information is of central importance fluctuates but is not negligible and, at least for now, is increasing rather than decreasing. I hasten to add that these are not said to be cases in which a CMP is inevitable. They are simply the sort of case in which a CMP might be thought about as one of the options.
I can perhaps make two points that are in the public domain. First—and this addresses a point raised by the Special Advocates—of the original 27 cases referred to in the Green Paper the Special Advocates raised the question of how many raised national security concerns as opposed to other sensitive information, which of course is a very broad category. I am told that an answer to a Parliamentary Question, and I am afraid I do not have it here, said that 26 of the 27 cases fell into the national security category. And then the second point: as Baroness O'Loan alludes to, Lord Wallace explained in Parliament, I think on 19 June, that there were then thought to be 29 live cases and that those were made up of 15 civil damages claims, three asset-freeze judicial reviews, seven exclusion judicial reviews and four lead naturalisation judicial reviews, though with around 60 further naturalisation

judicial reviews stacked up behind them. There remains even in my mind some imprecision as to the six cases you refer to and when they started up, but I have no doubt that the Ministers in charge of the Bill could supply that information if the Committee thought it was relevant.

Q70 Lord Lester of Herne Hill: When you came to us in June, you gave evidence indicating your view that Part 2, as it stood, was not proportionate and you emphasised that one of the conditions that you thought should apply is that the CMP should be a last resort to avoid cases being untriable. Does it remain your view that Part 2 of the Bill as drafted is disproportionate and needs to be amended to ensure that the CMP procedure is only ever used as a last resort and only as the result of a judicial balancing exercise? I should say, in asking that question, that some of us around this table attempted after June to introduce some amendments to that effect and, of course, the report stage will be in the House of Lords next month. Therefore, that question and the answers to it are, I think, particularly important.

David Anderson: I remain of the view that although Part 2 addresses a genuine question, it does so in a disproportionate manner. I think the two principal amendments that would occur to me, if I were dictator for a day, would be, first of all, in Clause 6, the so-called gateway in Clause 6(1). It is currently only the Secretary of State who may apply to the court and I would allow any party to the litigation to apply for a CMP. I am conscious the Committee has thought about that before. I have talked to you about that before. I would be happy to go through that in more detail, but you are aware of the main point. Yes, of course, it is normally the Government who has an interest in a closed material procedure, but sometimes it will be the individual who has that interest and that is something that Lord Clarke specifically pointed out in the *Al-Rawi* case. It is something that Mr Justice Ouseley specifically pointed out in the *AHK* case when he said he could not see that this procedure should only be available to the advantage of one party. And it seems to me that if the Government is going to persuade people that this part of the Bill is about something more than the convenience of the intelligence services, and I think that it is about more than that, it would be preferable if it gave effect to what those judges said.

The second amendment, and here I think I come very close to what Lord Lester has been saying, is that also at the gateway stage I would allow the judge to exercise discretion as to whether it is a case in which a CMP application could, in the future, be made to the court. He is currently required to declare that it is a CMP case whenever disclosure would be damaging to the interests of national security; 6(2)(b). He is directed to ignore the fact that the PII process might result in that material being withheld; 6(3)(a). Only the Secretary of State may consider the alternative of PII; Clause 6(5). The judge ought to be able to decide, in my view, "Let's go with PII for now and see how we get on. I am not going to tell you at the outset that this case is suitable for a closed material procedure."

I do not go so far as to say that the judge should be obliged in all cases to exhaust PII before he comes to the possibility of a CMP, but the judge should be trusted to make the relevant decision. It is ultimately a case management decision and whether CMP or PII or some combination of the two is the eventual outcome, in this type of litigation the Government's secrets are safe, so I can see no reason not to leave that discretion to the judge.

As to whether it should be a last resort, I would have no difficulty with building that into Clause 6 and your legal adviser was good enough to indicate to me that he has begun thinking, as I am sure the Committee has, along those lines and as to how that might be

achieved. But, yes, I would be supportive of that—that the CMP should be available if there is no other fair way of determining the case.

Lord Lester of Herne Hill: Could I raise another point that I only thought of recently, which is confidence in the judiciary? Is it right to be troubled that if we do not get this framework right then judges who go through the procedure are going to be very unfairly blamed for the consequences of the procedure, because it will be perceived among the public that judges are authorising secret trials and denying justice. Is that a matter that, in terms of public confidence, is relevant?
David Anderson: It does seem to me a relevant factor. One could make the argument that neither public confidence in the judges nor, indeed, public confidence in the Government and the security services is going to be achieved by a clause that is not even-handed as between the parties to litigation and that does not give judges the discretion to make what is, in essence, a case management decision.

