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ORAL EVIDENCE
TAKEN BEFORE THE
JOINT COMMITTEE ON HUMAN RIGHTS

THE JUSTICE AND SECURITY GREEN PAPER

TUESDAY 6 MARCH 2012

JOHN WADHAM AND ERIC METCALFE

RT HON KENNETH CLARKE QC AND JAMES BROKENSHIRE

Evidence heard in Public

Questions 170-232

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Oral Evidence

Taken before the Joint Committee on Human Rights

on Tuesday 6 March 2012

Members present:

Dr Hywel Francis (Chair)
Baroness Berridge
Rehman Chishti
Mike Crockart
Lord Dubs
Lord Morris of Handsworth
Mr Dominic Raab
Mr Virendra Sharma
Mr Richard Shepherd

Examination of Witnesses

Witnesses: **John Wadham**, Group Director Legal, Equality and Human Rights Commission, and **Eric Metcalfe**, Barrister, Monckton Chambers, examined.

Q170 Chair: Good afternoon and welcome to this evidence session on the Green Paper on *Justice and Security*. Could you introduce yourselves for the record, please?

Eric Metcalfe: My name is Eric Metcalfe. I am a barrister at Monckton Chambers. I was previously Director of Human Rights Policy at JUSTICE, the human rights organisation.

John Wadham: I am John Wadham. I run the Legal Department at the Equality and Human Rights Commission.

Q171 Chair: Mr Metcalfe, could I begin with a question to you in relation to the scale of the existing use of secret evidence? We note the commission's evidence, which says that the continuing lack of accurate information concerning the extent of the use of closed material is a serious problem. Is its use more widespread than the Green Paper seems to suggest and does it matter that the scale of its use should be known before Parliament legislates on the matter again?

Eric Metcalfe: It is certainly the case that the Green Paper does not accurately represent the extent of the use of closed material. One of the difficulties is that it is very difficult to define exactly what is meant by closed material. Is it proceedings in which a special advocate may be appointed? Because, as you will know from hearing evidence on this issue already, it is possible to have the appointment of a special advocate in a proceedings without necessarily closed evidence being used, for example, in a public interest immunity application, and vice versa: it is possible for closed material to be used without a special advocate ever being appointed, as is the case before the Investigatory Powers Tribunal. The Green Paper really does not provide an accurate picture. A good example is the non-statutory use of special advocates in proceedings before the Parole Board. That was an example where there was no express legislative provision governing the use of special advocates in closed proceedings. There had, however, been a previous set of rules under the Parole Board which allowed for limited disclosure of closed material to the person's barrister or solicitor, but that

was a different procedure that had operated since 1997. Again, unfortunately, the Green Paper really does not provide an accurate picture of all the different statutory proceedings and non-statutory proceedings in which either the special advocate may be appointed or closed material may be used.

John Wadham: I think it is also worth going back a little in history to see how the system first got established, because the idea of secret evidence in this context is a very unusual system and, we would say, contrary to the fundamental common law traditions in this country. It was designed for a very small category of people who were going to be subject or potentially subject to deportation because their presence in the UK was not conducive to the public good—what we used to call the “three wise men procedure”. In the case of *Chahal v the UK*, we had a process which was fundamentally unfair. The European Court said we had to have a better system and, as a result of some examples from the Canadian system, we came up with an alternative. But when I and others were involved in discussing with the Government the nature of that alternative, we expected that this exceptional procedure would be used in only that context. What has happened—and this should be of concern to the Committee, I think—is that it has expanded, as Eric suggested, into a mass of other kinds of tribunals, other kinds of processes and is being used much more often. We expected it to be used in 10 or so cases a year, and what has happened is it is much, much larger than that. I was happy with, in a sense, countenancing it because it was a fairer procedure than the procedure that existed before and it was restricted to those processes.

Eric Metcalfe: It is interesting to note that the Lord Chancellor this morning in a newspaper article suggested that the secret evidence or the closed material procedure would only be applied to a handful of cases. You go back to Hansard in 1997 when the Special Immigration Appeals Commission bill was first being debated and you find similar statements by Home Office Ministers Mike O’Brien and Lord Williams of Mostyn saying exactly this, that the special advocate closed material procedure in SIAC would only be used in a handful of cases. Since that time, over the last 15 years, the use of closed proceedings in UK courts and tribunals has expanded considerably.

Q172 Mr Sharma: What test should Parliament apply to determine whether the proposals in the Green Paper are justified? Is it essentially the same test as that applied by the Supreme Court in *Al Rawi*?

John Wadham: I think, as I have already suggested, that this is a fundamental departure from our common law tradition. We could talk about the ins and outs of Article 6 and what that requires, but the basis of justice in this country for many, many years has been that it is cards on the table: that you have a dispute, you take it to an independent tribunal and everyone sees all of the evidence and everyone can question the evidence, they can cross-examine the witnesses. And the best evidence that can come out is then adjudicated on usually by judges, but sometimes, in some circumstances, by juries and others. It is a fundamental part of that and so this is a very significant exception and so we would say, I think, that when Parliament addresses this question, it should be looking at the common law traditions of this country over those years. I think they have been identified by the Supreme Court in that case; there is no doubt about that.

Q173 Lord Dubs: I wonder if I might ask this: there are some people who believe that the use of intercept evidence would be desirable as it would give people a chance to have a trial. If that were the case, would you accept that the courts in which intercept evidence were to be heard might not be totally open?

John Wadham: We need to define “openness”. At the moment, I am discussing openness between the parties. There is a secondary question about whether the court or

tribunal should be open to the public or to the press, and you can well see arguments for there being circumstances where the court has to close to the outside world, but the parties are entitled to see the material. Obviously, we say in our evidence that the public interest immunity procedure, which sometimes does mean that evidence which would ordinarily go to the parties does not go to the parties where there is a question about its relevance and where there is a question about national security or other public interest disclosure issues, that might mean that not all of the evidence in all circumstances goes to all of the parties. That system works tolerably well.

Eric Metcalfe: If you look at the comparative experience of other common law jurisdictions who have similar civil and criminal proceedings as the United Kingdom—Canada, Australia, the United States, New Zealand, South Africa—these are all jurisdictions which use intercept evidence in open court. They use, essentially, PII procedures to keep the sensitive details of particular interception methods and the locations of observation posts and so forth secret. PII works extremely well in other common law countries with disclosure regimes which are very similar to that which we have under Article 6 of the European Convention on Human Rights. So I do not think that you need closed material procedures in order to allow for the admissibility of intercept.

Q174 Rehman Chishti: Mr Metcalfe, looking at the point on the need for change, the Independent Reviewer of Terrorism Legislation and the Bingham Centre for the Rule of Law both accept that there are likely to be some cases in which a fair trial of the claim cannot proceed because of the amount of material which cannot be disclosed on PII grounds. Does the commission agree that there will be cases in which the ordinary law of PII does not produce a fair trial?

Eric Metcalfe: In short answer, no. The view of the Independent Reviewer of Terrorism Legislation deserves some weight, but I note from the transcript of his evidence that he was not referring to having conducted any kind of review of closed material himself, nor had he been shown closed material indicating that there were cases of this kind. As I understand the evidence of David Anderson and also of Tom Hickman and Adam Tomkins from the Bingham Centre, it was rather the hypothetical possibility that you could, in principle, have a PII procedure that led to an unfair result. The question is what do you consider to be an unfair result? You can pose a hypothetical situation of a person with a just claim where the only evidence to support that claim would be material which, say, the police or the security service would say is covered by public interest immunity; it is too sensitive to be disclosed. Ultimately, the judge is faced with a balance. If, in our view, PII is applied correctly, it will be an exceedingly strong national security case which would outweigh the interests of justice in that case. The only instance that anyone has been able to point to a strikeout on so-called public interest grounds is *Carnduff v Rock*. This is a case where no one can really say whether the right outcome was reached or not, because none of us, I am assuming, have seen the closed material or the withheld material in that particular case. So I do not think you can look at *Carnduff v Rock* and draw that conclusion. I do not even think that you can point to a hypothetical case in which a strikeout would deliver an unfair result, because it is always going to be for a judge to decide if the interests of justice are outweighed by the interests of national security. It will be a very reluctant judge who rules that a just case will be struck out on national security grounds.

An important point to bear in mind is that there are always other ways of protecting the sensitive information. A classic example is the identity of a source. Sometimes you rely on PII to protect a witness from being identified, but there are always other ways of protecting sensitive information. You can, for example, use witness anonymity now in order to protect a witness's identity and allow them to give testimony without that person's identity being put at

risk; or you may provide witness protection; you may provide the gist of the information. There are always other ways in which the national security interest can be protected, whereas, if that person's claim is just and that person's claim fails, then that is the end of it. I think, in those circumstances, I do not see a hypothetical situation in which the interests of justice in a justified case will be outweighed by national security.

John Wadham: We certainly would not want to see a whole edifice of a new structure which is, as we say, exceptional and does not comply with our fundamental common law values around the possibility of this occurring or it having happened in one case. That does not seem to be an evidence base to set up an alternative civil justice system.

Eric Metcalfe: You have had the Wiley balance in operation for something in the region of 30, 40 years almost. It would be striking if such a fundamental common law right was removed on the basis of a police informant in the West Midlands, his claim being struck out simply because he could not get evidence of a contract with the police. It seems to me the strength of the common law right identified by the Supreme Court in *Al Rawi* requires a great deal more compelling evidence than simply the hypothetical possibility. If there were such a possibility, you would have expected to see many more examples over the last 30 years or so.

