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Chair

Mr. Paul Zed

Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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● (0910)

[*English*]

The Chair (Mr. Paul Zed (Saint John, Lib.)): I call the meeting to order.

Good morning. This is the Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

Today's videoconference is pursuant to the order of reference of November 22, 2004, which is the study of the Anti-terrorism Act. I'm very pleased to welcome, colleagues, Professor Clive Walker, from the University of Leeds School of Law. Welcome, Professor Walker.

Professor Clive Walker (University of Leeds School of Law, As an Individual): Good morning.

The Chair: I guess it would be good afternoon to you, sir.

Prof. Clive Walker: That's right. It's about two in the afternoon here on a very sunny day.

The Chair: Thank you for joining us, sir.

I believe you have an opening statement, and I'd like to ask you to proceed, please.

Prof. Clive Walker: Thank you, Mr. Chair.

Can I, first of all, thank you for the honour of addressing your committee. I very much appreciate being able to debate these issues with you. It's my week for parliamentary activities, because yesterday I was giving evidence to the Joint Committee on Human Rights in the United Kingdom Houses of Parliament. So I've been talking quite a lot about anti-terrorism legislation to various parliamentary committees this week.

My own interest in this subject dates back a long time, to when I began with a PhD on the subject of the prevention of terrorism back in 1982. So I've been researching the legislation since that time, including legislation not only in the United Kingdom but abroad. That includes Canada and your own Anti-terrorism Act of 2001.

I would claim that Britain has some of the most extensive legislation on the subject of terrorism, certainly in Europe, and particularly because of the situation in Northern Ireland, has some of the most extensive experience dealing with terrorism, certainly in Europe.

I put that point actually to a French journalist last week, and she told me off about it and said that no, France has by far the most extensive legislation. So you'll be pleased to know that Anglo-French rivalries exist in this matter, as in other matters. But leaving aside who may have the most legislation, it's certainly the case that Britain has a great deal.

Perhaps I can, as an opening statement, outline the provisions that exist. They exist in three or four different pieces of legislation. The most extensive is the Terrorism Act of 2000. That was followed, not long after—indeed, as a response—the events of 9/11, by the Anti-terrorism, Crime and Security Act of 2001. And more recently, following an adverse judgment in our House of Lords—the Supreme Court, if you like—in early 2005, the 2001 act was amended to some extent by the Prevention of Terrorism Act 2005.

If we distill what these pieces of legislation contain and put them all together, then I think you can say there are seven or eight areas that are covered by this legislation. The first area is proscribed organizations—the legislation that deals with active terrorist groups. We have legislation about terrorist property and, of course, seizure and forfeiture of that property. There is legislation about terrorist investigations that facilitates those investigations by, for example, giving the security forces powers to set up cordons or to require the disclosure of information.

The next area would be counterterrorism policing powers, which are perhaps most notable for their inclusion of extensive powers of arrest without warrant and extensive powers of detention that follow those powers of arrest.

We have the section on criminal offences—special criminal offences—offences such as giving training in terrorist techniques, directing terrorist organizations, and possessing materials for the purposes of terrorism.

There is a section about immigration and asylum, some of which, as I mentioned, was struck down by the House of Lords, but other parts of which remain.

There are provisions about what I would call dangerous substances and sites or vulnerabilities that are acute, the sites being places like airports, the dangerous substances being chemical and nuclear materials.

Finally, there is a section of the legislation that deals especially with Northern Ireland, where historically the focus of the legislation has been, and in Northern Ireland alone there are a range of special measures. One of the notable measures is the setting up of special courts without juries, which are commonly called Diplock courts, which, despite recent encouraging signs in Northern Ireland in terms of ceasefires, are still in force.

So that gives you an outline, I think, of the subject matter of the legislation. As I said, I've been talking about this for 25 years. I could go on, but it might be helpful if you indicated your areas of interest.

● (0915)

The Chair: Thank you, Professor.

I now throw the questions out to the colleagues.

Mr. Sorenson, are you ready to begin?

Mr. Kevin Sorenson (Crowfoot, CPC): Yes, I can start.

First of all, Mr. Walker, thank you for your presentation this morning. Certainly we're in the age of technology, where I think our committee has benefited from your testimony. Without this technology, obviously, we wouldn't have been able to hear from you.

Our committee has been given the mandate, as you may know, to review the measures that were put in place after September 11. We put in anti-terrorism legislation, and part of our mandate now is to review some of those sections. Some would say that Parliament acted very quickly after September 11, and hence the need for review, maybe the need for some sunset clauses.

Within our legislation we're finding, I think, as a committee, that much of the controversy is around a number of parts of the legislation. We're finding that a lot of questions are asked about our ministerial certificates, where people can be detained and evidence can be given of which they are not privy to the evidence. They can be held basically without charge.

You talk a little bit about policing powers. You're third point was on counterterrorism policing powers. Maybe you can tell me a little about the certificate process in Great Britain.

I'm also wondering if you can tell me about your accountability measures. You have the legislation. For example, how do you hold some of the commissions accountable? How do you hold the independent reviewer, perhaps, accountable? What accountability measures are there?

As an aside, as well, can you tell me a bit about the role of the Special Immigration Appeals Commission, just for my own interest? I wonder what mandate that group has.

Prof. Clive Walker: Thank you. There are obviously a number of questions in there. Let me start with your question about counter-terrorist powers.

I mentioned the special powers of arrest without warrant, from which flows a period of pre-charge detention in a police station. That has a history going back to 1974. There has been a power of this kind since then. When it was first enacted in 1974, the power talked about an arrest without warrant on reasonable suspicion that a person is involved in terrorism—commission, preparation, and so on, of terrorism.

The special detention powers that flowed from that was seven days. Back in 1974, that was in connection with the attempts to deal with Irish terrorism, particularly republican terrorism. Activities such as the bombing of pubs in Birmingham were what really triggered that legislation. Since 1974, it has been amended a number of times. I would point to two significant amendments.

First, it was recognized there should be greater safeguards for the suspect during that period of detention, because it creates the possibility for police abuse, either intentionally or unintentionally. So a number of safeguards were instituted. One of the most important is that the police have to go before a judge after four days in order to verify that there is a need for the investigation to continue. So it's no longer based wholly on police authority.

One of the safeguards you were asking about—accountability—is in terms of accountability to a judge. There are other forms of safeguards, which have been enacted particularly in Northern Ireland.

Sorry, did you want to raise a question there?

● (0920)

Mr. Kevin Sorenson: I wanted to ask if that judge had special clearance, if that judge was different from many other judges. How many judges do you have in Great Britain these police could go before, and what kind of clearance do they have? Presumably as they're given the evidence dealing with terrorism, it would be very classified information. I'm wondering how many judges there would be there.

Prof. Clive Walker: The number of judges is relatively limited. The number of arrests in contemporary times is actually quite limited.

At one time during the conflict in Northern Ireland, there were hundreds of arrests every year. Obviously, that would make it quite difficult logistically for just one or two judges to be involved. But given that now we're in the realm of dozens rather than hundreds, this job is confined to a handful of judges.

I haven't details on their security clearance—it hasn't been published—but I would strongly suspect there have been more than usual security checks, shall we say. I'm sure all judges are security checked to some extent, but I would suspect there is more than usual security checking on this handful of judges. So you're talking about probably no more than two or three judges who are active for the whole of England, a couple in Northern Ireland, and one or two in Scotland. So I don't think there is much of a problem about the security of the evidence.

Does that help your question?

Mr. Kevin Sorenson: Yes. Thank you, sir.

Prof. Clive Walker: The other area of safeguard that I would like to mention is particular to Northern Ireland, where, after a whole series of allegations of abuse of prisoners—we're talking about physical abuse as well as mental forms of oppression—a system was set up of an independent commissioner who would actually go into the police stations, into what were called the holding centres, and check on the welfare of prisoners, ask them questions, and would be allowed to witness the interrogations that were going on. So those were the safeguards.

I mentioned a number of other changes to these pieces of legislation. The other change that I think is important was made in 2003, which I think was particularly made with international terrorism in mind. Some of the difficulties caused by international terrorism include, for example, the difficulties of interpretation—that the suspect speaks a different language, and perhaps a rather unusual dialect of that language; the difficulties of liaison with foreign police forces—we have a suspect who has links with, let's say, Pakistan, and we need to check the antecedents of this person with the police in Pakistan. Because of all those difficulties, the period of detention was extended from seven days maximum to fourteen days maximum, and there have been just a handful of cases since 2003 where suspects are held for that kind of period.