Q71 Baroness Kennedy of The Shaws: I want to tease out this business about a clause that is not even-handed and then your suggestion that it could be even-handed and that the individual, the civilian, rather than the Government, might be able to argue for a CMP. I am trying to think of what circumstances that might be. Can you give me a hypothesis, rather than it just being a veneer of equality of arms, of where and in what circumstances an individual would be asking for a closed material procedure?
David Anderson: I suppose the material in question would be, firstly, secret and, secondly, exculpatory—of assistance to the individual. Maybe it indicates that somebody was mistreated, for example, whose evidence is now relied on—something of that kind. Of course, the individual will not have seen it, but suppose the Government does not make the gateway application for a closed material procedure, and says, "No, no, I think we can deal with this comfortably by means of PII". Is that not possibly a signal to the individual, "Perhaps we should make an application for a closed material procedure", assuming that to be available, "because we would rather have this case decided on the basis of all the evidence, including the secret evidence that helps us, than pretend that the evidence does not exist", as one has to do in the PII situation.

Lord Lester of Herne Hill: Could one example of that be the companion to Binyam Mohamed before Judge Kessler in the federal district court in the States? He was arguing that the reason why Binyam Mohamed had given evidence against him was that Binyam Mohamed had been tortured. There was, in fact, I think, a closed material hearing before Judge Kessler, as a result of which he was acquitted under federal habeas corpus. So that was a case where he was helped by the American procedures in producing exculpatory evidence to get himself freed.
David Anderson: Yes. I can see the procedural difficulty might be that the individual would not necessarily know that such evidence existed, but who knows? There are leaks, there are suspicions, there are sources of information.

Baroness Kennedy of The Shaws: I am just imaging myself making this application, because I am likely to, and I can imagine that the accusation will be made that counsel is on a fishing expedition.
David Anderson: There may be material known to that party that could indicate to the judge that the route is none the less worth pursuing. It is difficult in the abstract to say how common this would be, but when a judge as experienced in this field as Mr Justice Ouseley raises it in the *AHK* case as a real possibility and where Lord Clarke says the same thing in *Al-Rawi* and where the perception, if nothing else, of something less than even-handedness is

so great, it is a little difficult to see how it could be ruled out on first principles right at the outset in the terms of the statute.

Lord Faulks: The claimant could have some covert role, and might be acting, as it were, for both sides, which would only be revealed as a result of CMP.
David Anderson: Yes, indeed. That reminds me that my employment case was a case in which the individual did have a great deal of secret knowledge, which he wished to deploy in support of his own case, by virtue of the functions that he performed for the Government. So it was very much at his initiative. Indeed, he raised the secret material in his originating application and it was a consequence of that, really, that the whole procedure went into closed.

Baroness Kennedy of The Shaws: I have certainly been in cases where people have wanted to invoke secret material, particularly where they themselves have been active as an agent on behalf of the state. As we know, the *Matrix Churchill* case was one such case and so on. And most of those cases end up with the Government deciding they do not want that material going in front of the court and therefore the cases collapse. That is what happens and it seems to me that what we are seeking for here is something where there can never be equality of arms in reality, because the decision ultimately is always likely to be much more weighted towards the state.
David Anderson: Who knows? That may be so. The best I can say is that where these two senior and experienced judges can plainly envisage cases in which it would help the individual it seems unreasonable to rule out that possibility in statute, even if Baroness Kennedy is correct that, in practice, it is rarely used in that way.

Lord Lester of Herne Hill: I think that what you are telling us is that Part 2 needs to be amended in order that the judge has full discretion, does not need to be fettered in any way, and that CMP is of last resort, but we do not have to fetter it in the statute.
David Anderson: Indeed.

Q72 Baroness Kennedy of The Shaws: I am satisfied with Mr Anderson's answer to that. When we last were together you were about to make your visit to the United States. I just wondered if you could tell us what you learned in the United States about the impact of the *Binyam Mohamed* judgment.
David Anderson: It was a fascinating visit and, I suppose, starting generally, it struck me as a country where the counterterrorism legal debate is framed in very different terms to the terms that operate here. And perhaps before I answer your question on *Binyam Mohamed* and since we have been talking about it, I might just say a short word about closed material procedure. There was an American stake in closed material procedure that I had not entirely appreciated until I went over there, because of course some of this closed material will be American-sourced material, just as some of it will be sourced from other countries as well. I am certainly not going to be too specific here, but my sense was that there are some people in America who probably took a bit of persuading that the closed material procedure was an adequate way of protecting their secrets.
They are used, of course, to a state secrets doctrine, frequently invoked by the Obama White House and frequently concurred in by judges. That has the effect of rendering a lot of civil trials effectively untriable. They have stricter standing requirements than we do. They have strict rules on justiciability. So, for example, when Mr Al-Awlaki's father sought an

injunction restraining the American authorities from killing his son with a drone, he was held to lack standing and the case was also held to be non-justiciable. Had those defences failed, there would still have been the state secrets doctrine held in reserve. So they are accustomed to civil litigation in which this sort of thing is simply not ventilated at all. In English terms, one might note the *Carnduff v Rock* strikeout situation. They have been persuaded to accept the closed material procedure. I have no doubt there were some hard questions asked about how many people were in the court, how secure the court was, how well security-vetted the judges were and so on, but that was the way they approached the issue of closed material procedure and I had not appreciated that before I went.