Q175 Lord Dubs: On the same theme, I refer to the commission's evidence in which it says, "It can never be fairer to adopt a closed material procedure in order to determine a claim, even if the alternative is that the claim will be struck out." Is that the commission's view even if the claim in question is a claim in respect of a serious human rights violation?

John Wadham: In a PII case, the factors that the court would have to take into account in this balancing exercise will be difficult, but the first one is going to be the seriousness of the case itself. The more serious a human rights violation it was, the more likely it would be that the balance would be for disclosure or not for strikeout. The second question is going to be the relevance of the evidence and the merits of the case. So I think that, as Eric has said, the situation is it is going to be a very rare example. Although, theoretically, it has to be possible that that might happen, that is much, much less unfair than a situation where you create a process where regularly in the courts—and as we have already said, this is happening already—on the basis of arguments from Government and public bodies, people are denied the evidence that they need, the material that they need to pursue their cases. That is the much more dangerous and problematic threat to the fairness of our civil justice system than the possibility of one-off cases being decided in a way that perhaps is not fair.

Q176 Lord Dubs: So are you saying that a strikeout in such a case might put the state in breach of its obligation to ensure the availability of an effective remedy when we are talking about human rights?

John Wadham: I have done very significant numbers of national security PII cases in my career, including cases in the European Court of Human Rights, and I have lost some of those cases in the European Court of Human Rights. My experience is that the European Court of Human Rights is astute to the issues of the public interest in relation to national security. Although there are not that many cases that go there regularly from the United Kingdom, nevertheless I think that the Government would be justified, if these proposals were rejected, in representing their case in Strasbourg to say, "The alternative was to set up an even more unfair system and the best we could do is here and here are the facts in this case". I would be very surprised if the UK lost those cases.

Q177 Lord Dubs: Another question is this: the commission accepts the possibility of a claimant preferring to have their claim determined using a closed material procedure rather than it being struck out altogether. Would its concerns about the proposals to make CMPs

available in civil proceedings be met if the legislation made explicit that the use of such a procedure must be an exceptional measure of last resort when there is no other way of enabling a trial of the issue and only to be used after a full PII exercise?

Eric Metcalfe: No. The reason is because the very availability of a closed material procedure is likely to distort the PII analysis that the judge would be required to carry out as part of a right to a fair trial. It is an unfortunate feature of our system of justice that merely providing a power can encourage its use. A good example of this is the provision for witness anonymity, which did not exist, in essence, before the 1990s, but since it became available, it grew very rapidly so that, by the time the House of Lords came to consider its compatibility with fundamental rights in 2007, it was very concerned that a great many judges had decided to grant witness anonymity without there being an adequate basis in either legislation or the common law for that to be used. The reason is because the judges are concerned with reaching what they consider to be a fair result, and it is often very attractive for judges to consider that if they just look at the material by themselves in private, and maybe hear some submissions on it from one of the parties, they might be able to work out what the right result is. In this situation you have to bear in mind Lord Kerr's warning in the Supreme Court that it can seem superficially attractive for a judge just to look at the material in private and decide whether it makes a person's case, but evidence which has been insulated from cross-examination is likely to mislead. That is the very essence of our civil justice system, the idea that the accuracy of evidence derives from its ability to be cross-examined, to be tested by adversarial confrontation, and if you do not have that, then you only have one part of the story. You only need to go back to Roman times, to Seneca, who said "A judge who decides a case without hearing both sides acts unjustly even if they reach the right result". The important thing to bear in mind is that you can reach a right result through a number of different means, but not all of those would be fair. You can flip a coin and 50% of the time you might reach a right result, but that will not make flipping a coin a fair procedure. The right result is one which involves respecting the standards of fairness.

Q178 Mr Shepherd: Just on that, does this not apply also to the anonymity of witnesses now often granted by judges, because the very nature of who the witness is may be challengeable and the veracity of his evidence on the knowledge of who it is?

Eric Metcalfe: It was certainly the case that the House of Lords found that it was contrary to the common law. But Parliament debated emergency legislation and made provisions which fell within one of the exceptions under Article 6, and you will find that there are a great many safeguards to prevent witness anonymity being provided in a situation where it is necessary for a person to meet their case.

Q179 Mr Shepherd: With the indulgence of the Committee, I had a meeting with a former Lord Chief Justice; when this became a matter of some controversy a year or so back in the national press, I asked him, "How did this happen?" He said, on his watch, he was unaware that it was developing to the extent that it has developed.

John Wadham: That is exactly our point, in a sense: that there are always difficult circumstances where individuals need to be protected, or national security or the public interest need to be protected—

Q180 Mr Shepherd: But in civil cases?

John Wadham: In civil cases, and it is very difficult then, once you have a new procedure, to stop it being opened up to all kinds of other arguments and, not surprisingly, there are difficult questions to be asked. That is why I think we are concerned that the evidence on closed procedure material—I think, at least; and I was aware when this was being

discussed in Government—was being designed for a very tiny purpose. It has expanded and now the Government has produced a Green Paper and said, “We would like it expanded very considerably and we want this to capture all of the theoretical cases that you might be able to design, the one case we know about”. I do not think that is the way to make policy, where you are making exceptional derogations to something fundamental about the English common law tradition about how parties deal with the evidence.

Q181 Mr Sharma: Can you explain precisely why you believe the availability of a closed material procedure would in practice distort the PII process and how this belief sits with the view of the Supreme Court in *Al Rawi* that “the PII exercise cannot be avoided”, even if a closed material procedure is available?

Eric Metcalfe: We certainly agree with the second part; the Supreme Court was absolutely right in *Al Rawi* to say that you cannot effectively carry out a decision, you cannot effectively decide whether a closed material procedure is justified, until you have undertaken the PII process. It makes no sense, as the Green Paper suggests, that you could have proceedings to discuss the justifiability of closed material proceedings until you have carried out the PII. So, logically, the closed material question must always arise after the PII exercise has been carried out; which greatly, by the way, undercuts the Government’s case that it was making in *Al Rawi*: that PII was so very expensive and time consuming and that one of the main advantages of closed material procedures is that they would be cheaper. The Supreme Court said you would have to carry out the PII thing in any event.

The problem with a closed material procedure being available at the end of the process is that, where a judge is deciding whether the disclosure of particular material is necessary in the interests of justice versus the interests of, say, national security, the process—the decision making process, the balancing process—is likely to be highly distorted by the knowledge that, if the judge decides in another way, then there will always be a second bite of the cherry by the Government, because they have a closed material proceeding. What the Supreme Court warned against in *Al Rawi* is the idea that this might be compatible with the common law right to a fair trial. It is unfortunate that judges are not immune from the attractiveness of viewing evidence by themselves and trying to assess for themselves whether it makes up a case. It is something that they are obliged to do in *ex parte* proceedings in a number of cases. And judges, unfortunately, may fall prey to the temptation of just deciding, rather than go through the whole PII exercise, we can hurry this whole thing along if it is going to be too complicated—let us jump to the end and have a closed material procedure instead.

Q182 Lord Morris of Handsworth: Can you explain why, in the commission’s view, it is not possible to restrict the scope of the Green Paper’s proposals to cases involving national security?

John Wadham: I will just start with that. Public interest immunity is, in a sense, not state immunity; it is public interest immunity. Therefore, there is the possibility in any case to say that there are good reasons why this material should not be disclosed, not because it is about national security, but because it is about the anonymity, the protection of a witness, the protection of an informer, the protection of somebody who made a complaint, etc, etc. Of course, at a theoretical level the legislation could be restricted to national security, but it is quite difficult to see why the national security provision should be paramount when there are other good public interest reasons why other material should not be restricted equally. Therefore, at the level of theory it is possible. However, the public interest is to protect national security, but the public interest is also to protect witnesses that may be under threat or other people.

Eric Metcalfe: There are some simple examples. The scope of national security has, in English law or UK law, an extremely broad definition and would include, for example, stop and search cases. There was the prospect of closed material being used in the *Gillan* case when protesters wanted to claim that the Metropolitan police were stopping them unjustly. There was even the discussion of appointing a special advocate in that case. There is the *Corner House* case, which I was involved in, which involved the Serious Fraud Office halting an investigation into alleged bribery allegedly on national security grounds, because the Saudi authorities had said, “If you proceed with this we will withdraw co-operation for national security reasons”. So there are always such cases; at the outset, you think national security involves high-level terrorism plots and nuclear weapons and things like that, but the reality is that national security cuts across a great many more ordinary things, or things that are not obvious.

As John has pointed out, there are very compelling public interest reasons to protect sources in other areas. I was involved in a House of Lords case in 2005 involving the use of special advocates for a Parole Board case; the issue there was the protection of a witness. We always talk in national security cases about source protection and how important it is to protect sources, but you also get those issues in serious organised crime cases and you can also get those issues, if the case is serious enough, in an ordinary burglary case.

Q183 Lord Morris of Handsworth: There are two key principles here, are there not? There is the national security on the one hand, and on the other hand there are civil proceedings. You have answered the issues about the national security; can you then explain the reasons for the commission’s view that it would not be possible to extend the use of closed material procedures in civil proceedings and yet restrict their use only to exceptional cases?

Eric Metcalfe: Again the question becomes what an exceptional case is and how you define that. It seems to me that you can make a very compelling case that the protection of a witness’s life or an informant’s life is always going to be compelling. The protection of an individual life is important whether or not the case involves national security. It may just be a regular criminal or civil investigation; it may be a child protection issue. The exceptional nature of the case is not necessarily something tied with national security, and I do not see how you can sensibly restrict it to cases which would only fall into that very narrow area.