I should add that it is currently proposed in the terrorism bill that is now before my own parliament, the United Kingdom Parliament, that the period of detention should be three months and not fourteen days. That, I would say as objectively as I can, is a fairly controversial proposal that, to a number of commentators like me, is really disproportionate to the operational needs of the police. Any operational difficulties they have can be handled in different ways.

So that, I think, is my potted history of the powers of arrest without warrant. I could now move on to some of your other questions if that satisfies your queries.

● (0925)

The Chair: I am going to ask Mr. Ménard now to begin questioning.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): A lot of people here think that terrorist activities are already illegal under the common law and that the legislation which was passed was really intended to show the people that Parliament was doing something to protect them against the risks of terrorism.

Do you, in fact, consider that this legislation has been very useful to fight terrorism and that, if we had not passed it and had just settled for the existing legislation, we would not have been able to get the same results in fighting terrorism?

[*English*]

Prof. Clive Walker: Thank you.

First of all, I would make the point that I accept that these acts—certainly the United Kingdom legislation, and I'm sure the Canadian act—do in fact serve symbolic purposes, and that there is an element here of denunciation, also of public reassurance and being seen to take action against terrorism—social solidarity, if you like. Legislation serves those purposes. That implies, of course, that maybe the legislation does not serve the purposes of utility; it has no apparent effect.

On that point I would say the picture is more mixed. There are certainly some parts of the legislation in the United Kingdom that really have very little effect, that have not been invoked, for example, and do not seem to serve many purposes beyond the purposes of symbolism and reassurance and social solidarity. I think you might level that argument, that charge, against, for example, some of the provisions about proscribed organizations, the banning of terrorist groups.

One should not imagine, of course, that to be an active member, let's say, of al-Qaeda does not involve a variety of serious offences that can be charged even in the absence of a dramatic declaration that to be a member of al-Qaeda is an offence. So we find that those types of offences, those types of provisions, I would say, are primarily symbolic, and there have been virtually no convictions for any of those offences in Britain going back even to 1974.

I also, I think, share your observation that a great deal can be achieved in terms of counterterrorism activity by reference to existing law, what we might call "normal" law, outside of special legislation, the Anti-terrorism Act of 2001 in Canada or the various pieces of legislation that I talked about. When terrorists carry out bombings and they plot to carry out bombings, they are plotting murder; they are plotting serious offences involving explosions. We don't need any of this special legislation to deal with such activity, you might say. In that, I share your observations.

Having said all of that, however, I do accept in principle a need for special anti-terrorism laws. The reason I accept in principle is that the techniques and the operational difficulties caused by terrorism are not entirely the same as the operational difficulties caused to the police by, let's say, domestic violence or shoplifting. There are certain features of terrorism—its sophisticated organization, nowadays the fact that it has global reach—all of which involve operational difficulties that should be addressed by legislation. I don't rule out, for example, the idea of a special power of arrest without warrant. I do find it very difficult to justify a power of arrest without warrant that then triggers a detention period of three months. Perhaps a detention period of seven days or fourteen days may be more acceptable.

But the fact that we are dealing with serious crimes here, very serious organized crimes, that may result, as happened on July 7 in London this year, in over 50 deaths, does give us some pause for thought as to what the operational difficulties are and the need to deal with what I might call anticipatory risk, in this case. Whilst it might be acceptable to allow the law to take its course, as it were, with shoplifters, who don't really cause very serious harms, and to allow people to arrest after the event of shoplifting, it's less so, perhaps, in the case of people who plot to kill 50 people—

● (0930)

Mr. Serge Ménard: I'm sorry to interrupt you, but maybe we could go to a more specific thing. My English is not as good as my French, but anyway I'll ask in English.

Could you make the comparison with the fight against organized crime? Obviously shoplifting and even murder out of jealousy are not the same kinds of things to fight, but maybe we could compare the laws we have against organized crime, or the way we apply the law against organized crime, and the laws as we apply them to terrorist organizations.

Prof. Clive Walker: I again share your point. I see a number of parallels between organized crime and terrorism. We indeed see parallels in the legislation between organized crime and terrorism, particularly with a focus on the financial aspects of both terrorism and organized crime. To that extent at least, there are parallels.

I think, however, that there are some significant differences, which again give us pause for thought as to whether we've captured all of the necessary provisions within the legislation, if we simply say that whatever applies to organized crime is sufficient.

As you said, some of the difficulties relate to the motivations of terrorism, which may make it rather less predictable on what the points of attack might be. They are motivated by wider political goals, for example, rather than the wish to make money.

The networks are rather different in the case of terrorism and are probably more amorphous in the case of terrorism. If we're talking about al-Qaeda, then they are about organized crime.

[*Translation*]

Mr. Serge Ménard: In England, as part of the fight against terrorism, which has been the longest incarceration of a detainee without charges being laid?

[*English*]

Prof. Clive Walker: When you say "imprisonment", I think we need to distinguish between two processes.

The first process is on how long the police have held people without charge before they charged them and brought them before a court. As I mentioned in reply to the previous question, the maximum period of detention is now 14 days, and I think that has been used to the extent of 13 days on at least one occasion since 2003.

We then have a second question on how long people have been held pending trial before courts, which can be longer than that and can for be a year or so.

Could I also mention a third possibility? In the United Kingdom, until earlier this year, we had a process of detention without trial that existed for foreign terrorist suspects. It couldn't be applied to British citizens, but it could be applied to foreigners suspected of terrorism. I think 15 or 16 people were subjected to that process, and virtually all of those 15 or 16 people were held from some time towards the end of 2001 or early 2002 until 2005. In other words, they were held for three or four years without trial under those provisions, which were in the Anti-terrorism, Crime and Security Act.

● (0935)

[*Translation*]

Mr. Serge Ménard: Earlier, you spoke of abuse but you simply referred to brutal activities at police stations. I would like you to talk about abuses of the legislation or arrests which would have been made under that legislation.

[*English*]

Prof. Clive Walker: I suppose that abuse of the legislation would occur when the police are arresting people who really cannot in any sense be conceived of as terrorists and they are using it for purposes wider than terrorism.

The answer to that is yes, such abuses have occurred, primarily in what I could call relatively low-level policing, for example, with powers of stop and search. There are very wide powers to stop and search, without any reasonable suspicion, under a provision in section 44 of the Terrorism Act.

This has been used on a number of occasions against what I would see as political demonstrators. For example, peace protestors or environmental protestors have been subjected to section 44 in circumstances where there can really be no reasonable suspicion that they were involved in terrorism. Unfortunately, section 44 doesn't require reasonable suspicion. Whilst I can't say the exercise in those cases was unlawful, I would share the word that you've used, which might be that it is "abusive".

The Chair: Okay, thank you very much.

Mr. Serge Ménard: *Merci beaucoup.* Thank you very much.

The Chair: Thank you, Mr. Ménard.

Mr. Comartin, please.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you, Professor Walker, for giving us your time.

Without being rude, I'm always interested in the bias that individuals bring to their position on this type of legislation, I think, in particular. I see from your teaching background that you've taught both civil liberties and terrorism and the law, items around police power.

Could I ask you what your position is on the House of Lords decision? I don't know if it was in December 2004 or January 2005 when they struck down part of the anti-terrorism law. And could you position yourself on the civil liberty side, the centre, or pro anti-terrorism legislation?

Prof. Clive Walker: Perhaps I could answer your pertinent question about my background and my biases. I suppose I should say in a post-modern world we're all subject to our biases.

My own position is as an academic. I am independent of all the groups concerned, you might say. I have in fact worked both with civil liberties groups and also with official civil liberties groups, including in Northern Ireland, the Human Rights Commission. I also work with the police. I have, for example, given seminars to the Anti-Terrorist Branch of the Metropolitan Police Service and I am sometimes asked for my advice on both sides in cases of pending litigation, in cases of pending prosecutions.

