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The *Prevention of Terrorism Bill*

Bill 61 of 2004-05

This Bill allows the Secretary of State to make 'control orders' to restrict the movements or behaviour of suspected terrorists who cannot be prosecuted or deported, or impose obligations on them. The orders would be subject to some judicial oversight. Orders which amounted to an infringement of liberty would require a derogation from the European Convention on Human Rights to be in force.

The Bill was precipitated by the House of Lords ruling in December 2004 that indefinite detention of suspected foreign international terrorists under Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* was unlawful. Part 4 is due to lapse on 14 March 2005.

The Bill was published today and is due to be debated on second reading in the House of Commons tomorrow (Wednesday 23 February 2005).

Arabella Thorp

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Summary of main points

In a Business Statement on Monday 21 February 2005 (HC Deb cc21-27), the Leader of the House announced that a *Prevention of Terrorism Bill* would be debated on second reading in the House of Commons two days later, on 23 February 2005. The Committee and remaining stages of the Bill would take place on 28 February. The Bill was published on Tuesday 22 February.

The Bill was precipitated by the House of Lords ruling of 16 December 2004 that the detention of suspected foreign international terrorists under Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* was incompatible with the European Convention on Human Rights (articles 5, on the right to liberty, and 14, on freedom from discrimination).

It seeks to replace these detention powers with a new mechanism - "control orders" - for containing suspected terrorists who cannot be prosecuted or deported. The new provisions would apply equally to British and foreign citizens.

The Government has rejected proposals on using intercept (phone-tap) evidence in court.

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I Detention of suspected international terrorists

A. The Anti-Terrorism, Crime and Security Act 2001

The Government responded to the attacks of September 11 2001 by introducing new powers to detain foreign suspected international terrorists indefinitely under immigration powers, without charge, trial or any real prospect of deportation. This required derogations from the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). Derogation from the ECHR required a derogation order.[1]

Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* (ATCSA) which created this new power also provided for a variety of challenges to it. The Special Immigration Appeals Tribunal (SIAC) was chosen as the venue for these challenges.

Library Research Papers 02/52 and 01/96 provide more detail.

B. Reviews of ATCSA

ATCSA includes a series of built-in reviews, some specific and some general.

The operation of the detention powers must be reviewed annually by an independent reviewer.[2] Lord Carlile of Berriew, who also reviews the *Terrorism Act 2000*, was appointed as reviewer and has today issued his third annual report on the detention powers (previous reports, from February 2003 and February 2004 are available on the Home Office website).[3] His role is to look at how the powers are being applied rather than to question the existence and legality of those powers.

The detention powers will lapse unless they are renewed annually by statutory instrument, following the independent review of detention powers and consideration by both Houses of Parliament. This renewal process has happened twice, and the powers are now in force until 14 March 2005.[4] These provisions cannot be renewed beyond 10 November 2006[5].

The whole Act was subject to review by a committee of Privy Councillors, to be completed two years after Royal Assent.[6] The committee had the power to recommend that any provision of the Act it specified would cease to have effect unless both Houses of Parliament debate its report within six months. Their report was duly published on 18

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1 *Human Rights Act 1998 (Designated Derogation) Order 2001* (SI 2001/3644).
2 ATCSA s28
3 His reports, along with the Government's responses, are available at: http://www.homeoffice.gov.uk/terrorism/reports/independentreviews.html
4 SI 2004/751
5 ATCSA s29(7)
6 ATCSA s122

December 2003,[7] and specified the whole Act for these purposes, so that it should all be subject to review by Parliament. The committee, chaired by Lord Newton of Braintree, strongly recommended that the powers to detain foreign nationals indefinitely under Part 4 be replaced as a matter of urgency, because of a number of problems of principle, efficacy and practice that it identified. It suggested instead some alternative approaches which might allow all suspected international terrorists to be tried and sentenced in the criminal courts, or to be deported if they were not British, instead of being held indefinitely in immigration detention.

The report was duly debated by both Houses – the House of Commons on 25 February 2004[8] and the House of Lords on 4 March 2004.[9] As a result the Act remained in force.

A tribunal set up under the *Regulation of Investigatory Powers Act 2000* has the power to scrutinise the investigatory powers and functions of the Intelligence Services.

The parliamentary Joint Committee on Human Rights (JCHR) has published four relevant reports, both on Part 4[10] and more generally on counter-terrorism powers.[11] It agreed with the conclusion of the Newton Committee's report that Part 4 should be replaced as a matter of urgency, and considered some alternatives for a 'more satisfactory legal framework'. It suggested that the experience of other countries suggests that it must be possible to deal with the threat from terrorism by means of criminal prosecution.