John Wadham: Just to add to that, as I say, I have done a number of national security cases for people, including people who have blown the whistle on MI5, MI6, GCHQ, etc, and there are many cases in which the material that I have seen would damage national security if it was released. But I am afraid there are also cases where the parties to the litigation, where the state is involved, have claimed national security, and when the material has been in fact disclosed to me or via the process of the court proceedings—this is criminal but also in civil proceedings—it is clear that there was no real damage to national security as far as I can tell. Obviously people will say, “You do not know the full facts, you do not know the details”, but as far as one can tell, the claim was overblown. There is a real danger in giving people an exception that they will take advantage of. Lawyers and those working for the security services are equally human as the rest of us.

Q184 Baroness Berridge: You believe that the US practice of granting security clearance directly to civilian counsel in proceedings before military commissions may hold some useful lessons for the UK. Is the commission or anyone else making information available to Parliament about how that system works in practice?

Eric Metcalfe: The commission made limited reference, I believe, in the evidence and also, I think, in reference to the Green Paper. In 2009, I was the author of a report entitled

Secret Evidence, which made reference to the comparative practice in a number of other jurisdictions. The origin of the special advocate system was, in fact, before the Security Intelligence Review Committee in Canada. That was, like the US system before military commissions, a system of much more relaxed communication between a special advocate and the person whose interests they were appointed to represent. Strikingly, however, you do not need to go to the United States or even to Canada to find an example of this relaxed form of communication. I mentioned the case of *Roberts*, in the House of Lords in 2005. Between 1997 and 2004, there was a fully operational system under the Parole Board Rules of disclosing sensitive material, including material on national security grounds, to the barrister or solicitor appointed to represent the prisoner in a Parole Board case. That was undertaken without any supervision, without the strict prohibition you have on communication between the barrister and the person who they represent, and that was entirely unsupervised. The barrister or solicitor would be under a prohibition of discussing, either directly or indirectly, any of the closed material, but they could still hold a conversation with their client. As I have said, this system operated between 1997 and 2004. There is no reference to it in the Green Paper whatsoever, which suggests one of two possibilities: either the Government was not aware of it, or they were aware of it and they thought that it was not relevant. It seems to me striking that we are having this conversation; it is making very strong arguments in here that you cannot relax communication between special advocates and those they represent, and yet they were operating a system very similar to the US one, without even security vetting, in the Parole Board procedures.

Q185 Baroness Berridge: From what you have just said, am I right in assuming that between 1997 and 2004 there were no examples where it was abused or there were any claims that counsel had released information they should not have released?

Eric Metcalfe: I was involved in the *Roberts* case in 2005 and there was no evidence put forward by the Secretary of State in those cases that it had been abused. That case involved the Secretary of State wanting to use a special advocate instead of the relaxed system, so you can assume from that that the Secretary of State was unhappy with the relaxed system. But there was never any evidence and, more importantly, never any debate. These were established by way of rules of the Secretary of State, so they are secondary legislation. There was never any parliamentary debate over whether the previous Parole Board system was working ineffectively or whether there had been any security breaches. Certainly you would have expected the Government to have made that case, but that was not what was involved.

Q186 Mike Crockart: I would like to turn now to the person who makes the decision to instigate closed material proceedings. You have expressed concerns about the degree of control over disclosure that the Green Paper proposals would give to the Government, through the Secretary of State having the power to decide whether a closed material procedure was necessary. Do you think that a clearer statutory provision, that it is the court and not the Secretary of State's decision to order such a procedure, would meet your concerns on this?

John Wadham: If the procedure is created, then obviously the best and most significant protections would, in fact, require the court to make the decision. Obviously if the only test about that was on the judicial review basis, which seems to be being suggested, that is not a test of the merits of the question; that is a test that is at a much lower level of scrutiny by the judge. So I think that there are real issues if this process goes forward for us all—parliamentarians and others—to consider the details of how it might work in practice. One of the difficulties with this Green Paper is that there are a lot of very tricky, difficult, complex issues in it, not just about closed material but about the other issues of oversight, which I

would like to say something about if there was time. I think that we need to review that process, and obviously the more you have the independent judge making the decisions the less likely it is to be unfair.

Eric Metcalfe: Just to follow on, I think this goes back to Lord Morris's question, which is: you will obviously need to take the decision at the end of the PII process as a matter of practicality. So the current procedure proposed by the Green Paper would be unworkable for the reasons identified by the Supreme Court in *Al Rawi*. The commission opposes the extension of closed material procedures, but if Parliament felt it was necessary to go down that route then it is abundantly clear that you need a judge to make the decision rather than the Secretary of State.

Q187 Mike Crockart: Can I just be clear though? Because I know that the Government will argue that in their proposals it is the court which is making the decision; it is merely the Secretary of State who is kicking off the process. So can you just be clear about the difference between those two aspects?

Eric Metcalfe: The Government is trying to have its cake and eat it, because it also says in the Green Paper that the judge will review the Secretary of State's decision applying the principles of judicial review. To lawyers, that means that the judge is not required to, as John said, assess the merits of the Secretary of State's decision. The judge is only making sure that the Secretary of State is acting within the law. Nowadays, following the Human Rights Act, you do have slightly more enhanced judicial review than you used to, but the judge is still crucially limited in the exercise that he or she undertakes. So I do not believe that, in the Green Paper, the Government is describing accurately its own proposals when it says that it will effectively be the judge's own decision.

John Wadham: I know we are running out of time, but the issue is: in the process of disclosure in a civil case what happens is that there is an assumption that all the material is disclosed, so somebody who holds the material has to initiate it, because they are the only ones who have the material and know that there might be national security considerations. So in one sense that is right, but as Eric says and as I outlined, having a judicial review test for the judge in relation to the decision by the Government, the state in this case, must assume that the first proper decision being made is not an application to the judge but a decision which is subject to review, and that seems a bizarre approach to this regardless of what the substance of the CMP procedure is.

Q188 Lord Morris of Handsworth: Would you like to comment on the evidence of the Independent Reviewer of Terrorism Legislation that respect for the control principle is vital to our national security and justifies the placing of proportionate limitations on the *Norwich Pharmacal* principle in the national security context?

Eric Metcalfe: No. We prefer the view expressed by the Lord Chief Justice in the *Binyam Mohamed* case that the control principle, while of great importance, can never be paramount in a democracy governed by the rule of law. Really it is important for our allies and those with whom we co-operate on security matters to understand that we will respect their confidences as best we can; but, as the Lord Chief Justice made clear, there will be some circumstances when an independent court will decide that it is necessary for certain information to be disclosed in order for fundamental rights to be respected. I do not agree with the Independent Reviewer's conclusions concerning *Norwich Pharmacal*. It is correct to say that *Norwich Pharmacal* was unusual, because it is the one instance of cases discussed in the Green Paper which the Government itself has no way of settling out of court at its own initiative. But I think it is a travesty of the very careful judgments of the Divisional Court and the Court of Appeal in the *Binyam Mohamed* case to suggest that the judges might,

willy-nilly, disclose sensitive intelligence material. What we found was disclosed was, of course, not ultimately a *Norwich Pharmacal* decision in any event, and what was disclosed was already in the public domain for the United States. It is very clear from the courts' approach to the *Norwich Pharmacal* cases that they will be incredibly reluctant to ever disclose material which they consider would be operationally sensitive and, to my knowledge, it has not yet happened. So I do not think the theoretical problems that it has been suggested might exist in *Norwich Pharmacal* justify taking the extreme step that has been proposed.

John Wadham: Could I just have 30 seconds to talk about the rest of the Green Paper, Mr Chairman? Although this is a fascinating area for lawyers and for us to crawl over the detail, there is a bigger issue about the accountability of the security services in general, which this Green Paper picks up. I think that there are real problems both about the committee that oversees the agencies and the commissioners and the Investigatory Powers Tribunal. I think that there is a lot to be done to fix that to make sure our security services can do the job they need to do, but are in fact accountable to the law, and that people have an adequate and proper complaints system and that it is accountable to Parliament, and I am not sure that in each and every one of those the systems work very well and I think it is something that the Committee might want to look at outside of the more detailed assessment that you are making in relation to closed material.

Chair: Thank you very much for your evidence today. If you feel that there are points that we have not properly covered, and you hinted that towards the end, then we would be very pleased to receive a further memorandum from you. Thank you very much.

Examination of Witnesses

Witnesses: **Rt Hon Kenneth Clarke QC MP**, Lord Chancellor and Secretary of State for Justice, and **James Brokenshire**, Parliamentary Under-Secretary for Crime and Security, Home Office, examined.

Q189 Chair: Good afternoon and welcome to the Joint Committee on Human Rights. For the record could you both introduce yourselves, please?

Mr Clarke: Kenneth Clarke, Lord Chancellor and Secretary of State for Justice.

James Brokenshire: James Brokenshire and I am the Parliamentary Under-Secretary at the Home Office for Crime and Security.

Q190 Chair: Thank you very much. Could I begin by asking a question of both of you really about the fundamental significances of the changes that you are proposing? One of the constant themes we have noticed in the evidence we have received in relation to the Green Paper is that there seems to be an underestimation of the extent to which its proposals represent a radical departure from this country's constitutional tradition of open justice and fairness. Do you accept that the proposals in the Green Paper are such a radical departure and that there is, therefore, a heavy onus on you, as the Government, to demonstrate a compelling justification for them?