So I think my position is relatively catholic, if I could put it that way. I wouldn't like to say it's unbiased in the sense that of course we all have our backgrounds and our interests, but I have worked, as it were, for both sides of the argument, and I think I have put my viewpoint fairly dispassionately in a lot of books and papers.

Where do I stand on the spectrum between policing and civil liberties? I stand for both, I think is the answer. I believe in civil liberties. I have taught civil liberties, but then the police believe in civil liberties and the government believes in civil liberties. In our country, following your great tradition of the Canadian charter, in 1998 we passed the Human Rights Act, which makes it official policy to believe in human rights.

And I spent a lot of time after that act was passed giving seminars to police forces about how they should adopt this philosophy of human rights and how it would actually not stand in their way of policing but would make them better police officers.

So I don't necessarily see a conflict here. One of the greatest rights that we have is the right to life and the right to security, and I have therefore argued in my book and in my papers that I have no objection, in principle, to special anti-terrorism legislation. In that I differ from some of my academic colleagues who argue there should be no special legislation. I do not adopt that view. As I indicated in reply to the previous questions, terrorism brings its own special operational difficulties that should be addressed by legislatures.

● (0940)

Mr. Joe Comartin: And your position on the House of Lords decision?

Prof. Clive Walker: I would say, as a technician, as it were, as a legal analyst, that the House of Lords decided against the legislation on quite sound grounds. Those grounds related actually to the discriminatory impact of the way in which the legislation was framed and the way in which it was operated.

The House of Lords did not actually say, although doubts were expressed on the point, that there was no emergency facing the government, facing the United Kingdom, that would not justify any special anti-terrorism measures. It was simply saying that the measures that were passed were framed and applied in a discriminatory way, and I think I would agree with their analysis on that point.

Mr. Joe Comartin: Just to pursue that, do you have any opinion on whether the present amendments, which are proposed and working their way through the House in the United Kingdom, are going to face a successful challenge under the Human Rights Act or the European charter?

Prof. Clive Walker: I think there are a few provisions that certainly will be challenged and are in grave danger of being successfully challenged. Two I would pick out. It is quite a lengthy bill. I have it here. It is 38 sections, so I won't go through every section, but let me just pick out two measures that I think are the most controversial.

The first is clause 1 of the bill, which is about encouragement of terrorism. I don't think it is wrong on the part of the government to seek to try to stop forms of incitement to terrorism, forms of speech that incite people to commit terrorist acts with the intent that they should do so. I think it is justifiable to have an offence of that kind. I would say we probably already have sufficient offences, but if you want to encapsulate it within a new offence, then so be it.

I would say, however, that clause 1 goes well beyond what I have just set out. The forms of indirect incitement, or "glorification" as it was at one time designated, go beyond that idea and I think can run into the difficulty that they will breach freedom of expression provisions under the Human Rights Act and the European charter.

The other measure, which I've already indicated, is that the government now proposes that detention following a police arrest might be for a period of three months and not, as it currently is, fourteen days. I think even if a judge periodically reviews that period of detention, the Strasburg court, which is used to forms of continental investigations in which a judge is in charge of the investigation and therefore the suspect is really in the judge's hands and not the police's hands, will not be satisfied with the safeguards of a periodic judicial review of the detention and might well strike down this provision as in breach of the right to liberty.

● (0945)

Mr. Joe Comartin: We're looking at alternatives, as part of this committee's study, to our security certificates. One of the proposals we've heard has been to use the methods, rather than of incarcerating suspects—since they're only incarcerated, without any charge, or at least any charge they're aware of—of house arrest, electronic monitoring bracelets, that kind of device. Do you have any sense of where the House of Lords is as to eventually either accepting that methodology versus incarceration, or again, striking it down?

Prof. Clive Walker: Following, of course, the adverse House of Lords judgment in late 2004, the British government enacted a provision along those lines, as you might be aware, in the Prevention of Terrorism Act 2005, called control orders. We haven't as yet had any litigation about these control orders for me to be certain as to what the results will be.

I would comment this. You have a kind of sliding scale under our legislation. The forms of restraint that can be imposed can be very light or very heavy, all the way from perhaps a provision that says "don't meet a certain person" through to house arrest. As applied, they have been at the higher end, at the house arrest end. Interestingly, the government has applied these provisions without derogating from the normal rights to liberty under the Human Rights Act or the European charter.

I rather think the European court will strike down forms of house arrest without derogation. In terms of whether derogation would be allowed, I think that raises a wider question as to whether you think there is an emergency affecting the United Kingdom brought about by threats of terrorism.

I mentioned that the House of Lords, back in late 2004, gave indications that they were doubtful about that proposition, but they did not actually pronounce finally on it at that time in 2004. The fact that we've had some very serious bombings may in fact strengthen the government's case.

The Chair: Thank you very much.

I'm going to jump in and move our questioning to Mr. Wappel, please.

Mr. Tom Wappel (Scarborough Southwest, Lib.): Thank you, Mr. Chairman.

Good afternoon, Professor.

I have just a few questions. You've said a few times you accept the need for anti-terrorism laws in principle. I want to ask you if we could move from in principle to in fact. I wanted to know if you accept in fact the various pieces of legislation you outlined at the beginning of your presentation, specifically the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, and the Prevention of Terrorism Act 2005? I recognize those acts have numerous sections, and you may have a bone to pick with one or more of them. But as they exist on the books now, do you support those specific acts in general?

Prof. Clive Walker: I would say I support them in general. I support the model of actually having quite wide provisions about terrorism. Whether you actually use them in a given case, I think, must be judged on grounds of proportionality and necessity. But the idea that you can have a state, such as the United Kingdom or maybe Canada as well—but you know better on that score than I do—that does not face up to the challenges of terrorism by having legislation designed to deal with it, I find extraordinary. We have special laws dealing with fraud; we have special laws dealing with rape. Why would we not have special laws dealing with terrorism?

Mr. Tom Wappel: Professor, speaking of Canada, have you had an opportunity to review our act and study it in any detail?

Prof. Clive Walker: I have. I wouldn't like to profess I know as much about it as I know about the United Kingdom provisions, but I have reviewed the measures. I find a lot of it, you might say, run of the mill in the sense that it is meant to enforce international conventions. One finds quite a lot of legislation throughout the world—when they talk about their anti-terrorism code—that in fact enforces international conventions about hijacking, the use of nuclear materials, and so on. I think a fair part of your legislation is like that.

I would pick out two measures that strike me, shall we say, neutrally—because I was accused of bias earlier—as interesting to an academic commentator such as me. The two measures are in section 83.28, investigative hearings, and secondly in section 83.3—I don't know what you call these—the peace bonds or entering into a recognizance.Those are quite unusual. I commend the Canadian Parliament for its inventiveness in those regards.

● (0950)

Mr. Tom Wappel: Thank you, Professor.

As you know if you've reviewed our act, it provides for a review by Parliament, which of course is why this committee was formed and why we're speaking to you today. Do any of the U.K. acts you've referenced have review mechanisms? And if so, who or what reviews them?

Prof. Clive Walker: Yes, they do have review mechanisms. Those review mechanisms are both on the face of the act and have been accepted, if you like, by convention, by practice. The review on the face of the act in a section or sections of the act, I'm sure Lord Carlile, who I understand is also speaking with you, can explain further, because he is the official reviewer of the legislation. There is a section in the statute that says there shall be annual reports to the government as to how the act is being enforced and whether there is any need for reform of the act. So Lord Carlile has produced an annual report and a number of other special reports on this piece of legislation. They're published, they're taken quite seriously, and I think that is an important mechanism.

I've got arguments with Lord Carlile about this. Lord Carlile, of course, is a very fine fellow whose credentials I would not wish to question, but I have argued that it might be useful to have not only a panel of one, who each year reviews this legislation, but perhaps a panel of two or three. My argument is that a panel of two or three could involve people who are appointed from time to time, therefore getting a fresh look from time to time at the legislation. The danger with Lord Carlile is that he's seen it all before, and some of his reports repeat what he's said in earlier years. So I think the system is good and Lord Carlile has done a very fine job, but that's not to say the system couldn't be better.

The reviews that take place by practice or by convention, as I said, are reviews by parliamentary committees akin to your own parliamentary committee, that almost every year now.... For example, the Home Affairs Committee of the House of Commons, or the joint committee shared by the House of Commons and House of Lords on human rights, have also investigated how special anti-terrorism laws are being used. I think their reports have also been very important and very useful, in addition to Lord Carlile's report.