Baroness Kennedy of The Shaws: May I ask who were you talking to? Who were your meetings with?
David Anderson: I met White House, National Security Council, Justice Department, State Department and intelligence agencies. I also talked to Human Rights Watch in New York and to the American Civil Liberties Union, Brookings Institution, two congressional committees—the House of Representatives Committee on Homeland Security and the Senate Select Committee on Intelligence—and a few others. Not all of them were prepared for me to give their names, so it is probably easier if I just stick to the institution.

Baroness Kennedy of The Shaws: Categories are fine.
David Anderson: To go back to the question, so far as *Binyam Mohamed* was concerned, my experience was that memories of it, though not always detailed, were fresh and, in some cases, quite raw. A strong preference was expressed by really all of those I met from the Government side for an unconditional assurance that information subject to the control principle would not be liable to be released into open by British courts, although it was considered more important that such an assurance could operate in practice than that it could look good in theory. I was told, and I am quoting from what I was told, "We want a system that works, but there are some systems that obviously will not work." What they meant was a system that works to protect their information. I was also told, "We offer and demand unconditional assurances within the limits of an imperfect system". So that is the sort of language that I was hearing. The future of intelligence-sharing was explicitly linked to our ability to, as it was put, "sort this one out"—not just the volume of intelligence-sharing, but the processes. So, for example, material that currently goes through directly might require the clearance of a local agency head. That sort of thing would mean that cooperation became slower as well as, possibly, less extensive.
I think what angered them about *Binyam Mohamed*, rather as I anticipated in June on the basis of what I had been told by others, was not so much the outcome of *Binyam Mohamed* in terms of what was disclosed, as the fact that an English court had been prepared to disclose material which the Foreign Secretary had concluded presented a likelihood of real damage both to national security and to international relations; a conclusion that was supported by evidence from very high-level officials in America expressing their concern. When I pressed them on whether they thought our judges or people in the United Kingdom generally were in the habit of spilling their secrets or, indeed, had ever really spilled their secrets, they said no. They are rather impressed that we are not leaky and, indeed, some of them may have been a little embarrassed, because shortly before I went over there in June there had been quite a well publicised leak attributed to the United States about a very sensitive operation in Yemen, which you probably remember hearing about. So there was an acknowledgement that certainly nobody is perfect in that regard, but equally, the way they see *Norwich Pharmacal* as applied to national security is: what is the point of it unless it is

designed to produce some circumstances, however rare, in which a British judge would disclose information contrary to the control principle?

Baroness Kennedy of The Shaws: Did you hear any criticism of Lord Neuberger, any suggestion being made that he had disclosed material that should not have been in the public domain?
David Anderson: No. The objections I heard concentrated on the issue of principle, not on the practical consequences of the *Binyam Mohamed* result.

Baroness Kennedy of The Shaws: I am just interested to know, having been there and having had these conversations and having heard a very different language and so on and really a very strong iteration of the control principle, did it leave you with the impression that this legislation is, in fact, being driven by those American demands?
David Anderson: I do not know about that. I am quite sure that they had something to do with it. Exactly how much they had to do with it I do not know. I know that others did. Sir Daniel Bethlehem put some evidence before the Committee either very late last night or earlier this morning. I have been lucky enough to see that and I believe that the concerns that are expressed are not unique to the United States, but certainly it is part of it.
I would just make perhaps two other points about the reactions that I experienced. The first was that I was briefed in advance by OSCT and by the embassy and I was told, as one is told on these occasions, that X or Y is a good friend of the United Kingdom, they are internationally minded, they like our way of doing things. That was said of two or three people. Those, I think, were the two or three people who were most intense in their rejection of the idea that *Norwich Pharmacal* might apply in the national security field. That surprised me.
The other thing that struck me was the extraordinary efforts that have obviously been put in by the Foreign Office and by other staff in Washington not only during *Binyam Mohamed* and similar cases, but in the lead-up to this Bill and during the passage of this Bill. One sometimes reads about the decline of diplomacy. That certainly demonstrated to me the advantages of a well-stocked embassy.

Q73 Lord Lester of Herne Hill: It has been my impression that the United States' lawyers and their clients are much more concerned about *Norwich Pharmacal* than they are about CMP and that they understand perfectly well that we have the European and British rule of law, which leads perhaps to some different conclusions from theirs. When we are looking at what to do with Part 2 of the Bill, would it be fair to say that American concerns are more directed to *Norwich Pharmacal*? We know that *Norwich Pharmacal* may not have survived judicial scrutiny, but are they more concerned with *Norwich Pharmacal* than they are with CMP?
David Anderson: I believe they certainly are, and I believe they also understood—and, if they did not, I tried to underline it to them—that the way we operate the closed material procedure and the various procedural rules we might have should not really affect the security of their information at all, because of the eject button that we have discussed in previous sessions. I think their concern about CMP was almost more about the physical security of the court environment: are these judges sufficiently trustworthy? Are the people in the courtroom sufficiently leak-proof to ensure that this is indeed a closed proceeding? And since it was clear that they had been given the necessary reassurance on that by others,

the closed material procedure was something that they were prepared to accept and had no particular difficulty with.