Mr Clarke: I do not, Chairman, and I think what has happened is we have gone out to consultation, genuine consultation; it could be that we have not expressed our proposals clearly enough in the Green Paper. The reaction has been very slow to it, but it has suddenly started mounting into ever more dramatic claims that we are bringing to an end this country's traditions of open justice and proposing to exclude the parties and the public from all kinds of extraordinary things, all of which I think is based on a complete misunderstanding. No one is more firmly committed to the principles of open justice than I am, and I think what we are really trying to address is a question of how we can see that justice is done in comparatively

restricted, very difficult circumstances. We are talking about cases where relevant evidence could be given by the intelligence services, our spies, and that the relevant evidence is derived by the service using either sources or technological methods—covert surveillance or interception of various kinds—of which, of course, the parties are quite unaware. That does not often arise. It has arisen in recent cases that such evidence cannot be given in open court, and the result is that key evidence, very pertinent to the outcome of the civil claim in the proceedings, is either never put before the judge or cannot be taken into account by the judge in reaching his decision. I think that is extremely unsatisfactory. I think we have a reputational thing. I think our intelligence services, like everybody else, should be accountable so far as is practically possible, and there should be a position where they give evidence about these matters to a court if they are accused of malpractice of some kind. I, as a citizen, would like to know what the outcome is of the judge's decision on the arguments being made against the intelligence services or by the Government in favour of the intelligence services. But it plainly is not the case that in any democracy in the world you can have the country's spies appearing in court openly, giving evidence about their belief in the information, the sources of that information, the technology they have used, the methods by which they have infiltrated the security system of the terrorist organisation they are trying to shadow or whatever it may be. It is, in my opinion—in my usual unwise way I think I used the word “ridiculous”—quite extraordinary to imagine that you can just go ahead with an ordinary open justice approach and have somebody called, give his name, say how long he has been in MI6 and go on to describe the kind of things he is going to be cross examined about. The result is that, in a civil action, the Government cannot give that kind of evidence; it tends to fold its tents, go away, say it is not going to contest liability any further and move on to a question of damages, which is the quantum of damages, which is what we did when we settled the case recently of the Guantanamo Bay detainees.

What we have put forward is closed material proceedings as a solution for that. Of course, it is not as good as open justice. If open justice was practical we would prefer that. But it is a way in which the judge can have all the relevant evidence placed before him or her, and special advocates can challenge it within, of course, the obvious limitations of the process. The alternative is nothing, and the alternative is an inquest that is adjourned—they have lots of adjourned inquests in Northern Ireland—or a case that was never fought so that, as I say, ordinary citizens, like you and me, in the end never know which side the judge came down on. So conspiracy theorists believe all the claims of the claimants, and more establishment people believe all the claims of the security services, and nobody ever knows. It is that narrow problem we were addressing, and in the last few days I have read ever more fanciful claims—that you would not be able to have inquests into friendly fire incidents and all kinds of things—which are miles away from the Government's intention, and I hope we have not so carelessly drafted the Green Paper as to give too much ground to all these fears.

Chair: With respect, Lord Chancellor, thank you for that, you are anticipating lots of our questions, so could I ask you to be—

Mr Clarke: I hope I have answered them all already.

Chair: We enjoy listening to you, but we also enjoy asking questions.

James Brokenshire: Dr Francis, I wonder if I could just add briefly to the comments that the Lord Chancellor has raised in highlighting that this is about presenting evidence to court to ensure that we get outcomes from cases that properly consider all of the evidence. As the Lord Chancellor has highlighted, of course the preference is always to be as open as possible, and I hope during the consideration in this session that we will be able to explain the separation, contrasting closed material, that element that is not able to be disclosed in open court, with so much of the case that is open, that is public.

It is also, in terms of the issues that we are seeking to be addressed, worth highlighting that it is not just about damages, as important as that is. It is also about judicial review cases where a decision may have been taken by the Home Secretary to exclude someone from this country on national security grounds, the appeal to which is judicial review, and if the basis upon that assessment cannot then be considered it is a significant issue that we need to address to ensure that that appeal right can properly consider all of the information that is relevant.

Q191 Mr Raab: Secretary of State, you said it is a very narrow problem; can I just ask you what specific evidence in terms of cases or investigations the Government is relying on to demonstrate that the current legal regime is inadequate and exposing the Government to the liability that you have described?

Mr Clarke: The plainest which presented itself to us when we were fairly new in office were the claims made by the Guantanamo Bay detainees. They were claiming damages for ill treatment to which they said the British Government had been complicit. That ran straight into this problem, and the British Government decided that it could not possibly call the evidence that we had—it would have seriously compromised our intelligence activities—with the result that we ceased to defend the action and we settled the amount of damages. I am told there are 27 cases in the pipeline—I have not seen all these cases—where this could be raised. It is becoming more common. I think, in the way these things happen, having had one case like that, we are going to have quite a lot of other cases where people are going to start making claims of one kind or another about the British intelligence services and about, no doubt, other agencies of Government, including police intelligence sometimes, where it is going to be difficult to defend it.

In the case of ones where national safety and security will be compromised by giving it, we either have no evidence or we have some admittedly second-best way of presenting it. That is what we want a genuine consultation on, at the end of which this Committee's conclusions, I hope, will be one of the things that will feed into the eventual drafting of a White Paper, and eventually a Bill.

Q192 Mr Raab: Can I ask just one very focused follow-up on that? You mentioned the 27 cases additional to the Guantanamo cases; can you give us a number for how many have been settled solely because of fear of disclosure of security sources rather than the claimant also, or separately, having an arguable substantive case?

Mr Clarke: No, no, they are not ones that have been settled; the number I gave is the one that comes to mind about those we think are in the pipeline—I do not know if they will all be settled or not—where we could have a situation where sensitive information of relevance to the safety of the public and the state, as it were, could become relevant in these civil proceedings.

Q193 Mr Raab: In relation to the cases that have been settled, how many were exclusively because of fear of disclosure of security sources rather than an additional element of the substantive claim?

Mr Clarke: I do not have a figure for that. All I know is the one which I was tangentially involved in, the Guantanamo Bay case; I did not take a leading part, but I was involved in the mediation and settlement of it. That was what it was all about. We could not continue. We had no defence without the evidence; whether the defence would have succeeded or not, which I would quite like to have known, we will never know because it could not be put in, could not be tested, could not be asserted. All we did was negotiate with

the representatives of the detainees for the amount of money they would take on the basis their claim was established.

James Brokenshire: It is fair to add that there are a small number of cases that we are talking about here where the significance of disclosure is that great that our judgment is that this process is required. So whilst I recognise the desire to focus on the numbers, to look at the numbers that indeed we put in the Green Paper itself, the impact of disclosure in even a small number of those cases could be quite significant.

Q194 Baroness Berridge: Can you outline for us why in *Al Rawi* all the witnesses have said that PII was not exhausted in that case? Can you help us with cases where you are saying that PII reached the end of what it can do and therefore you now need this process?

James Brokenshire: I suppose, in essence, PII is designed to exclude evidence, to take evidence out so that it is not considered by the court. Therefore, the approach that we are seeking to take through the closed material procedure route is to put evidence before the court to enable and to allow that to be considered, so that the court is then able to reach its fullest consideration based on all of the evidence, whether closed or open, whereas the emphasis on PII is very much about taking evidence out and therefore not allowing the court to consider it.

Mr Clarke: We do not have to replace PII. PII works in different ways, as James says, quite correctly. PII is an assertion of immunity and, if accepted by the judge, means that that evidence plays no part favouring one party or the other in the judgment. In some cases, it is possible to have a claim for public interest immunity, but it is what can only be called an iterative process, where you discuss the gist of the evidence and you put that in. There have been some cases where that has been done, but it tends to be cases where there is no particular difficulty. There is a hard core of cases where you are not going to get that kind of discussion, compromise and understanding. We avoided all this—or Lady Justice Hallett did—in the 7 July inquest, but that was because of, firstly, her skill and the reasonableness of everybody involved. But without casting aspersions on anybody, the only people represented were the families of the victims of the bomb. The bombers' families were excluded from representation, as I recall. PII and an iterative process might not have made the same progress if you had had the bombers' families represented, I think.

Q195 Baroness Berridge: We understand, or we are led to believe, that the Americans in particular are concerned that our courts do not respect the control principle. Can you confirm that the courts in *Binyam Mohamed* did not order the disclosure of anything that was not already in the public domain in the United States, and could you identify for us cases in which our courts have ordered the disclosure of material that the Americans and our other partners wished to remain secret?

Mr Clarke: I am not going to enter into the controversy about *Binyam Mohamed*. Those who defend the decision point to the court as having given as its reason that this was already in the public domain in the United States. My understanding—and I have had no direct contact with the CIA about it—is the Americans do not agree with that. All I can say is that case has given rise to difficulty. The question is: are we saying that we should be able to disclose, or a judge should be able to disclose, the contents of intelligence that we have received in confidence from the Americans or any other allies who shared it with us? The risk is—and it is a real risk—that, if that possibility occurs, our allies will not share the intelligence with us. They do not share intelligence with us taking a chance that it might be revealed outside. We cannot control them. No Minister can get the Americans to come off that, and if we start exposing our confidentiality to the risk—just the risk—that it might be disclosed to a British court, I personally have been persuaded that we really run the risk of a

reduced level of co-operation with Americans and others, who will just simply not give us the material.