Mr. Tom Wappel: Thank you very much, Professor, and thank you, Mr. Chair.

The Chair: Thank you.

Mr. Cullen, please.

Hon. Roy Cullen (Etobicoke North, Lib.): Thank you, Mr. Chair.

Professor Walker, thank you for participating in this meeting.

I wonder if you could help me refresh my memory in terms of what is available today in the United Kingdom to deal with foreign nationals who pose a risk to society in Great Britain. You mentioned the 2005 act, I think you called it the anti-crime or anti-terrorism act, which disappeared. You mentioned control orders that seem to be in effect now. Does that include detention? I'm thinking about the parallels in our country, where we have security certificates—this has raised some controversy in this country—under which foreign nationals who pose a risk to Canadian society are detained. We call it a three-walled detention centre, because they are free to leave Canada at any point in time, recognizing that this sometimes creates some difficulties if they have a place that they argue is no safe harbour for them. Nonetheless, during the time they pose a threat to citizens, they are detained.

What is available now in the United Kingdom to deal with that sort of issue?

● (0955)

Prof. Clive Walker: I will give you a very brief description of where we've reached. The starting point was that Britain also had what we called “the prison with three walls”, which was in the Anti-terrorism, Crime and Security Act 2001 and allowed the Home Secretary to detain foreign terrorist suspects indefinitely without trial. As I mentioned earlier, there were approximately 16 or 17 people who were detained for approximately three or four years under that provision.

Along came the House of Lords, our supreme court, which in December 2004 said that this provision breached human rights—the rights against discrimination. Under our system, the House of Lords can't actually strike down the legislation. But it is a very powerful statement, which I think the government would wish to comply with.

The result was that the provisions about detention without trial were repealed in April 2005 and were replaced with control orders under the Prevention of Terrorism Act 2005.

The provision for control orders differs from detention without trial in two important respects. The first is that it doesn't allow for detention—not detention in a prison, anyway—but it does allow for house arrest and for quite serious incursions into your liberty. You might , for example, be ordered not to have a computer. You might be ordered not to have a bank account. You may be subject to curfews. You might be required to report to the police station three times a day. All of that is possible.

The other significant difference is that it applies to British citizens as well as to foreigners, as was the case of the detention without order trials. I understand that one or two control orders have been issued against British citizens. We're not sure of the details, because anonymity tends to apply in these cases.

There were approximately 10 or 12 control orders issued when the Prevention of Terrorism Act 2005 came into force. Those orders against foreigners have now all been repealed. The reason they've been repealed, I understand, is that all of those foreigners have now been rearrested with a view to deportation.

The government is actively pursuing the idea of entering into memorandums of understanding with foreign countries such as Algeria and Jordan and Egypt, which are the nationalities of the people now in detention pending deportation. That, of course, is a very controversial policy as well.

Hon. Roy Cullen: Yes, thank you.

So right now that is the government's response to individuals who are felt to pose a threat to British society.

One of the criticisms of the security certificates here in Canada—which, by the way, have existed for a long time under our immigration and refugee protection legislation but have been scoped into the review of our anti-terrorism regime—is the fact that an individual has a right to counsel, and they're given a summary of what they're being detained for, but to protect national security sources, not the sources....

It has been suggested that to beef that process up and to provide a little more transparency, an independent council—an amicus curiae—would be sworn to secrecy to help in that process, and the argument is to create more fairness.

I understand you did have that system in the United Kingdom, where I'm told it's had mixed results. I wonder if you could comment on that.

Prof. Clive Walker: We enacted a provision called the Special Immigration Appeals Commission Act in 1997. This commission, SIAC, deals with deportations on national security grounds where there is concern about revealing the full extent of the information about those national security grounds to the deportee. This was set up for immigration purposes but has since been adapted for anti-terrorism purposes as well. For example, those who were subject to detention without trial appealed to this commission because it was a very convenient body for keeping the information secure.

We have a system of an independent commission, which is headed by an independent judge. It's special in the sense that the evidence is kept away from the suspect, which would not of course normally be the case in open proceedings.

The compromise that has been adopted is to appoint what is called a special advocate. The special advocate is an independent barrister. Most of them are immigration experts, actually, who apply to be appointed as special advocates. No doubt they are again security checked. They are allowed to see the totality of the evidence being put before the commission, the evidence on which the deportation is to be based, but they do not reveal it to their client—or their quasi-client, as it were—and they're not allowed to speak to the client about what the evidence says.

● (1000)

Hon. Roy Cullen: How is that system working? That was my question. Has it been well received? Is it working well?

Prof. Clive Walker: I think the general view is that it's working as well as it can in very difficult circumstances. It is clearly not wholly satisfactory that we can't have open justice in these cases, but I think it has been viewed as a satisfactory compromise by the courts in this country and also, I would add, by the Strasbourg court. The European Court of Human Rights has viewed it as a satisfactory compromise as well. Whilst I wouldn't say we exactly welcome this move because it does get in the way of due process to some extent, we think it is perhaps the best compromise we can find for the moment.

The Chair: Thank you very much.

Lord Carlile is waiting for us, but I want to allow my colleague Mr. MacKay the last bit of questioning.

Mr. MacKay.

Mr. Peter MacKay (Central Nova, CPC): Thank you, Mr. Chair, and thank you, Professor Walker.

Much of the ground, I think, has been tilled, but I would like to come back to one of the principal roles of this committee. That is the examination of how we improve upon this process or ensure that it is in compliance with our Human Rights Act. One of the differences that exists right now in your country is this additional oversight mechanism in your Parliament.

Also, we're going to be hearing from Lord Carlile as an independent reviewer.

First of all, my question is, is the independent reviewer linked to the parliamentary oversight in Great Britain, and how do you view that particular process as helpful to the shepherding of the legislation and the overall oversight that's provided by Parliament itself?

Prof. Clive Walker: The answer to your first question is that the independent reviewer, Lord Carlile, is not formally or legally linked to the parliamentary committees I mentioned. They have self-tasked themselves, if I could put it that way. They are of course as independent as you are as to which subjects they would like to investigate, but because counterterrorism legislation has been so prominent as an issue in the United Kingdom, certainly over the last five years, they have picked up on it as being an important issue they should not ignore.

The second question was, what is the impact of this type of inquiry? I think, first of all, it's very helpful to have an annual inquiry. I was, again, somewhat taken aback by Canadian legislation that has left long periods without any form of independent oversight being triggered. We would certainly not see that as adequate in the context of British legislation. I think the constant monitoring is helpful.

I think the other aspect of this form of inquiry is the ability to garner independent evidence, to take statements from witnesses, to talk to interested parties, and to bring forward, shall we say, a more expert and reasoned opinion than is sometimes possible—with the greatest respect, speaking to members of Parliament here—in parliamentary debate, which I would suggest tends to be rather more partisan, so we have the evidence on which to base debates. I do find the evidence from these inquiries being used as important bases for points made in debates, and that is all very helpful.

● (1005)

Mr. Peter MacKay: You've provided us with some information about your observations and predictions, if you will, as to what may happen through the courts, and you told my colleague Mr. Wappel that you'd had occasion to examine our anti-terrorism legislation.

I guess this is a bit of an academic or analytical question, but can you give us an idea as to how you feel our legislation would hold up in the European context? That is, how would the British or European courts view in particular the security certificate process? You have a similar process, your security of state certificates, which allow for this lengthy period of detention. In particular, if you could, focus in on the difference with Canada, where we differentiate in a very real way between full-fledged Canadian citizens and those who are under deportation orders or those who are seen as foreign nationals.

Prof. Clive Walker: Ultimately, the provision we see as having some parallels in Britain was struck down by the House of Lords in December 2004. It was declared to be incompatible, to put it more accurately, with human rights provisions. I do see parallels there with your own Canadian provisions in that we both seem to be talking about detention with three walls and a form, therefore, of discrimination—which was the core of the judgment in the House of Lords—a form a discrimination between those terrorist suspects who happen to be foreigners and those terrorist suspects who are not foreigners.

Unfortunately, we know that some of the terrorists in Britain are not foreigners. The July bombings certainly proved that point to us if we had any doubts.