Lord Lester of Herne Hill: You have already been asked by Baroness Kennedy about Lord Neuberger in the context of *Binyam Mohamed*. It certainly was put to me by a senior Government lawyer that in *Binyam Mohamed* intelligence material was disclosed by the Court of Appeal which ought not to have been. It seems to me that that is completely untrue and I wonder if you have a view about it.
David Anderson: All I can really do is repeat that the burden of the comments I had from the Americans did not relate to any damaging effect of the disclosure of that material. It related to the fact that the court was prepared to overrule the Foreign Secretary, who himself was acting on the basis of pretty clear assurances from, among others, the US Secretary of State.

Q74 Mr Sharma: You have partly addressed this, but there might be the possibility of you adding a few things. How precisely is the *Binyam Mohamed* argument perceived by the relevant agencies in the US, including the intelligence agencies? You have mentioned it, but could you add anything else?
David Anderson: These things take on a sort of mythology of their own. What I might perhaps usefully do in answer to that question, rather than repeat what I said, is to explore a little bit what they mean by an unconditional assurance. And I think they were very conscious when talking to me that the letter of the United States law does not give an unconditional assurance that, for example, United Kingdom-sourced intelligence was safe from disclosure in American courts. And I made a point of talking to this, in particular, with the American Civil Liberties Union about what the options might be. If one were to seek to get hold of United Kingdom-sourced intelligence information in the United States, as I understand it—though of course I am no expert on American law—on the basis of what I was told, the most obvious route would be to go under the federal Freedom of Information Act, which is an Act giving plaintiffs a robust right to extract information from Government. But it contains equally robust exemptions, first of all, for national security information, properly classified, pursuant to an executive order and, secondly, for intelligence sources and methods; that is exemption 1 and exemption 3. The ACLU told me that a heavy measure of deference is applied in the national security context when looking at those exemptions, although the courts have said that that deference is only due when the Government adequately explains the basis for its withholding and that the deference does not equate to judicial abdication of the duty to review the basis for withholding. And they passed cases to me establishing those propositions, which I would be happy to pass on to the legal adviser if they are of interest.
But they also told me that they did not know of any case in which the classification of foreign-sourced intelligence information was even challenged. So I think when the Americans ask for an unconditional assurance in practice, they do not believe that they are being hypocritical. That is what they think American law, in practice, supplies in relation to foreign-sourced intelligence information. It was also put to me that if any court took a different view, the US Government would go to the Supreme Court to defend our classified information.

Q75 Baroness Berridge: Just in relation to the people you spoke to, could you give us some indication of what the non-governmental organisations said to you? Because the impression we get here is that there is domestic discontent in the United States at some level about actions that are being taken and about the level of secrecy that there is. For instance, Human Rights Watch, did they display an understanding of the normality for us of

the courts being able to overrule the Foreign Secretary? That is not something that we find difficult. What was their view?

David Anderson: It is very difficult to generalise and probably unwise to attribute particular views to particular organisations, but there is certainly some dissatisfaction on that side of the line about the efficacy both of the judicial branch and, indeed, of the Congress as an effective check on the power of the Administration in the field of counterterrorism. But one has to appreciate that over there people tend to look at terrorism, even within the confines of the United States, in military terms to a far greater extent than we would think of doing here. And the idea that a dangerous terrorist should be subjected to a criminal trial is by no means as uncontroversial in America as it would be here; witness the attempts, in the end unsuccessful, to bring Khalid Sheikh Mohammed, the supposed mastermind of 9/11, to a criminal trial in the Southern District of New York.

Q76 Rehman Chishti: Is their perception of the effect of the *Binyam Mohamed* judgment legally accurate, in your view?

David Anderson: I was not hearing legally very detailed expositions of the *Binyam Mohamed* case. I have no doubt the ins and outs were explored at the time and have been explored since by lawyers in the agencies. What was put to me concerned more the perception that our judges had taken upon themselves the power to give away American secrets and that there would be cases in which that power might be exercised. That, I think, is a conclusion that does follow from *Binyam Mohamed* and I can understand why they say that it would follow from any legislation that cemented the continued application of the *Norwich Pharmacal* decision to intelligence information supplied by other countries.

Rehman Chishti: How secure, in your view, are British secrets in the US? Can the US Government provide the same assurances as they seek from the United Kingdom Government?

David Anderson: In relation to the ability of the courts to grant disclosure to United Kingdom intelligence information, I have already dealt with that in terms of what I said about the ACLU. In terms of "Is the United States completely leak-proof?", no, it is not. No country in the world is completely leak-proof and there happened, as I said, to have been a particularly high-profile leak in June, just before my visit over there. So certainly no one was trying to pretend to me that leaks could not happen in the land of Wikileaks.