Binyam Mohamed has unsettled them. It is too late to go back on the merits of that case; that is all water under the bridge, but since the *Binyam Mohamed* case, there is real concern about whether we are going to have the full-hearted co-operation with the Americans we do need to provide proper security to our population and to our interests.

Q196 Baroness Berridge: Can I ask you, Secretary of State, whether by that you are meaning that the control principle is absolute and not subject to the rule of law? Because the Lord Chief Justice spoke about this in the *Binyam Mohamed* case, and it is understood that the Americans do not have that situation. They agree that the rule of law goes over the control principle. Is what you are saying that the control principle trumps the rule of law?

Mr Clarke: I do not agree with your description of the American situation. What happens in America is that the Government asserts State Secrets Privilege and that is an end of it. It is much more blunt than ours. American intelligence material would not go into American proceedings once they have asserted State Secrets Privilege, capital S, capital S, capital P. They just say, “No”. So it is rather difficult to persuade Americans that, if it comes over here, we have to go into the extremely interesting discussions of PII and the balancing judgment of the judge and all the rest of it as to whether or not their intelligence material might suddenly be shared with the wider world. I am afraid I cannot command the American intelligence people to stop being so worried and that our judges have only annoyed them once and all the rest of it, which is the present situation. I would like—or not me, because I am not directly involved—but those who protect this country’s safety would like to be able to tell the Americans that they can be absolutely assured that this material would not get into the public domain by either judicial process or any other process.

Q197 Mr Raab: Going back, or focusing in on PII, Secretary of State, is this a question in terms of the adequacy of PII of looking to the future and seeing what is coming down the track, or is there specific evidence from past or existing cases that demonstrate that the PII is incapable of protecting the security sources or that it leads to unfairness in practice? Is it a mixture of both or one or the other?

Mr Clarke: PII, strictly speaking, means you claim public interest immunity and that is it. As I have said, in practice, my understanding is the parties and their legal representatives respond to that by reaching an understanding, with the help of the judge, about what can be produced and what cannot and how they are going to proceed in the action. However, if our only weapon as Ministers is to assert public interest immunity, unless there is some reasonable understanding amongst the parties in the proceedings, the consequence is that evidence plays no part in the final decision. That means the final decision is far from perfect as far as third parties or the public are concerned.

James Brokenshire: If I could just give a further example to that, on an exclusion case where the Secretary of State determines that someone should be excluded from the UK on national security grounds, the challenge to that is judicial review. If the Secretary of State has relied on sensitive material, then you would then be potentially utilising PII to exclude that material even though it may be at the heart of the appeal consideration in relation to judicial review. So I think the additional complexities that sit alongside the damages issue and the sensitivities issue that attach to the evidence are equally relevant to the consideration here of why, when we look at what has been taking place around this *Norwich Pharmacal* type of case that has developed over the years on the disclosure of third party information, we are seeing more of those cases coming through—that is a changing environment—and, indeed, whether there is some sort of forum shopping that may be taking place around this. It is for

these reasons that we look at this emerging picture and determine that we do need to take some form of action to guard against that.

Q198 Mr Raab: If I may, very briefly, you have described the problems with PII in terms of what you feel will happen as a result, but—I do not mind either one, but perhaps the Secretary of State as it is a justice issue—what precisely is it that is wrong with the procedure? Because you described the parties and you relied on their good will, but you have a security cleared judge there. Is it that you are failing or there are elements within the Government that do not trust the judge to make the right decision? If it is not that, what is it? What is the aspect of it, given that judicial supervision?

Mr Clarke: PII excludes it from the judge, as it were, although the judge has to be satisfied, so the judge, ironically, reads it and the judge then makes his balancing judgment. If he upholds the Secretary of State's application, then it is out. Of course, once it is in it is shared with the other parties and the whole point of seeking PII, the only basis upon which the Minister should be seeking public interest immunity, is this is sensitive information that cannot be shared with the other parties, their lawyers or with the wider public. That is why it is a blunderbuss: if you win your PII claim, you withdraw the evidence into total secrecy so far as everybody, but the judge himself who has read it, is concerned, but the judge is expressly not to take it into account, not to give it any weight in the decision in the case.

Q199 Mr Shepherd: Lord Chancellor, you and I will well remember the *Matrix Churchill* case, of course, and how the law on PII at that time was an absolute assertion, accepted by and large by judges. We develop this now further. The judge is a sort of balancing act, i.e. a check on the claims of the Executive in the pursuit of these prosecutions. That seems somehow at least an independent element as opposed to the perceived interests of the Executive. Our system of justice has always wanted to counter the power of presentation and argument of the state in relationship to a citizen or those accused in a witness box. We know a great injustice was done in *Matrix Churchill* in a parallel case of people who were also supplying material to the then Iraq government. They were convicted because the judge accepted the Minister's attestation, which is a personal one, as the Secretary of State well knows. That is what worries a lot of people: that this is essentially an assertion by the power of the state. What is therefore the counterbalance in this?

Mr Clarke: I well remember *Matrix Churchill*: I was involved in it. We have moved on since then. That was all exposed and it showed what the dangers were. I quite accept that just an assertion by the Secretary of State cannot be allowed to be absolute. People have got the impression from my Green Paper that that is what we are asserting. I share your view about that: my PIIs survived the inquiry into that; mine were okay. Other departments were putting in PII to avoid embarrassment, to cover up the fact they had made a pig's ear. It was the classic case of misuse of legal assertion by Ministers behaving innocently; if they had thought for five minutes, they would have realised they should not have been doing this. There we are.

What we therefore have to do—and we have canvassed the way in which we think it could be done in the Green Paper—is give the judge a role in this. I would not expect someone—you, Mr Shepherd, or a very large number of people who are interested in this field—to just accept that the certificate of the Secretary of State full stop means the judge and everyone else can have nothing to do with it. What we have suggested is that although he certifies, the judge does have the right to decide whether this is reasonable using the ordinary test of judicial review. That should go on: once the evidence has been called, the final decision about what evidence should be closed and what will not will be left with the judge. It is difficult to get the role of the Secretary of State right. Only the Secretary of State can set

it off, because only the Secretary of State and his advisers have sufficient all round information to know whether there is a case for asserting risk to the national safety or not; but only the judge, in the end, can check that as a reasonable decision; and only the judge, in the end, can make the decision about what goes in now. We have consulted on it, and we are anxious to get that right. I hope that the reaction to it will enable us to put it in the right way that satisfies those with a keen interest in justice and at the same time does not jeopardise national safety. It is not the case that we are saying the power of the state is to order the judge to go away; the judge must have a role in deciding—

Chair: Lord Chancellor, we must make progress. You will be pleased to know that you have anticipated at least one question.

Q200 Mike Crockart: You will be returning to that decision in a second. I do not want to labour the point of the 27 cases that we have touched on already, although it was the Government that included them in the appendix to the Green Paper, but it is key in judging whether these proposals are proportionate to understand the scale of the problem. The Independent Reviewer of Terrorism Legislation, David Anderson QC, in his evidence to us argued that he has sought unsuccessfully to ascertain how many of those 27 current cases concerning sensitive information could only be fairly resolved by means of closed material procedure. I just want to act on his behalf and say can you help us on that, and if not can you write to us with a figure and an explanation of that?

James Brokenshire: It might be worth me adding, in relation to the Independent Reviewer David Anderson, that Mr Anderson is being given further access and details in relation to those 27 cases to be able to examine them and look at that for himself. The 27 cases are live cases; they are obviously still continuing, and therefore it is difficult for us to comment on them in detail as a consequence of that. I do go back to my original point that it only needs a small number of significant cases of information being disclosed or taken out either for there to be a national security issue or for the judge in that case not to be able to form a complete judgment based on all the information that is there. It is both of those elements that we are seeking to address through the proposals in the Green Paper, and obviously we are continuing to reflect on the representations that have been made in response to the Green Paper itself. It is with that intent and aim that we are approaching this.

Mr Clarke: It only needs one case to go wrong. If you suddenly alert some Al-Qaeda cell in such a way they guess who it is you have turned and where your information is coming from, or they suddenly realise you have a technique that enables you to intercept things that they did not realise you were capable of intercepting, then you have done some very considerable damage. We think there are 27 such cases, but in the worst scenario one case blowing up our intelligence penetration of a very dangerous group of people would be very, very bad from a national point of view.

Q201 Lord Dubs: Lord Chancellor, in the foreword to the Green Paper the emphasis is very much on protecting national security, enabling the security and intelligence agencies to do their job, and indeed, you made that point in answer to an earlier question. On the other hand, there are some concerns that the proposals in the Green Paper go wider than that: they apply to any disclosure of sensitive information which may harm the public interest. Is that the case? In other words, what evidence does the Government rely on to demonstrate that there is a wider problem than simply the security considerations?

Mr Clarke: We are addressing that. It probably is not set out with the greatest clarity in the Green Paper, because you have to dot about in the Green Paper. Doing that, some people have started expressing perfectly sincere fears that we are giving some Secretary of State the power to start asserting that it is not in the public interest to put things in. That is not

what we intended. We do believe what we are describing is going to apply to a small number of cases in practice: perhaps not all the 27 we are talking about. We are not thinking of withdrawing all kinds of things where it would be kind of better from the point of view of the authorities if we did not have this cross-examination in public of witnesses. What I had better say—the Government as a whole is going to have to consider this—is we are now addressing that. My colleagues have been using all the examples I have been given—based on spies, national safety, terrorist suspects—as the examples all the way through the discussions we have had. That has been uppermost in our mind and we will guard against bringing in all kinds of other things where the enforcement of the Litter Acts, or something, is going to be compromised if you have it in open court. I deliberately give an extremely silly and fanciful example, but some of the fears being expressed are going to be quite easily rebutted.