So if similar legislation were to be re-enacted in Britain or we were to somehow transpose our supreme court to Canada, I think those arguments might well be used against the Canadian legislation. We responded to those arguments with what we now have, which are control orders that don't amount to detention but do amount to the restriction of liberty and can apply both to foreigners and to citizens.

Mr. Peter MacKay: I have one last question, Professor, and my colleague alluded to this earlier. Do you believe there is merit in having judges cleared and specifically trained in the area of terrorism for the purposes of their role in the entire system, their judicial role of oversight, of decision-making?

Similarly, should we have special prosecutors and defence advocates as well, people well versed in the subject? We do this, clearly, in family law, we do it in business law, and we do it in all sorts of other areas of the law. Is that where we're headed, given the sophisticated nature of both the legislation and the actions of terrorists?

Prof. Clive Walker: That's a good point. How many judges you wish to train would depend, of course, in part on how many of these cases you have.

We have in Britain, and more particularly in Northern Ireland, quite a range of business going through the courts. Just as you say, we have special courts dealing with commercial matters or family matters. So it is helpful to have special protocols, special training, dealing with terrorism matters too, not just from the point of view of security vetting, but also so the judges can understand the background, for example, if they're dealing with the review of detention by the police for a period, whether it's seven days, fourteen days, or three months, so they understand, for example, some of the psychological pressures that arise through the very length of that detention, no matter what the police are doing to the person—I'm not here accusing the police of brutalizing or anything like that—so they understand that a three-month detention period has its psychological impacts as well as having other dangers. So have training, certainly, a specialist bar, certainly.

● (1010)

The Chair: Thank you, Mr. MacKay.

Thank you very much, Professor Walker, on behalf of the parliamentarians here and our committee. We want to express our deep appreciation for your making your time available this afternoon in England for our committee. We appreciate your insightful and intelligent observations and contributions to our committee.

We're going to take a short recess and prepare for Lord Carlile.

Thank you again, Professor Walker.

● (1015)

The Chair: I now reconvene the meeting.

Good afternoon, Lord Carlile.

Hon. Lord Carlile of Berriew (As an Individual): Good afternoon.

The Chair: We appreciate your spending some time with our committee.

As you know, this committee is reviewing the Anti-terrorism Act. We've just received one of your colleagues over in Leeds, Professor Walker, who testified before our committee just moments ago.

So we thank you very much for appearing before our committee, and we would invite you to make some opening comments, if you have any, please, sir.

Hon. Lord Carlile of Berriew: I would like to. It might be helpful to your committee if I tell you what I do and a tiny bit about my background, to know why I do it. Would that be helpful?

The Chair: Yes, thank you very much. Please go ahead.

Hon. Lord Carlile of Berriew: I was appointed as the independent reviewer of the Terrorism Act 2000, our main item of terrorism legislation, actually, by coincidence, on September 11, 2001, and I have become the reviewer of additional legislation passed since then. The press sometimes calls me the watchdog of terrorism legislation over here. My basic job is to report on the operation or the adequacy for purposes of counterterrorism legislation in the United Kingdom.

I have a new responsibility, given to me earlier in 2005, and that is to prepare reports on the effect of government proposals for further legislation against terrorism. I have recently published one of those reports, pending the introduction of the Prevention of Terrorism Act 2005, on October 10. My reports are presented to the Home Secretary, but he has to publish them whether he likes them or not, and they are routinely published.

My background is that I am a lawyer. I'm a specialist criminal advocate. I particularly specialize in financial crime, though I deal with other aspects of serious crime. As well, I chair a barristers' chambers. I'm head of a barristers' chambers of 78 advocates in London.

I was a member of the House of Commons as a Liberal Democrat MP for 14 years, from 1983 to 1997, and I've been a life peer—that is to say, a member appointed for life—of the House of Lords since 1999.

It's with that mixed and broad background that I was asked to be the independent reviewer of terrorism legislation.

The only other thing I would add by way of introduction is that—and I would say this, wouldn't I?—in my view, having an independent reviewing mechanism, the reports of which have to be published, is a useful discipline for government. They can accept or reject what I say, but at least it helps to focus the debate, especially as I am able to see a lot of closed material, secret material, that other people do not have the opportunity to see.

I hope that will suffice as an introduction.

The Chair: Yes, it does. Thank you very much.

Now we will put a round of questions from colleagues at our table here, sir. I'd first invite Mr. MacKay to ask you some questions.

Mr. Peter MacKay: Thank you, Mr. Chair.

Welcome, Lord Carlile. We very much appreciate your presence and your taking the time to speak with us today.

Hon. Lord Carlile of Berriew: Thank you very much. I'm only sorry not to be in Ottawa, a city I like very much.

Mr. Peter MacKay: You're always invited. We'd love to have you here.

I understand your home is in Wales. Is that correct?

Hon. Lord Carlile of Berriew: My home is in Wales. That's correct.

Mr. Peter MacKay: Well, your rugby club is having a good year.

● (1020)

Hon. Lord Carlile of Berriew: Yes, very good.

Mr. Peter MacKay: I want to begin where you just left off, and that is with the ability you have to examine what we would refer to as operational details of our security agents from time to time. What, if any, obligation are you under to try to strike that balance between disclosure and penetrating questions, obviously, around the performance and the use of that information? I suspect that must be sometimes a very challenging role for you because of the obligation you have to protect the public and to see that the balance is struck.

I would also like to know a little bit more about the reporting mechanism that you have to Parliament. Is it directly to Parliament, or is it to a minister or to the Prime Minister?

Hon. Lord Carlile of Berriew: If I could deal with the last question first, because I think it comes first in terms of the way I function, I am appointed by the Home Secretary, so I report to the Home Secretary.

I write about four reports a year—and it varies slightly, because I've written an additional one this year. One is specific to Northern Ireland. One relates to the largest terrorism legislation we have, the Terrorism Act 2000, and there are usually two others. They are submitted to the Home Secretary. I ask the Home Secretary's office to check them, but only for factual accuracy, because I don't want to make factual mistakes. Also, I am anxious that I should not reveal in my reports anything that might damage national security. I am privileged to be able to see material that concerns national security, but I know that I cannot reveal it, save with consent, and that's a given.

The Home Secretary's office then looks at the reports. I would imagine that he and his private office probably read them before they're published, because they have the advantage of possessing them, but they are published generally very soon after I write them. The date of publication always depends upon whether Parliament is sitting or not, because for procedural reasons they can be published only when Parliament is sitting. I'm sure you, too, have arcane parliamentary procedures.

Mr. Peter MacKay: We do, indeed.

Hon. Lord Carlile of Berriew: So far as the use that is made of material is concerned, I consider it very important for me to be able to replicate the work of others.

For example, if the Home Secretary makes what is called a control order under a particular act of Parliament to restrict the movement of a suspected international terrorist, I insist on going through exactly the same exercise as the Home Secretary. I literally look at the same file, review the same material, and call for further papers if I want them.

But I would take it as my responsibility to give a general description of what I've done rather than a particular description. This does create problems because there's always a trust gap between those who see things and those who aren't able to see them, so they have to trust those of us who do—and of course, they won't always do so, and that's just part of the territory.

Mr. Peter MacKay: May I ask you, in terms of your powers of office, do you have investigatory powers? Can you compel evidence or witnesses? Can you investigate complaints that might take you quite far afield?

And if I could, I'll tack on another question—that is, your relationship to the parliamentary oversight, which is something we're wrestling with in this country, as we currently don't have a similar body that provides oversight for our security forces.

Hon. Lord Carlile of Berriew: So far as the parliamentary oversight is concerned, I give evidence to the multiplicity of parliamentary committees that can look into these issues: the Home Affairs Committee, which I take to be the equivalent of your committee today; the Constitutional Affairs Committee; the intelligence affairs committee; the parliamentary joint select committee on human rights—to name but four. There may be others. I give evidence to all those committees, not as a matter of course, but whenever they request me to.

As to my powers, my responsibilities are stated very generally in the acts of Parliament under which I am appointed, though mine is a statutory appointment. I have to report on the operation of the legislation.