Q77 Lord Faulks: Mr Anderson, you have been discussing with them and they are well aware of the provisions of the Bill currently before Parliament, which will involve what one might call a blanket ban in relation to *Norwich Pharmacal* orders. No doubt they would be reasonably satisfied with that. Did you get the impression that anything short of that, some modification of the full rigour of the Bill, including, say, judicially reviewable ministerial certificates or something like that, would be acceptable or is it an absolute as far as they are concerned?

David Anderson: Well, I was not there to negotiate and I was conscious that it was always possible there could be an element of bluff in what I was being told. I did run the judicially reviewable ministerial certificate past some lawyers who understood what it meant and I did explain that our judges were very deferential when it came to assessments by the executive of what the national security required. My impression was that our Government has spent a good deal of effort and charm and goodwill in persuading the United States that we are going to sort this out through Clause 13 of the current Bill. What would happen if they went back

and said, "We have changed our minds. We think something less is advisable, because we think it is important that there should be cases in which our judges can give away your secrets", which may be how the Americans would see it? I suspect they would get a fairly dusty answer, but one does not really know until one has tried the negotiation. Whether anyone within Government has done so or not, I do not know.
In the *Omar* decision, as the Committee will probably know, Lord Justice Thomas, who was the lead judge in *Binyam Mohamed*, came to a rather different conclusion in the context of a *Norwich Pharmacal* application made in assistance of proceedings in Uganda and rather indicated that there are other ways of doing these things, by mutual assistance provisions whereby one court asks another court for information. It may be that that is perceived as having taken some of the heat out of the situation, but I certainly did not detect any willingness on the part of the Americans to look again at a solution that would be designed in order to allow our courts to spill their secrets in however rare a case.

Lord Faulks: Following on from that, suppose the Bill was amended, either by the Government or as a result of a vote in Parliament, with the result that there was some watering down. Do you think there would be then a potential risk to the supply of intelligence?
David Anderson: The way it was put to me was not quite so crude as that, but it was said that there would have to be a reassessment of the intelligence relationship. And I said to some of these people, "You must be reassessing the intelligence relationship the whole time. Are you really telling me that the leakiness of High Court judges in England and Wales is the only factor, the only significant factor or even the most significant factor that dictates that intelligence relationship?" and I got a pretty dead bat. It was an important factor. It was something they had been very concerned about and had now been reassured about. If the issue is reopened they will have to reassess. Quite what the result of that reassessment would be one does not know.

Q78 Lord Lester of Herne Hill: Juan Mendez, the UN Special Rapporteur on torture, gave a lecture on 10 September in which, in relation, if you like, to *Norwich Pharmacal*, he raised the issue as to whether the control principle means that the country that is in possession of information about human rights violations is not in a position to mention them. And he said, "I think it hampers the ability of dealing effectively with torture". I think that the relevance of that to your evidence, following on Lord Faulks's questions, is whether there should be any exception on the face of the Bill in a situation of that kind. The United States is seeking a statutory guarantee that something like *Norwich Pharmacal* would not be used again in dealing with intelligence material in the ordinary way. Given that the United States is party to the UN Convention against Torture, as we are, and there is also customary international law, do you think that if there were a limited exception dealing with international war crimes, crimes against humanity, torture and matters of that kind, that that would be acceptable to our cousins across the Atlantic?
David Anderson: I cannot speak for the United States Government and I do not know whether Ministers have sought to negotiate that. I could imagine that, from the American perspective, just as the wrong may be at its most acute, because one might be dealing with somebody who had been tortured into a confession, say, equally, on the other side of the balance, their desire to preserve the secrecy of their own intelligence might be at its most acute, because it could be interpreted as implicating people that they knew or people for whom they were responsible in acts of that kind. So I would be a little surprised, on the basis of my conversations, if that were to be a solution that found favour, but until somebody puts it to them across the poker table it is difficult to say what the result would be.

Lord Lester of Herne Hill: In your own opinion, what would be your comment on the point raised by Juan Mendez?
David Anderson: As to his comment, I think he is right, at least in the short term. Of course, if one is looking at somebody facing a trial in another country and you have information that demonstrates, say, that a crucial witness against him had been tortured or that his confession had been obtained by torture, well, of course it assists the fight against torture to disclose that evidence, even against the will of the Government that supplied it to you. Looking longer term, however, I think one can reasonably take the view that a Government that discloses information in those circumstances, against the will of the country that supplies it, is going to find that it is supplied with less of that kind of evidence in future and, therefore, is perhaps not in a position to assist, the next time it comes around, with the fight against torture. And looking at it also more self-interestedly, a country that does that may find itself deprived of information that is important for the defence of its own security.

Lord Lester of Herne Hill: Given that those considerations apply, do you have any way of solving the problem raised by Juan Mendez?

The Chairman: I am sorry to interrupt you. There is a division now, so we will suspend this sitting for the next 15 minutes.