Q202 Lord Dubs: Lord Chancellor, in an earlier comment—and in fact in the *Daily Mail*—you said that “the final decision on whether individual pieces of evidence must be disclosed will rest with the judge”. That seems to be a bit of a change from the way the Green Paper is currently phrased.

Mr Clarke: It is not meant to be.

James Brokenshire: No, and we talk about closed material proceedings, and that is the way in which those proceedings move forward: that there is a clear assessment by the judge of the relevant material to determine whether it should be open, and therefore public, or closed. It is a key part of the consideration in these closed material proceedings to strike that balance. The emphasis is always on seeking to disclose where possible, and only reserving those issues where there is an implication in terms of national security or otherwise.

Q203 Lord Dubs: Is the safeguard in the courts’ role to review the Secretary of State’s decision on disclosure on judicial review principles? Is that the extent of it?

James Brokenshire: There are two stages here—

Mr Clarke: I will allow James to speak.

James Brokenshire: In essence there is the decision that is made by the Secretary of State as to whether a closed material proceeding should apply, based on the harm that might be caused if it were to continue in completely open session. It is that decision that is then capable of review using the judicial review principles by the judge, but then the separate part of that, if that decision is upheld, is then the consideration of each of those items or classes of evidence to determine whether it does fall into the closed element; and, if it does fall into the closed element, what gisting, what summary of that information can be provided in respect of even that closed material. A judgment will be made as to whether that gisting of itself will be harmful to the national security interests.

Q204 Mr Raab: Very briefly, that is quite useful in some sense to take us a bit further towards reassurance in the judicial element. Does that not then get you back into the problem of the US control principle, because the more you give the judge the last word, the more uncertain and unsettled our American colleagues and partners will be? Does it create a knock-on effect in relation to your fear of intelligence being cut off?

Mr Clarke: We have a dilemma. What I would like us to do with our final decisions, which will be subject to the consultation, including this Committee’s bidding, is to satisfy you, Mr Raab, that the judicial element has been brought in to the maximum possible extent, consistent with the purpose of the whole thing. At the same time I would like to satisfy the Americans that, if they give us material in confidence, then even by that process we will not break their confidence. The problem with just explaining to the Americans that our courts work in this way so your material might come out in the United Kingdom is they will not

share the material to the fullest extent that they are used to doing. That weakens our ability to defend the country. We will try to be as receptive as possible to the argument that the judge has got to have a proper and sensible role in all this; you cannot just have the unfettered decision of a Secretary of State. On the other hand, we have to uphold the control principle, and it may well be that intelligence given to us in confidence by third party countries, as our allies, should not be capable of emerging by our process.

Q205 Mr Shepherd: In the world of WikiLeaks this is very difficult, is it not, because we have had released into the public domain huge quantities of very sensitive information, directly affecting diplomats in post and all the rest of it? I wish the Americans well in their quest there, but we are concerned here about the integrity of our own legal processes, and the fairness of court actions. You will have read, I am sure, and seen the special advocates almost universally have declaimed and spoken against this as almost an assault on our common law principles. That may be hyperbole in some eyes, but it is right at the heart of the issue. First of all, I have to ask you, do you accept the special advocates' position? Do you give it credibility?

Mr Clarke: Of all the responses we have received to our Green Paper, the evidence of the special advocates most unsettled me. It did surprise me, and I was very startled by their strong reaction. I met two of them; we are engaging with them, and it is obviously important that we take on board their very strong strictures. Anything we can do to address the process by which they take instructions or impart information to their clients in order to do their job properly, that can sensibly and properly be done, we should obviously try to do. I have to say that others involved in the process say the special advocates underestimate their own impact on cases. They are advocates, and I think the advocacy they put forward in their witness statement is extremely strongly critical—it is root and branch at times—of the process in which they all take part. I understand the very great constraints under which they operate, and anything that can sensibly be done without compromising security we must carefully consider, and we are doing so. Taking what they can report back to their clients afterwards—gisting and so on—I am not quite sure why they are so doubtful about seeking the courts' permission; the court would wish to give them permission to do that, in my opinion. The judge wants to be able to do justice in the case. That kind of thing has to be tested with them. They say they cannot call witnesses: there is no reason why they cannot call witnesses; they can call expert witnesses if they have expert witnesses. I do not think you should just take it baldly as a rejection, but we must engage with them and, wherever it is possible to do so without compromising safety, try to meet their points and improve the process.

James Brokenshire: If I might say, Mr Shepherd, it is important to state that the courts have upheld the principle of closed material proceedings providing fair trial within the framework of the European Convention. On the concept of, "Does this provide a proper judicial mechanism?", yes, we think that it does. It comes down to some of the principles on seeking to put information into a court and allowing full consideration of all of the information, which is the key part here. I had a very constructive meeting with the special advocates to talk through some of the practical challenges that they have identified in their submission, talking through the Chinese wall provisions that we have suggested, mechanisms by which we may assist them through further training and support, to support the I think very good job that they did. I was very struck by the evidence that Lord Carlile gave to you, which was very much in keeping with everything that we see in Government. It is just how good they are at the job they do in making the case for their clients, getting evidence into open rather than closed session and through other means as well. I think special advocates are doing a very effective job in that way.

Q206 Mr Shepherd: I will stick with the Lord Chancellor's exegesis if I may; your concerns, Sir, are clear. And special advocates, of course, sum it up as "inherently unfair"; that is a phrase that has repeated itself through our sayings. On the question of the judges that you have just introduced, Lord Kerr—I never know how to pronounce his surname; we had a colleague, Michael Ancram and he is a "Kerr" or a "Karr", and I can never remember which—who is a respected judge you will agree, said in court, "[to] be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead." That is at the heart of our concerns.

Mr Clarke: Those assertions are all made. As I said at the start of the process, of course open justice is perfect justice. In an ideal world you would want every case to be conducted in a perfectly open way, full instructions taken, full cross-examination, publicity if necessary, the public there sitting listening to it. Once that cannot be done, and it obviously cannot be done in the kind of cases we have been talking about today, you are talking about a second best. But nevertheless, you can challenge; it is just a question of making sure that the special advocates are in the position to provide adequate challenge, which some people assert they do, and so—Lord Kerr, I keep calling him, I do not know—on Lord Kerr's point, it is challenged by the special advocates. The special advocates say, "Well, it is difficult to challenge because we can only get written instruction from our clients once we have got the sensitive material". They can seek permission from the court to take further instructions. We must work at that. I do not dismiss the special advocates—

Q207 Chair: Lord Chancellor we have to suspend the session for 10 minutes because there is a vote in the Lords. I apologise for that.

Sitting suspended for a Division in the House.

On resuming—

Q208 Mr Shepherd: Having taken the trouble to quote Lord Kerr, I wanted to ask whether you agree with him. I will do the quote again: "[to] be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead." Do you agree with Lord Kerr?

Mr Clarke: I think the ideal for any system of justice is that evidence is given openly and is challenged. If there are circumstances where that cannot be done, then you have to obviously, in listening to the evidence or considering the evidence, bear in mind the limitations under which it has been challenged. I reassure myself by saying that the judges in these cases are perfectly capable of assessing the weight they can give to evidence. The judge in the British situation is almost certainly someone who has been an advocate himself or herself in his or her career; they will know that they have to bear in mind, at the back of their mind, that the special advocate has done his or her best but there is a limit to how far they can challenge compared with a perfectly open system. I still think that is preferable to nothing; that is preferable to not having the evidence considered; that is preferable to the public never knowing which way the judge came down, having considered everything they had before them to the best of his or her ability.

Q209 Mr Shepherd: You will see where, as I said before, it is the integrity of our own legal system that worries us, or the admirableness of it. The propositions that we are putting are obviously a corruption of the ideal of that system for the reasons that you are giving. That is the thing that we have to confront as a Committee and as a society: the propositions that you are putting in front of us. It is very, very worrying to some of us; that of course is true.

Mr Clarke: It would worry me. I haven't changed my views, as you know Mr Shepherd; I haven't over the years. That is why, in the exceptional circumstances that public

safety is definitely going to be put at risk if you subject this material to ordinary open cross-examination, then you have to do the best you can that still gets the most just conclusion you are going to get of the actual case. With the professional skill and judgment of the special advocates and the judge who is trying the case, you will get a better outcome if all this evidence is considered than you will get if it all just has to vanish into a black hole because it cannot play any part in the outcome of proceedings.

Q210 Baroness Berridge: Secretary of State and Minister, we are dealing with an unusual situation here where we are considering a form of judicial process. Have you had representations from the judiciary in relation to the proposals in the Green Paper, and if so what representations have been made?

Mr Clarke: I have discussed it with the judiciary, with the Lord Chief and the two High Court judges who he asked to consider this matter and discuss it with me. One thing we are absolutely clear about is judges do not advise Ministers on matters of policy. Judges will discuss the broad issues involved, will discuss their experience of these cases, will certainly offer points about procedure, process and how they would best like to do their job, but in the end separation of powers is such that the judges have to reach a point where they retreat and say, “That is a matter for Parliament, that is a matter for you Minister, a matter for whether Parliament is going to agree with you; I cannot advise you on that”.