Nobody has ever tried to stop me from doing anything. If they did, and I thought it was important, I would of course resign at once. But hitherto, I have asked to see material; I have spoken to whoever I wished to speak to; I've occasionally had to ask for guidance as to whom to speak to; I've had access to other government departments; and I've been able to go and make comparisons abroad with other jurisdictions. For example, I was with the celebrated Judge Bruguiere in France yesterday morning.

● (1025)

Mr. Peter MacKay: I suspect—and it's what we were told as a committee while visiting your country and meeting with the parliamentary oversight committee as well as the heads of various security agencies, including MI6 and your internal security forces—that as a result of your country's history in having to deal with terrorism, arguably for much longer than most countries, a trust has developed between your office and the offices of the parliamentary oversight members, and this is critically important when it comes to the ever-present need to ensure that sensitive information that might imperil ongoing investigations is protected while at the same time you are wearing that very real obligation to ensure that civil liberties are not being abused.

Is that a fair statement?

Hon. Lord Carlile of Berriew: If I may say so, I think that puts it extremely well.

A part of my responsibility is to try to weigh the balance between the civil liberties of the great majority of people, who want to go to work on the tube in London without being blown up, and the civil liberties of those who may be suspected wrongly—or rightly, for that matter—of having committed criminal offences. That is a very difficult balance.

I believe that my office does have a significant degree of trust. I'm sure I would know if it didn't. I can only speak for myself, but if I felt I had lost that trust, then I would feel there was no value left in the role I carry out.

Mr. Peter MacKay: It's a very high standard to achieve, and the consequences are grave, of course, if the balance is not struck.

Can I ask you, Lord Carlile, if you might explain to us a little bit more about your Secretary of State certificates, which are akin to our security certificates? This seems to be by far the most controversial element of our anti-terrorism legislation. Similarly, I suspect this is an area that has received a great deal of focus, and of course it has gone to the courts. It's going to our court, to the Supreme Court of Canada. As I understand it, now the standard is three months.

As far as the determination of the individual and the actual threat to national security is concerned, can you talk a little bit about how that standard is set, and what, if any, information is given to detainees? This appears to be the area that is most troubling for many civil libertarians in this country, the aspect of disclosure—which is mandatory in our normal courts and is of course charter-protected now, since we have had a ruling from the Supreme Court that basically requires the state to disclose all elements of the charge that is made out and any information that has been laid.

Hon. Lord Carlile of Berriew: I think in your question you may have elided two different issues, actually. If I can start with what I thought you were starting your question about—

Mr. Peter MacKay: There are two separate processes, I know, one of detention and one the security certificate.

Hon. Lord Carlile of Berriew: Under the Prevention of Terrorism Act 2005, which replaced the Anti-terrorism, Crime and Security Act 2001, the relevant part of which was struck down by the law lords, the House of Lords, the Secretary of State can make control orders against suspected international terrorists. They are not limited by time, but they go through quite a complex court procedure. They're automatically reviewed by a court called the Special Immigration Appeals Commission. It's a division of the High Court of Justice, and it's chaired by a High Court judge sitting with two assessors with relevant experience.

And I think I'm right in saying, from memory, that four control orders out of a total of eighteen that have been made have been varied, but none have been removed totally. The government, however, has chosen to place in custody ten of those eighteen people, who are illegal entrants under deportation procedures—if they're not illegal entrants, they do have permission to remain. One of them is from Jordan, that's Abu Qatada, and he could be deported to Jordan. The other nine are Algerian, and because of article 3 of the European Convention on Human Rights it isn't possible yet to deport them to Algeria, but work is going on to create a memorandum of understanding with Algeria.

Now, the French do deport some people to Algeria. That is all a bit of a muddle at the moment and is being challenged in the courts.

The three months is a separate issue. The government has introduced a bill called the Prevention of Terrorism Bill 2005. Under that bill, it is proposed that the current maximum arrest period of fourteen days should be extended to a maximum of three months, and that during that period it should be supervised by a district judge who is a paid magistrate who normally deals with lower-level cases.

In a report that I published on October 10, I gave the opinion that this judicial protection was inadequate. Having examined some of the evidence, I believe there's a very small number of very serious cases, one or two a year perhaps, where an arrest period of up to three months may be justified, but there must be much stronger judicial control.

One of the things I discussed when I was in Canada a year and a half or so ago was our use of special advocates, and I've suggested too that special-security-cleared advocates be appointed to advise in relation to those detentions.

Finally, on disclosure, which is a very important issue, to generalize the obligation of disclosure in the whole of the United Kingdom, the person who is the subject of a criminal or criminal-type action against him is entitled to disclosure of all material that materially assists his case or materially undermines the Crown's case. It doesn't mean that all relevant material must be disclosed.

So for example, if there is a form of secret electronic surveillance, the technique of which is highly secret, it need not be disclosed unless the product materially assists the subject's case, which is pretty unlikely, because if it did, he probably wouldn't be in the position he finds himself in.

● (1030)

Mr. Peter MacKay: I have a couple of questions in terms of the special advocates, and we are moving in that direction too, I would suggest. On the training for both special advocates and judges themselves, do you feel that this is a critical component of again feeding into the balance that's required, that individuals have specific knowledge of both legislation and practice of terrorism? And how do we do our level best to ensure fairness in the system?

Hon. Lord Carlile of Berriew: If I may be presumptuous enough to use the word “advice”, my strong advice to you would be to only go there if you give the special advocates and the judges very carefully structured training in precisely the matters you've raised. I found in reporting on the role of the special advocates that we had a problem with an inadequacy of training, which meant that however skilled they were, and they're all top-line lawyers, they were not trained in the techniques they needed. That is now being remedied, I hope, and I think it's a key issue.

We did have problems with a special advocate system, and that, I think, was the foundation for the problem.

Mr. Peter MacKay: Thank you very much, Lord Carlile.

Thank you, Mr. Chair.

The Chair: Thank you.

Mr. Ménard, please.

[*Translation*]

Mr. Serge Ménard: Lord Carlile, I see that we have many things in common. I have been a criminal lawyer all the time I practised law. I have also been elected president of the Bar, as former president of the Quebec Bar, and I also met with Judge Bruguière when I was Minister of Quebec Public Safety.

I can see that the interpretation is working well. I always start on a humorous note and I see by your smile that you understand what I am saying.

As a criminal lawyer, I always thought that terrorism was some sort of criminal activity and that in fact all terrorist activities were in one way or another subject to the Criminal Code. It is of course possible to have operational problems as was mentioned by the previous witness, but there again, it seems to me that terrorist investigations are quite similar to those which must be undertaken into organized crime.

Do you really believe that we needed special laws to fight terrorism, and that the laws which have been passed, basically—

● (1035)

[*English*]

Hon. Lord Carlile of Berriew: I do, and I believe so strongly. The opinion you've expressed is an opinion that has been expressed from time to time by Lord Lloyd of Berwick, a retired law lord who, whilst a law lord, was the author of the report that led to the enactment of the Terrorism Act 2000—and I think Lord Lloyd may have changed his mind from time to time.

If I can, I'll just characterize one important difference between terrorist crime and normal organized crime, or what police in Northern Ireland call ODCs, ordinary decent criminals, in a distinction that they make.

With organized crime, it is often possible for the police investigating that crime to leave arrest until very late. Indeed, for example, there was a huge robbery at London Heathrow Airport a couple of years ago—I was involved in the case for a time professionally—in which they allowed the robbery to take place, and they arrested the robbers whilst they were committing the robbery, with the result that in the end most of them pleaded guilty. You can't run that risk with terrorism.

I could point to a number of operations, if I were able to describe them in detail, in which the police and the security services in the United Kingdom have felt they had to intervene very early because of the risk of frightened or nervous terrorists trying to bring an act to fruition much earlier than was originally intended. This means that a great deal of the evidence gathering has to take place after what is sometimes regarded as a premature arrest.

We do not have a law like the French criminal offence of *association de malfaiteurs*, I think it's called, which is a very broad concept that allows for someone to be arrested for any sort of connection with terrorist activity. *Association de malfaiteurs* describes very accurately what it means. It means what it says.

I think what I've said to you is therefore an example of the reasons why special laws are needed. In addition, the protection of national security, in my view, requires some special provisions. Otherwise, one could have complete disclosure, which could compromise the security services in some instances for years if their techniques were made known.