Q79 The Chairman: Mr Anderson, you were saying?
David Anderson: I was asked about the positive obligation to prevent torture and whether the United Kingdom has to comply with that obligation. I agree, yes, it does. The only point I would make on that is that there might be other ways of doing so than by releasing information supplied by foreign Governments into the public domain. For example, I believe it is widely known that during the *Shaker Aamer* case, which of course was the second of these *Norwich Pharmacal* cases that came after *Binyam Mohamed*—albeit the Government was resisting the application of *Norwich Pharmacal*—it was active behind the scenes with the United States Government to ensure that those over there on that side of the case were fully aware of the evidence that was sought by *Shaker Aamer*. Of course, at the same time it was seeking to negotiate his release from Guantanamo. And there may be other ways. One is under a duty, perhaps, to perform constructively the duties under the two Acts referred to in *Omar*, the Crime (International Cooperation) Act 2003 and the Evidence (Proceedings in Other Jurisdictions Act) 1975. It would be quite a stretch to say that the positive duty extended so far as to require all states to have the equivalent of a *Norwich Pharmacal* jurisdiction extended to national security, any more than it would require all states not to have national security exemptions from their freedom of information Acts. That is putting it perhaps rather crudely, but there are various different ways of getting to that objective.

Lord Lester of Herne Hill: Could I just take you up on that? I was not involved in it, but my memory of *Binyam Mohamed* is that the creative use of *Norwich Pharmacal* by members of my chambers is what eventually led to his release, effectively. Attempts were made by the British Government to persuade the United States Government to pass on information about ill treatment and that those failed and then the English court was invoked. The divisional court gave the Government and the American Government a hard time in questions. That process no doubt created very bad feeling among legal advisers on both

sides of the Atlantic but it was that crude method that eventually led to Binyam Mohamed being released from Guantanamo. Is that right? Because if that is so, it indicates that the most effective means might well be an exception in a case of that kind where there are allegations of serious ill-treatment.
David Anderson: I do not know why Binyam Mohamed was released from Guantanamo, but assuming that what you have said is right, it does not affect the point that desirable though it might be in the short-term for information of that kind to be used in order to shed light on torture or allegations of torture, it is a little different from saying that all states are obliged, as a matter of international law, to grant disclosure of that kind. The only point I was seeking to make is that there are other ways in which a member state might seek to discharge its responsibilities, even though I would immediately accept that in some cases they will not be as effective as a *Norwich Pharmacal* application might.

Q80 Baroness O'Loan: I wanted to take you back to something that you said, something that we have heard articulated repeatedly, and that is that if a Government or a court discloses sensitive information received from another Government, then it is unlikely that that Government will provide sensitive information in the future. Do you not think that is a slightly simplistic argument? I know it is made to you, but do you not think it is simplistic, because the reality is that the provision of materials between states is a symbiotic process and terrorism is a process with infinite international ramifications, so is that not a bit of a smoking mirror?
David Anderson: I quite agree with you that the statement as it is put to me is simplistic. It is not that you pull the lever and this result happens. It is equally clear to me that if our courts were to get into the habit of disclosing information of this kind contrary to the wishes of the US Government, the US Government would wish to reassess the intelligence relationship. And, indeed, on the basis of what I have been shown, there are signs that we are currently on probation and that there has already, in some respects, been a diminution in intelligence sharing.

Baroness O'Loan: But, Mr Anderson, is it not the case that the information that was disclosed was information that had previously been disclosed in the United States and does that not have some impact on the analysis?
David Anderson: I am hesitant to give a clear answer to that, because my understanding is that that is disputed and I do not think, if the security services were sitting here, they would give you a yes to that question. I am not really equipped at this stage to get into the ins and outs of it, but certainly the view taken by the court in *Binyam Mohamed* is that no rational person could have come to the view that the release of this information would damage American national security. One can have a good deal of sympathy for that view while still understanding why it made people in America rather cross.

Q81 Baroness Berridge: You mentioned the federal Freedom of Information Act. Is there any way, particularly dealing with the concerns raised by Lord Lester about the torture remedy, of achieving what we achieve under *Norwich Pharmacal* but using the model from the federal Freedom of Information Act? If we were to be able to borrow their language and put it here, could they have an objection to that if we were able to achieve that? I have not read the statute, obviously.
David Anderson: I would be very happy to put the noble Baroness in contact with those at the ACLU who have the most profound knowledge of this, but I sense your question is really a question about whether they could object were we to simply ape the wording of their own code. So far as I am aware, no one has put that to them. And the point that was repeatedly made to me is that their test, ultimately, is a practical one. They are not

interested just in what is written on the page but in how it is likely to be interpreted and whether our judges would apply such a heavy measure of deference, as they put it, as the judges in the United States.

Baroness Berridge: If the issue, as you say, is a practical one, the practical issue here is that our judges do not have a record, do they, of getting this wrong?
David Anderson: Who knows? These are really questions for Government. I did not try that one out on them. I am not sure how they would have reacted. My sense was that they had been assured that they will be getting what is in the Bill and they would be reluctant to reopen it, but who knows.