Q211 Mr Shepherd: And the Law Officer?

Mr Clarke: The law have contact with the judiciary, and certainly the Attorney and the Solicitor have regular contact, and I have had meetings on this subject with judges, but you can only take it so far. They want to know what we are contemplating, and I want to know what their view and process are, but we are all very clear that they cannot give advice on policy to the Government of the day.

Q212 Baroness Berridge: I just want to follow that up. I know they can only go so far, but Parliament is involved in this scrutiny process now and when the legislation is put forward. Will Parliament have the opportunity of hearing those representations that the judiciary have made?

Mr Clarke: We are proceeding on the basis that we will publish the responses we have had to the consultation—the written ones, that is—if the consultees agree, and most we have released. I do not think the judges have put in any written evidence, and I can only say that, if the Select Committee want to hear from judges, have a go at the Lord Chief Justice, but I am not sure he will agree to come. He would want all kinds of reassurances about what kinds of questions he will be asked, and no judge will appear here and give an opinion on our Green Paper and the merits of it. Not only do I think they would be most unwise to do so; I think they do not need my opinion. You would not have the faintest chance of persuading them to do that. Nor do they express their view to me either: “Yes, we agree with that; no, we do not agree with that”. They discuss in general terms the process they are used to. If the Committee can persuade a judge to come here and talk to you—

Q213 Baroness Berridge: Do you appreciate, though, our concern that a limited amount of representation has been given of the judicial view to the Executive and to the Lord Chancellor, which will not then be given to Parliament?

Mr Clarke: I cannot compel judges to respond to a consultation process, nor can I compel judges to appear before Parliament. The judges are right to be highly sensitive to the circumstances in which they might do that, but they do sometimes come and appear before Select Committees. I assure you, I have not debated with any judge the merits or otherwise of

any part of this by way of a discussion on policy. I have had general discussions. The judges are quite scrupulous, and they are not going to start getting drawn into whether or not they agree with a Minister on an item of policy. They will not do that even when they are talking in private to a Minister.

Q214 Lord Morris of Handsworth: Lord Chancellor, can I perhaps take you to a less high profile end of the judicial system, which is Inquest? Do you accept Inquest's evidence that, under the current inquest system, coroners can—and do—cope with even the most sensitive and highly classified material without the need for closed material procedures? If not, what examples can you give where coroners have not been able to overcome the problems posed by sensitive materials?

Mr Clarke: It usually is the case that they do. In some of the most difficult cases, for example, involving service personnel and families, it is normally possible to establish a perfectly good process by which the rights of everybody are respected, a proper inquest is held, but, again, military intelligence or secure information is not compromised. The 7 July bomb inquest we had recently: I have already spoken and praised everybody who took part in that. To others we cannot guarantee that. Sooner or later there will be a case that tests this, because the parties, out of their political conviction or for some other reason, are extremely hostile to the authorities, the Government, there are great issues at stake, and the Government is not prepared to compromise itself by disclosing everything to them. Again, I speak in ignorance, so do not give great weight to this evidence. My understanding is that, in Northern Ireland, there are quite a lot of inquests that have been adjourned for many years. Again, I am being very cautious about what I say, because once you get into Irish politics, the conduct of inquests in Northern Ireland is a very, very fraught subject. I do not know if anybody here has been in the Irish Office, but they have had this difficulty. We have to consider whether or not we are going to anticipate whether a case might arise sooner or later where we have the same difficulty.

Q215 Lord Morris of Handsworth: Can I ask whether the coroners have been consulted outside of the Green Paper?

Mr Clarke: I have not directly consulted with them.

James Brokenshire: I am not aware that that is the case, but what I would say to you, Lord Morris, is that we recognise that this is a very sensitive issue, reflecting on the rights of the family to have access to this process. When you look at the Green Paper and the way in which it is phrased, we recognise that there are no easy solutions to addressing this particular challenge. The question that we genuinely sought public view on is the extent to which we should be examining and considering the possibility that the Lord Chancellor has been alluding to as to where there is sensitive information that could not be disclosed to the coroner in the some way. Yes of course there are other mechanisms that could be available, perhaps some sort of inquiry, but they tend to be very long, they tend to be quite complex in their nature, so you may not see that regularly used. That is why we feel it is right to ask the question that we have asked and why we are considering this with very great sensitivity.

Q216 Lord Morris of Handsworth: But you do accept the principle of the right for families to know?

Mr Clarke: That is true, but the families would be in the same position as parties in civil cases, knowing nothing if information is just withheld because it cannot be disclosed. James is quite right to stress that we are proposing this with very, very great care, but in the 7/7 case the Government in fact applied for a closed hearing because we wanted to put in material about the work of the intelligence service: one issue was whether or not they could

possibly have averted the bomb on the London Underground as part of their intelligence work. The judge quite rightly held that the Coroners Rules did not enable her to hold a closed session. We were then in a bit of a crisis. We could have tried to proceed by amending the Coroners Rules. That would have been one obvious next step, but we might still have found it going through the courts and being argued about. In the end, common sense prevailed: the parties between themselves produced an agreement on the way in which they could proceed, and I quite agree that is optimal in every case. The Government was satisfied that national security was not going to be compromised; all the parties involved were able to have a proper hearing of sufficient of the issues for everybody to feel it had been handled properly. But you cannot guarantee that in every case because, as I say, the only families involved were families of innocent victims of people travelling on the Underground when the bomb went off.

Q217 Mr Shepherd: Baroness Manningham-Buller has spoken about the events and some of the matters that were considered very, very sensitive as to the effectiveness of the security services, and in fact identifying the 7/7 plot and things they could do. I think she did that—was it in the Dimbleby or Reith lectures that she gave last year?

Mr Clarke: I am afraid I did not hear it. Do you mean she gave details about the intelligence operation?

Q218 Mr Shepherd: No, about the concerns that arose around it: had the security services missed sensitive and important information that meant they could have anticipated? It was engaging with a wider public than—

Mr Clarke: The judge in the inquest accepted that it was a valid issue for the inquest: had the intelligence services covered every eventuality and had they perhaps failed to take adequate action to prevent the risk? They managed to handle it to everybody's satisfaction. It required great skill and some reasonable give and take and understanding on all sides that they all desired to have it properly heard—

Chair: We need to progress, and please, I ask my colleagues not to make any further interventions unless you do it through the Chair.

Q219 Mr Sharma: Do you accept the proposals in the Green Paper will have an effect on media freedom? What is the Government's justification for such a serious interference with this fundamental democratic right?

Mr Clarke: I defend the freedom of the media as vigorously as anybody else, but we do not allow the media to print unedited intelligence material at the moment, because it would compromise national safety. Nor do I know any sensible journalist who believes that MI5, MI6, for example, should freely start giving press releases about what it is doing. Open justice I firmly believe in, and I do not think that justice should ever take place behind closed doors unless there is an extremely compelling reason. National security can sometimes be one of those reasons.

James Brokenshire: It is worth highlighting, Mr Sharma, that on our closed material proceedings in relation to, as was, control orders and TPIMs, there are open judgments that are reported in relation to those and that those have been actively reported on by the press and elsewhere. When a judgment is given, yes, there is a closed judgment, but there is also an open judgment and the judge will always seek to put as much into the open judgment as he or she is able, to facilitate subsequent reporting and to facilitate the press in their review of a particular case.

Mr Clarke: There is no inhibition on allegations being made. I read in the last two days one or two journalists suggesting that somehow we are stopping people from making allegations. They are perfectly free to make whatever allegations they like. *Binyam*

Mohamed: no inhibition was placed on his allegations, or anybody else involved. It is the counter to them that we are talking about.

Q220 Baroness Berridge: We had evidence from Joshua Rozenberg who pointed out that the current trend throughout the court system is towards greater openness and transparency, so if you look at the family courts, the Court of Protection, inquests and the Supreme Court. The Green Paper is going directly at odds with that trend. Are you concerned about that? Also, the evidence from journalists was that under the new procedure they would not have learnt of the information through disclosure that substantiated the claims that were made in the *Al Rawi* case and *Binyam Mohamed*. Can you assure the tribunal that that would still be the case today, after the changes you outlined, or would that have happened under a closed procedure?

Mr Clarke: I am all in favour of increased openness and transparency and I am proposing to allow television cameras into more courts than at the moment, but I am not proposing to allow televised evidence given by spies on national intelligence material. It is a balance in these things. Some of the claims that have been made about what our new process would effect I find puzzling. I have just said to Mr Sharma that no-one is proposing to inhibit allegations at all. They would be given in open court if the proceedings are underway and would be challenged by whoever is appearing on behalf of the Government. It is certain aspects of the Government's response that cannot be given in open court. That is all.

Q221 Baroness Berridge: To give you a specific, the allegation about which Ian Cobain gave evidence to us he said that he made back in 2005, about our involvement in serious human rights abuses, and he was told, "That's a conspiracy theory". It was then through the disclosure process in court proceedings that he learnt that that was not the case. In that situation, open justice was very important. It is not just the allegation: it is the substantiation of an allegation. Would that still be the case under the new proposals, or would they not learn that ever at all?