[*Translation*]

Mr. Serge Ménard: I understand. Besides, I have often said, during discussions on this legislation that the difference lies in the fact that we must arrest individuals before crimes are committed rather than wait until after they have been committed.

I should like now to refer to an article which I read in the *The Economist*, a British magazine that you probably know quite well. In the July issue, I believe, or perhaps was it in the August issue, a comparison was made between the anarchists at the end of the 19th century and the beginning of the 20th century and the terrorist groups of today. I'm not sure whether you have read those articles.

[*English*]

Hon. Lord Carlile of Berriew: No, I have not read that article.

[*Translation*]

Mr. Serge Ménard: All right.

Do you believe that your position is essential, if we must have anti-terrorism legislation?

[*English*]

Hon. Lord Carlile of Berriew: I believe my role is useful. I think it is absolutely essential to have some form of independent reviewing or ombudsman system. Whether some—and I think Professor Walker is of this view—are right in saying there should be an institute as opposed to an individual is a matter of opinion.

The problem with institutes, in my view, is that they become institutional, to state the obvious, whereas with an individual, although it may occasionally be idiosyncratic—and I suppose I would have to plead guilty to that from time to time—it's likely to be a little more provocative of thought. There have been independent reviewers before me, albeit on a much narrower front—because as I said earlier, I was actually appointed on 9/11—and they were dealing mostly with Northern Ireland. However, I think they have all proved their value over the years as being individuals prepared to look at issues in a secure setting. I think institutions are more prone to leakage as well, which can cause difficulties.

My view overall—and I would say this, wouldn't I, because I do the job—is that there is a value in having an independent reviewer. There's probably considerable value in having an independent reviewer who is really independent, who doesn't mind very much what people think of his or her reports and is prepared to put the work in to try to understand the territory properly.

● (1040)

[*Translation*]

Mr. Serge Ménard: Could you tell us the size of the staff available to you to carry out your duties?

[*English*]

Hon. Lord Carlile of Berriew: That's an extremely interesting question.

I'm allowed to hire whatever staff I want, and I've never been refused anything. However, because of the material I see, I would feel myself constrained by the type of staff I could use. I have policy advice that I can obtain from anywhere in government. I have somebody who looks after all my arrangements in the Home Office. My chief executive in my barrister's chambers, rather curiously called the senior clerk in the British tradition, looks after all inquiries for me, and he's very accustomed to dealing with confidential matters. I draw on NGOs quite widely; they come to me and I go to them so that we can discuss issues. And if I felt the need to employ additional staff, I have been told I could have them.

In fact, I find I can hunt alone on the whole. It's most effective to make a work program for myself, keep careful notes, and do the work myself, with such research assistants as I need on an as-and-when basis.

I don't believe one needs a large institutional staff to do this job, and indeed I don't do it full-time. I spend about 40% of my professional life at the moment acting as independent reviewer of terrorism legislation. That has increased by about 15% since the London bombings of July 2005.

[*Translation*]

Mr. Serge Ménard: I should like you to tell us now about the abuses of the legislation that you have noticed.

[*English*]

Hon. Lord Carlile of Berriew: I have a number of concerns about the way counterterrorism law operates in this country. I'm concerned about the use of control orders and what appears to be some lack of success. The fact that the government has chosen to arrest and detain, under deportation provisions, people who are the subject of control orders, suggests a lack of confidence in the government in its own recent legislation. That causes me concern.

We have a particular stop-and-search power, under section 44 of the Terrorism Act 2000. That enables police officers in specified geographic areas, so certificated or specified for periods of up to 28 days, to search persons for terrorist material without suspicion that they have terrorist material. That power is used far too much, in my view, and I've recommended that its use could be reduced by 50% without any damage to national security. Quite a lot of work is being done on that at the moment, and indeed I have a draft report prepared by the National Centre for Policing Excellence in my briefcase at the moment on that subject.

I also have concerns about the potential use of counterterrorism powers. I don't know if you have the same extent of animal liberation terrorism in Canada that we have in this country, but there is a danger, I think, of terrorism act powers being used perhaps more widely than is intended. I'm not saying it should never be used for animal rights activists, but it is important that we should not step across the line between legitimate protest and terrorism.

I'm concerned too that the current bill before Parliament may possibly catch people it is not intended to catch. For example, the government proposes, under the new bill, to make it an offence to attend a terrorist training camp anywhere in the world—simply to attend. Well, the leading diplomatic correspondent of the BBC, John Simpson, has from time to time attended terrorist training camps, not to learn how to be a terrorist—he doesn't need to, he works for the BBC—but in order to report upon them. I think it is in the public interest that we should learn about such places and be aware of what is going on in the world. I think the example I've just given is slightly an example of the law of unintended consequences, and I hope the government will amend that proposal.

● (1045)

[*Translation*]

Mr. Serge Ménard: I thank you very much. This is exactly the type of answer I was looking for, based on your duties and qualifications.

That's all, Mr. Chairman.

[*English*]

The Chair: Thank you.

Mr. Cullen, please.

Hon. Roy Cullen: Thank you, Mr. Chair.

Thank you, Lord Carlile.

In reviewing the Anti-terrorism Act here in Canada, one of the ideas that has come forward is that because the provisions of the Anti-terrorism Act in Canada have not been used—in fact I think one provision was used perhaps once—the argument put forward is that if it hasn't been necessary and we haven't used it, why keep it on the books? The counters that we've heard to that, of course, are that it should be there in case we need it and that it might have a deterrent value.

I'm wondering what your thoughts are on that, Lord Carlile.

Hon. Lord Carlile of Berriew: I've had a lot of experience with that kind of problem in relation to Northern Ireland. Under part VII of the Terrorism Act 2000, there are provisions that apply to Northern Ireland alone. They are special provisions arising from the situation that's been going on there since certainly 1971. From time to time, I have recommended that some of those provisions be removed because they're osseous; they're neither used, nor can one foresee their use. In almost all cases, the government has accepted that, and the provisions they've agreed not to use are finally being repealed in legislation that had its second reading in the House of Commons yesterday.

My view is that a law should only remain on the statute book if there is some pretty clear evidence that there may be a real need to use it at some point in the future. I don't think one should have a law that one might conceivably, possibly, use if something comes up in twenty years' time, because it brings the law into disrepute. And as one of your committee members said earlier, there is general criminal law that actually does deal with a lot of these issues in any event.

I also think it's very important for the public to understand why we have these laws. The public is more likely to understand a law that has a reason and a use, rather than one that might be used every twenty years.

Hon. Roy Cullen: Thank you.

The control orders, and some of the controversy right now in the U.K. about people potentially being deported.... This comes back to the rationale behind our security certificates in Canada, which actually have existed for a long time but have now been rolled into this debate about the anti-terrorism legislation. For those individuals, in our case, security certificates are for foreign nationals who pose a risk to the safety of the Canadian public. They're detained in what we call the three-walled detention centre and can leave at any time, notwithstanding the challenges for some in terms of where they might go.

Now, you indicated that regarding the control orders, there are a number of those people currently who the government is proposing to deport because they've run afoul of some immigration laws. I gather that's controversial as well. What about those who might have followed all the immigration laws but are seen as a threat to the national security of Britain? What will happen to them?

Hon. Lord Carlile of Berriew: They can be made the subject of control orders. The previous provision, which allowed for the detention of foreign terrorist suspects, the so-called Belmarsh provisions, named after one of the prisons they were kept in, was struck down by the House of Lords partly on the grounds that they were discriminatory. They discriminated against foreign nationals and therefore were unlawful. The control orders are available against all residents in the United Kingdom, whether U.K. nationals or not. So that is a more flexible system. It has now been used against British nationals living in the United Kingdom who were thought, on evidence, to have connections with the loose fraternity that we call al-Qaeda.

So far as the 10 individuals who have now been detained under deportation are concerned, the reason they're being deported is that their remaining in the United Kingdom, so the government says, is contrary to national security. There is a system of law under the commission I mentioned earlier, the Special Immigration Appeals Commission, whereby that can be challenged. We also have, I think like you, a pretty sophisticated law of what here we call judicial review, a public law system.

The problem over those detainees for deportation is that they can't yet be deported. None of the nine Algerians can be deported until a memorandum of understanding is reached, if it is reached, with Algeria. That in itself, the absence of such a memorandum of understanding, is giving rise to a further legal challenge at the present time.