Q82 Baroness Kennedy of The Shaws: Mr Anderson, I would like to pick up on something that Baroness O'Loan has said. There really seems to be a consensus that somehow our courts holding the line on torture and being prepared to make rulings that opened up information and allowed it into a case where it was going to support allegations that there had been torture would lead to less cooperation in the sharing of intelligence. And you have agreed that that whole process is much more symbiotic, because the United States relies on us for information with regard to some of their droning and some of their activities in parts of the world that are rather important to them. But how do you stop torture if you do not take a line? By making decisions that are saying, "This is about an absolute prohibition and if it comes to something as important as torture, we, the courts, have to hold the reins in a different way," is that not likely to have the impact of the United States having to review its own, perhaps, willingness to be as accepting of those practices?
David Anderson: Such a principled stand would certainly cause the United States to reassess and I do not know what the consequence of that reassessment would be. All I can say is that I believe it to be true of the United States just as it is true of the United Kingdom that, yes, it has a number of mutual intelligence-sharing relationships, some more important than others. The US-UK relationship undoubtedly is one of the most important there is, but just because it has such a symbiotic relationship does not mean that it gives everything. It is no secret that the United Kingdom is the recipient of a great deal more US intelligence than a number of other comparable western democracies, even though many of those democracies might have information that is very useful to the United States about particular areas of the world.

Baroness Kennedy of The Shaws: I want to take you to Clause 13, because in light of the discussions that we have just been having, how can we really live up to our obligations to provide effective remedies for torture if we do not have some kind of process that allows the judge to decide, in certain circumstances, to let them in?
David Anderson: I suppose the answer of the court in *Omar* would be: "We need to respond to statutory requests made from courts in other jurisdictions". The response of the Foreign Office might be: "We can do a surprising amount behind the scenes by talking to foreign Governments and making sure they are aware of information".

Baroness Kennedy of The Shaws: It did not work in *Shaker Aamer*.
David Anderson: But ultimately what you are putting to me is a highly principled point, which one cannot resist, save by accepting that sometimes asserting a principle may carry with it a pragmatic cost.

Baroness Kennedy of The Shaws: I just want to finish on the business of Clause 13. Do you think the way that it is presently drafted is compatible with our obligations to provide effective remedies to victims? And with the principle that there should be no legal impunity to serious human rights violations, how can we reconcile that with Clause 13?
David Anderson: I said last time that whatever I learnt in America I was likely to consider Clause 13 as too broad, and I still consider that. Even if one accepts the message that I was receiving and am now transmitting about the intelligence-sharing relationship, and therefore, even if you accept the need for Clause 13(2), saying a court may not disclose sensitive information—sensitive information meaning information derived in whole or part from information obtained from or held on behalf of a foreign intelligence service, to paraphrase 13(3)(c)—it is not clear to me why the remaining (a), (b) and (d) of Clause 13(3) need to be there. They are perhaps justified in the eyes of the domestic intelligence services, but the control principle and our intelligence-sharing relationship, it seems to me, is sufficiently safeguarded by 13(3)(c). So one could delete (a), (b) and (d) and then put everything else, including domestic intelligence information, into the judicially reviewable ministerial certificate that is provided for in 13(3)(e).

Q83 Lord Lester of Herne Hill: To follow up the questions that you have just been asked by Baroness Kennedy, the Minister has given a compatibility statement that is compatible with the European Human Rights Convention, but we know that Section 3 of the Human Rights Act says that this Bill has to be read and given effect, so far as possible, compatible with the Convention rights. If the Government were not to amend Clause 13, would there not be a serious risk of litigation in which there was a challenge to Clause 13 as it stands, in an appropriate case, for not being compatible with Article 3 and, for that matter, with the Convention against Torture?
David Anderson: I would have thought litigation on this Act is inevitable and the point that Lord Lester raises might well be raised in the courts. I am not going to venture a view as to how that would be resolved. It would depend on the Strasbourg jurisprudence, on the extent of the positive obligation under Article 3. I am not aware of a case saying that that obligation extends so far as to require contracting states to have *Norwich Pharmacal* jurisdictions that they exercise in the national security field, but I am not saying the argument could not be made.

Lord Lester of Herne Hill: There are cases pending in Strasbourg at the moment where the Court of Human Rights and other countries have been calling on them, in rendition and torture cases, to provide information, as I understand it. Ought we not, as Parliamentarians on this Committee and more generally, to try to have a statute that is as safe as can be against litigation of that kind by making sure that the safeguards are included in the Bill itself? Sorry, that is a rather leading question.
David Anderson: I think you may have in mind the case *El-Masri v Macedonia* and possibly also a Romanian case on rendition and torture where these issues are being raised.

Lord Lester of Herne Hill: Yes, those cases.
David Anderson: I think to answer your Lordship's question would be, for me, to become a bit too political, but I would well understand if it was a view that your Lordship took.