Mr Clarke: It is more likely to be under the new proposals, although it will be less than perfect. Let me go back to the most obvious example, because it is the most recent, it is the one I was somewhat involved in: Guantanamo Bay detainees. I am sorry to go back to it yet again. I would have liked those cases to have been heard through to a judgment. I am inclined to believe the defence put forward. Indeed, I do believe the defence put forward, but I would feel more reassured as a citizen if a judge had given a judgment and pronounced in favour. Do not take that as casting any doubt on the intelligence services, because I have no reason to doubt them at all, but I think citizens would have felt doubly reassured if it had been properly heard and the allegations had been dismissed and judgments had been given for the Government with costs and all the rest of it. But we were not able to do that. Because we could not give the evidence in closed proceedings, the defendants just withdrew, and the Government said, "We are not defending ourselves, we still deny the allegation, could we settle on how much you will take by way of compensation on the basis your claims are going to be unchallenged?" It is precisely the need to get these allegations dismissed and accept the risks in some occasions—I hope in rare ones they might even be upheld—that we are trying to bring in a process to enable us to meet.

James Brokenshire: It comes back to our principal aim of seeking to allow information to be provided to the court, and for the judge to determine what should be open and what should be closed. That is why those protections are very much afforded in the structure that is contemplated within the Green Paper.

Q222 Mike Crockart: My question returns to Mr Shepherd's point from earlier. In your foreword to the Green Paper, you say that "the prize is improved executive accountability", but in light of the strength of reaction the Green Paper has provoked, does it remain your view that the proposals will enhance rather than reduce Executive accountability, and increase rather than undermine public confidence?

Mr Clarke: My last answer was a rephrasing of that. We have got to counter the extreme reaction. What has happened is we have taken rather a long time since we produced the Green Paper; it is getting near the time when we should produce a clear response. There are doubts, criticisms and questions. People seemed in the last week or two to be feeding each others' interpretation of the Green Paper and attributing to us a desire to go into secret justice, which was not in the mind of anybody who put that Green Paper together in the first place. We have to claw our way back and I hope persuade this Committee that we can put in place a process that improves Executive accountability—even if it falls short of perfection, which would be open justice—and will enable proper hearings and decisions to be reached by judges using all the evidence available in the best possible way it can be made available to them, given all the restrictions.

James Brokenshire: I do not think the public would see it as right that Government has to settle claims where it believes that it has a strong case to defend but is unable to put that evidence before the court, or equally, for the decisions that are made that may be subsequently reviewed through judicial review, that they are not able to put before that court, and therefore scrutinise properly, the actions of the Executive in making that decision. It is at the heart of this Green Paper that we take those factors into consideration. I agree with the Justice Secretary in saying that there has been a lot of speculation as to the broad remit that perhaps some have interpreted in relation to the Green Paper itself. It is that fundamental aspect that we have at our core, and our intentions are in seeking to support and promote justice and support the scrutiny of the Executive's actions, rather than to in some way inhibit that.

Q223 Mike Crockart: I take your point about wanting to make sure that, where you want to take cases the full way to judgment, you manage to do that, but I do not accept that that is actually the public's perception. The public perception is quite the opposite, and there is a deep mistrust about the motives behind this Green Paper. You need to do something to deal with that, otherwise do you accept that the damage that will be done to public trust is a necessary cost to taking this through?

James Brokenshire: I hope in many ways that the answers we have given to this Committee have been very clear that the nature of closed material proceedings and the nature of the issues that Government is seeking to protect are very much about justice, protecting the public and the security issues allied to that. It is with that emphasis that we are seeking to give in relation to the Green Paper that we judge that simply taking no action does not advance the interests of those issues I have highlighted in response to you, Mr Crockart. Therefore our judgment is that action is required to protect national security and also to allow that examination of the decisions of Government through the court process. That is at the heart of what we are seeking to do here.

Q224 Baroness Berridge: We are now onto *Norwich Pharmacal*: a slight change of tack. The Green Paper says that there are seven cases in which difficulties have been raised under the *Norwich Pharmacal* jurisdiction. Can you help the Committee with how many of these have been since the decision in *Binyam Mohamed*?

James Brokenshire: All seven is my understanding. The seven further cases have been since the *Binyam Mohamed* case in terms of seeking further disclosure, if that may assist.

Q225 Baroness Berridge: Can you identify for us any case in which applying the *Norwich Pharmacal* principle has ordered the disclosure of material that the Americans have wanted to make secret?

Mr Clarke: I do not think you have ever had a case where American material has been—I am not aware of one. *Binyam Mohamed* stands as an isolated case, but no-one knows of another case.

James Brokenshire: The point is that since the *Binyam Mohamed* case, we have seen the seven further cases. Therefore the focus is on what was initially developed as a concept through an intellectual property case, which has now been applied from a national security context. Therefore, it is against that—the impact we have seen in relation to our relations with our partners on the provision of intelligence information—that we judge it is appropriate to consult, as we have done, on taking action to address those concerns.

Q226 Baroness Berridge: Could you just confirm that there is no suggestion of what we have heard from other witnesses: that the issue with the Americans is leading to intelligence that has risk to life being withheld? Is that your understanding?

Mr Clarke: There is no question...?

Baroness Berridge: There is no question that intelligence that poses a risk to life is being withheld from us?

Mr Clarke: I certainly cannot give an answer “yes it has” or anything of that kind. Collaboration between intelligence services means you disclose information to each other with good will, seeking to collaborate. It is only when you put it all together that you begin to realise quite what you are doing, all the people who are involved. We do not collaborate with the Americans on trivial matters. They rely on us co-operating with them as well, but it makes an enormous difference if we can have access to American and other material: they are not the only intelligence service, not at all the only intelligence service, with which we collaborate. Other intelligence services will not start giving us material we would like to have if they think the British legal process might disclose it. Hardly anybody else has an equivalent to *Norwich Pharmacal*; it is very, very unusual, and it is just possible after *Binyam Mohamed* that people have been intrigued by the idea that you can get hold of American intelligence by going through this rather obscure process in the British courts, which, as James said, was not intended to cover these sorts of cases at all.

Q227 Mr Sharma: Do you accept the criticism of David Anderson QC about the Green Paper proposals, and is the Government actively considering his suggested alternative of judicially reviewable ministerial certificates?

Mr Clarke: It is very important evidence, but he does not dismiss root and branch what we are saying. He does not say that PII is a perfectly adequate alternative, and I have already said we would like to reassure everybody that the judge is not being excluded from the process of judging that material should be kept in closed proceedings. The judge has to have a role in deciding whether or not the Secretary of State’s certificate is reasonable, it is a reasonable decision to give the certificate, and he has to have a role in deciding what material remains closed as the closed hearing goes on. I have read, and have here, some of Mr Anderson’s evidence; he is someone we very much want to reassure and have onside, but he is not root and branch opposed to what we are proposing.

James Brokenshire: David Anderson has underlined the nature of the problem and, certainly from my reading of the evidence he has given to you, recognises that seeking to provide protections in respect of issues relating to national security is something that is regarded as important, from all of his discussions. We are of course reflecting on all of the submissions we have received in respect of the Green Paper. We have put out two suggestions that we are consulting on in respect of how to best address the *Norwich Pharmacal* issue, and clearly we will give consideration to the submissions that have been received.

Mr Clarke: I can give you select quotations, if you like: I have Mr Anderson's evidence before me. He is by no means rejecting what we have put forward.

Q228 Lord Dubs: Lord Chancellor, just a question about the process of getting the Green Paper drafted: how much of a role did the security and intelligence services have in drafting the Green Paper?

James Brokenshire: There have been some discussions prior to the publication of the Green Paper in terms of the proposals that have been set out for consultation, but it is that engagement. If the question is seeking to ask whether there are formal submissions that have been received from the security and intelligence agencies that have yet been published, the answer to that is no. The discussions were very much in the earlier stages.

Mr Clarke: They had an input, but so did quite a few other branches of Government. In the end, the Green Paper was a ministerial paper—drafted by officials, largely, but approved by Ministers.

Q229 Lord Dubs: Although you have withheld some of the submissions.

James Brokenshire: Again, this is on the basis that the Lord Chancellor wrote to the Committee about this, explaining the fact that various people had not given their consent to disclose. We have been working through, as you will be aware, securing those permissions so that those submissions can be published. That is still, to my knowledge, work in progress.

Mr Clarke: I repeat: the intelligence services have not made a written submission. MI5 and MI6 do not feature amongst those where they have not given consent.

Q230 Lord Morris of Handsworth: Are you saying that every submission where consent has been given has been published?

Mr Clarke: Yes.

James Brokenshire: To my knowledge, yes.

Q231 Chair: Lord Chancellor, final question: you mentioned right at the very beginning the White Paper. Could you give us an indication of the intended timetable of the White Paper?

Mr Clarke: Soon, I think. I would very much like to get the White Paper out and so would my colleagues, because we are getting concerned about the ever widening nature of the debate in the last few days. So we would quite like to get a White Paper out. I cannot guarantee when it will be, but we are all anxious to get it out. Then of course it will require legislation; the actual drafting of the legislation is the next key point in response to the understandable points raised by this Committee.

Q232 Chair: I take it that “soon” means before the Queen's Speech?

Mr Clarke: Yes, I would hope so.

James Brokenshire: Dr Francis, we have said to you that we would wish to take account as best as we are able of the considerations of this Committee, and therefore if a

decision is taken to legislate, that will not be before the commencement of the second session to enable publication of your report and some consideration of that.

Mr Clarke: So long as you do not hold the report up for too long, but I assume you are thinking your report will come out before the Queen's Speech as well.

Chair: Could I thank you on behalf of the Committee for answering our questions? Your answers were not always in the order we anticipated, but we did get there in the end. Thank you very much.