● (1050)

Hon. Roy Cullen: Thank you. That clarifies it for me. These people, then, could be deported, not just on the grounds that they violated some immigration laws, but because they're seen as a threat to the public security of Britain.

Lord Carlile, in terms of your work practices, you talked about meeting with NGOs. You obviously have access to the Home Office and others. Do you have a structured regime in terms of how you review? I'm wondering, for example, if you meet with detainees. What kind of process do you use?

The problem is, of course, that different people would want to see you and meet with you and discuss these issues. Do you have any sort of structure for approaching this?

Hon. Lord Carlile of Berriew: I do, yes. I do have a structure. Routinely, I attempt to meet the detainees. They will not all meet with me, and indeed this year all the subjects with control orders have refused to meet me. They all have the benefit of legal advice. My suspicion is that they take legal advice before they decide whether to meet me. I do not know what legal advice they're given, obviously, but if it were the case that they were given legal advice not to meet me, because in some way they would be seen to be co-opting the system, I would regard such advice as quite wrong.

I have been able, when they were detained in prison, to take some pretty positive steps of a very mundane nature, like ensuring that they have better dental provisions, or that their diet was more successfully attended to.

I also routinely meet with politicians and others who have a direct or indirect interest in the legislation. The most methodical thing I do is that when I write my reports, I review the statutory provisions section by section, so that every year, when people read my reports, they can compare my report with the previous report and see if the evidential base has changed. I also seek to obtain statistics, and on the whole do obtain quite useful statistics, on the use of the different provisions.

I hope that answers your question.

Hon. Roy Cullen: Yes. Thank you.

Do I have time for one more?

The Chair: It's your last question.

Hon. Roy Cullen: Yes, that's very helpful. Thank you very much.

In the United Kingdom, have the citizens had any challenges in terms of defining terrorism? I know that it's often an elusive challenge. Is defining terrorism still a controversial matter in the United Kingdom?

Hon. Lord Carlile of Berriew: It's only mildly controversial.

Terrorism is defined at the beginning of the Terrorism Act 2000. Please don't ask me to repeat it, because it's very long and I don't have it in front of me. It is a more restricted definition of terrorism than the definition of terrorism in the relevant Untied Nations documents, but it's still pretty wide and it certainly covers everything you might imagine to be terrorism.

The government is slightly extending the definition of terrorism in its current legislation, the Prevention of Terrorism Act 2005. I do not regard that to be particularly controversial, but some may.

It will certainly be a subject of discussion at the committee stage of the bill. I think you follow almost precisely the same parliamentary procedures as we do. At the committee stage of the bill in the House of Lords, which is swamped by lawyers like me, I think there may be some more tendentious and detailed consideration of the definition of terrorism.

● (1055)

Hon. Roy Cullen: Thank you.

The Chair: I'm going to jump in at this point, colleagues, and invite Mr. Wappel to wrap up.

Mr. Tom Wappel: Thank you, Mr. Chairman.

I'll be reasonably brief, Lord Carlile. Thank you very much for giving us your time.

I have a few specific things about the nature of your appointment and what you do.

What specifically is the nature of your appointment under the act? By that I mean, are you appointed at pleasure, or during good behaviour, or for a specified period of time, or in some other manner?

Hon. Lord Carlile of Berriew: I was appointed initially for three years. My appointment was then extended for a further two, but it was actually slightly more than two, because I had done more than three years when I was asked to do it for a further two.

I think that under the Human Rights Act 1998 and the European Convention on Human Rights and Fundamental Freedoms, it was necessary for me to have a fairly lengthy appointment in order to ensure that I was properly regarded, as I am, as being independent.

Mr. Tom Wappel: Are you comfortable with the three-year period, or in the best of all worlds, according to you, would you like it to be longer or shorter? What do you think?

Hon. Lord Carlile of Berriew: I'm comfortable with a three-year appointment. I think that the ideal period for doing the job is probably six or seven years.

As much as I find it extremely interesting and, dare I say, enjoyable because it's very stimulating intellectually, I would not think it right to do it for more than a maximum of seven years. After six or seven years, I think it really needs a fresh mind upon it. But I think that many of us who have been parliamentarians would agree that doing anything for more than six or seven years tests one's endurance.

Mr. Tom Wappel: Thank you.

Are you comfortable reporting to the Home Secretary? Would you prefer to report to Parliament or to some other group? Are you happy with the way it's set up now?

Hon. Lord Carlile of Berriew: I don't think there's a perfect recipe for this. I would not be happy, and I wouldn't do the job, if there was any question of any reports I wrote not being published, after a suitable iterative dialogue to ensure that I didn't get anything factually wrong or disclose matters of important national security. The important thing is that they should be published and should be available.

I insist on my reports appearing on the Home Office website. You can get all of them at the click of a button, which is very good, and the public can have access to me on my private e-mail, which is disclosed there.

Therefore, as long as it's a transparent process, so far as is possible, and everything that I write is published, I'm content with this arrangement, but I think there is no perfect constitutional arrangement. One has to suit it to one's own conventions.

Mr. Tom Wappel: All right.

Finally, I find it amazing that you produce at least four reports a year and it only takes up 40% of your time, given that presumably, from the sound of your evidence, you're doing all the reading and you're doing all the writing.

In that regard, I'd like to discuss whether or not you—I don't mean you specifically, but your successor or as a model—think there should be some kind of supporting secretariat or bureaucracy there to aid a person in your position.

Hon. Lord Carlile of Berriew: I think the government should allow the person in my position to decide the answer to that question. I mean, 40% of my time is 40% of quite a lot of time, because in my experience as a trial lawyer and as a member of parliament, and so on, I've enjoyed work and have put in a lot of it. I also find that I work better on my own, but that's idiosyncratic to me.

I think it is important that the person who does the job should be permitted to have as much help as they need. I see absolutely no sense, however, in setting up a bureaucracy that is simply going to be redundant most of the time. I do know one or two government organizations—and I don't want to be particular about them, because I don't want to cause offence—in which a bureaucracy has been set up, which spends a lot of time out to lunch. I don't think that's a very sensible idea.

Mr. Tom Wappel: Perhaps literally and figuratively.

Hon. Lord Carlile of Berriew: I mean both.

Some hon. members: Oh, oh!

Mr. Tom Wappel: Thank you very much, Lord Carlile.

Thank you, Chair.

The Chair: Thank you, colleagues.

Lord Carlile, I want to thank you on behalf of our committee. We're sorry that you weren't able to join us in Canada, but we understand that our Senate is going to Britain next week on the same subject we've been working on, so perhaps you'll be bumping into those folks.

Colleagues, before we conclude, I just want to remind you that tomorrow we will have the Canadian Association of Chiefs of Police, and Dr. Martin Rudner and Dr. Ganor. We also have Maureen Basnicki scheduled for November 16.

So those are just a few housekeeping matters.

Mr. MacKay.

● (1100)

Mr. Peter MacKay: Mr. Chair, on the same subject matter of witnesses, I have been contacted—and I'm not sure if you or the clerk have been contacted—by a number of victims groups and organizations that would very much like to have an opportunity to give testimony.

The Chair: That's Ms. Basnicki.

Mr. Peter MacKay: The witnesses I'm referring to specifically are family members of those killed in the 9/11 bombing, and they've expressed a specific desire to give testimony. I just wanted to put that on the record, and if there is some way to accommodate them, I would respectfully request that we try to do that. I know that we're very short for time, and I know that we want to get this report into the writing stage, but I think the victims' perspective is extremely important in all of this.

The Chair: Agreed, Mr. MacKay.

Maureen Basnicki is from a victims group and will certainly be invited for November 16. I believe that given the time constraints you've put the chair under, that's about all we can do in slotting time in, because we obviously also have to receive the Deputy Prime Minister again and the Minister of Justice—and perhaps even the director of CSIS again. That was one of the things we had talked about several months ago. So I'm just trying to schedule all of those things.

Obviously we're still looking at November 14 for Washington. That hasn't been approved by House leaders yet, but we should know that in the next day or so.

Okay, colleagues, thank you very much.

Thank you again, Lord Carlile.

We're adjourned.

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