Q84 Baroness Berridge: Just one follow-up on that. Was there any recognition when you were in the United States that the problem did not arise with the issue of the proceedings in *Binyam Mohamed*; that the chain of events goes back to the practices that were adopted in the immediate aftermath of the very serious terrorist incident? Was there any sense that there was a recognition in their minds that that is where you trace the chain

of events back to, not the issue of the proceedings in *Binyam Mohamed*? I was very surprised, can I say, when I read the injuries that did not seem to be disputed in the report I read on *Binyam Mohamed*?
David Anderson: Well, I suppose it depends who you speak to. That was not the sense I got from my dialogues with the Administration, no.

Q85 Baroness Kennedy of The Shaws: This is really about independent review. Given that this is such a departure from the normal processes, there ought to be a review every year to see how it is working, what the implications are and so forth. Do you think that annual renewal might be a way of keeping an eye on this?
David Anderson: Well, I suppose there are two issues there; one is review, one is renewal and, as a reviewer, I of course buy into the concept of review. This does seem to me an area where annual review by an independent reviewer, who would not necessarily be me, could be extremely beneficial, not least because of the danger that has been identified on many occasions of creep: a procedure that is introduced in a small way ends up being used quite a lot or a procedure that is introduced as one procedure then crosses the species barrier into another type of procedure and, before you know where you are, it is all around.
Obviously a review could not start re-litigating all the cases that were decided in that year or deciding which judges were right and which were wrong or anything like that. But it could, at the very least, give an indication of the size of the problem, how often closed material procedures are being used, how often *Norwich Pharmacal* procedures are being used, what the results of those applications are. And that, in turn, could inform a public debate. Whether it could inform an annual political debate in Parliament I do not know. You all have more experience of this than I have. I am conscious that my predecessor, Lord Carlile, I think in evidence to the TPIM Bill Committee last year, said on the issue of annual review that it is "a bit of fiction, to be frank". He was referring to the annual control order reviews and a picture was conjured up of the usual band of stalwarts turning up and saying what a dreadful Act it was and then nothing really happening.
Whether there would be value in annual review in Parliament or whether there would be value, perhaps, in something like a three-year sunset clause, so that the evidence could be marshalled and if the Government wanted this regime to continue they would have to make a case for it all over again, I do not know. I sense again it is probably a political decision. But in terms of the review by an individual—and I would have thought if it was the Independent Reviewer for Terrorism Legislation who was entrusted with it; there would be some appropriateness in that bearing in mind the limitation to national security—it would be desirable that they should do it with somebody who has experience, probably as a Special Advocate, certainly someone who has a good deal of experience of closed procedures. And an alternative would be to appoint such a person to do the review. I would be very supportive of either of those ideas.

Q86 Mr Sharma: I am sure you will be glad to have the last question now. Can you explain the nature of your concerns about the stop and search counterterrorism power and why, in your view, it warrants careful scrutiny?
David Anderson: The power I am concerned about is the power in Schedule 7 of the Terrorism Act to examine and detain any person at a port or airport in the United Kingdom. That is a power that can be exercised without suspicion and for the purpose of determining whether somebody is or is not a terrorist. It was used about 74,000 times on individuals in the year to March 2011 (as well as 11,000 times on unaccompanied freight) and my

understanding is that the figures for last year are similar, perhaps slightly lower. I have no doubt that the power is a useful one and my reports have given examples of intelligence-based stops that have resulted in convictions or disruptions or, indeed, in the accumulation of useful intelligence. So in that respect the Schedule 7 power is better, more useful than the Section 44 stop and search power, which was effectively struck down by the Court of Human Rights in *Gillan and Quinton* and then repealed by this Government. But the Schedule 7 power does have a number of controversial features and I will just mention three or four, if I may.

First of all, how useful are stops that are motivated not by specific intelligence but simply by the application of risk factors? Most of the eye-catching examples seem to be cases where they knew who they were stopping before they stopped him or they had good intelligence about the person they were looking for. I have asked the security service for help with this rather as I did with the issue of closed material procedures, because I said, "If you want to persuade me that this non-suspicion power is useful I need to understand why".

Secondly, a majority of those stopped—only a bare majority—in the last year for which we have figures were non-white and that is a proportion that increases the longer people are kept.

Thirdly, there is a power to detain anybody for up to nine hours on the say-so of a police constable. The Home Office proposes that comes down to six. It is still a very long time.

Fourthly, it is compulsory to answer questions. There is no right of silence.

Fifthly, there is no audio taping or video taping of questions unless the subject is taken to a police station.

And finally, now that Section 44 has gone, it is certainly the aspect of our counterterrorism legislation that, from what I can gather, causes most concern to Muslims and to other people of Asian, Middle Eastern and North African appearance.

I am not saying it is a bad power or that it ought to be repealed. It undoubtedly has very useful features. Two years in a row, I have recommended a review and public consultation on this power. The Home Office initiated a public consultation last month. It runs until 6 December. They have certain limited ideas for how the power should perhaps be trimmed. I am supportive of those ideas, but I would certainly also be supportive were this Committee or any other Committee to wish to look at the power in a little more detail.

The Chairman: Mr Anderson, thank you very much for your evidence today. As ever, you have been very helpful and also you have been very patient during the vote.