Partly in response to the report of the Newton Committee, and partly because of the fact that the detention powers will lapse in March 2005, the Home Office published a consultation paper on the detention powers. The Government rejected the committee's central recommendation that the Part 4 powers be revoked, and set out its reasons for thinking that these powers were still necessary and important.[12]

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7 Privy Councillor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, 18 December 2003, HC 100 of 2003-04: http://www.homeoffice.gov.uk/docs3/newton_committee_report_2003.pdf

8 HC Deb 25 February 20o4 c293 ff

9 HL Deb 4 March 2004 c 776-833

10 *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4*, Sixth report of session 2003-04, HL Paper 38, HC 381, 24 February 2004, and *Continuance in Force of Sections 21 to 23 of the Anti-terrorism, Crime and Security Act* 2001, Fifth report of 2002-03, HL Paper 59, HC 462

11 *Review of Counter-terrorism Powers*, Eighteenth report of session 2003-04, HL Paper 158, HC 713, 4 August 2004, and *Anti-terrorism, Crime and Security Bill*, Second report of 2001-02, HL Paper 37, HC 372

12 Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*, February 2004: http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf

C. The Special Immigration Appeals Tribunal

In addition to the review procedures set out above, ATCSA gives the Special Immigration Appeals Tribunal (SIAC) powers to hear three different types of challenge to detention under Part 4.

The Special Immigration Appeals Tribunal (SIAC) was set up in 1998 to hear immigration and asylum appeals involving national security or the public interest. There had previously been no right of appeal in such cases – a situation which had been declared in the case of *Chahal* to be incompatible with the European Convention of Human Rights.[13]

Because some of the evidence before SIAC cannot be disclosed to the public, the appellant and his representatives cannot see this evidence and are excluded from court when it is being examined. The appellant's interests are then represented by a 'special advocate', who is not allowed to make contact with the appellant after he has seen the 'closed material'.

To begin with SIAC heard relatively few cases. However, its caseload and prominence both increased dramatically when its role was expanded to cover challenges to the detention of suspected foreign terrorists after September 11 2001. The three ways in which SIAC may be involved in challenging detention under ATCSA are:

- hearing a challenge against the legality of the derogation from the ECHR and therefore of the detention powers themselves;[14]
- hearing an appeal against the legality of the Home Secretary's certification that he believes the detainees are international terrorists and that their presence in the UK is therefore a risk to national security;[15] and
- conducting regular reviews of certification which assess the current need for detention.[16]

The regular reviews of certification do not begin until six months after any appeals against the original certification have been finally determined. Thereafter a review must happen within three months of any previous review having been finally determined. As each appeal or review may take a number of months, this cannot be summarised by saying that there are reviews every three months.

SIAC also decides bail applications for suspected international terrorists detained under ATCSA.[17]

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13 *Chahal v United Kingdom* (1996) 23 EHRR 413
14 ATCSA s30
15 ATCSA s25
16 ATCSA s26

A Library Standard Note (SN/HA/1083) describes SIAC and its powers and proceedings in more detail, and mentions that one member of SIAC and two special advocates have resigned over its role in relation to the detention of foreign suspected international.

D. House of Lords judgment

Soon after their detention, a group of ATCSA detainees brought a challenge to SIAC about the legality of the derogation from Article 5 of the European Convention on Human Rights (ECHR) that was required to bring in the powers in Part 4 of ATCSA.

On 30 July 2002 SIAC upheld the detainees' challenge to the legality of the derogation, saying that it was outside the powers of the Secretary of State. Without the derogation, Part 4 of ATCSA was in breach of Article 5 ECHR; and the SIAC also said that because its effect was discriminatory (it applies only to non-British citizens) it was also in breach of Article 14 ECHR.[18]

The Home Secretary then appealed to the Court of Appeal, which overturned the SIAC in October 2002 and held that the derogation was not unlawful.[19] The Court decided that Part 4 was not discriminatory, saying that British nationals (who cannot be removed from this country) are not in an analogous situation to foreign nationals who currently cannot be deported because of fears for their safety, because such foreign nationals do not have a right to remain in this country but only a right (for the time being) not to be removed for their own safety. In any case, the Court held that it is well established in international law that, in some situations, states may distinguish between nationals and non-nationals, especially in times of emergency. Furthermore, the Court concluded that Parliament was entitled to reach the conclusion that detention of only the limited class of foreign nationals with which the measures are concerned was "strictly required" in the circumstances.

The detainees therefore appealed to the House of Lords. Liberty made written and oral submissions in support of the appellants, as it did in the courts below. Amnesty International made written submissions, also in support of the appellants.

In its judgment of 16 December 2004 the House of Lords - sitting as a panel of nine for only the second time since the second world war - reversed the Court of Appeal's decision by a majority of eight to one. It held that the derogation from the ECHR was unlawful, and therefore quashed the *Human Rights 1998 (Designated Derogation) Order 2001*[20] and declared section 23 of ATCSA incompatible with ECHR articles 5, on the right to liberty, and 14, on freedom from discrimination. They did so for two main

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17 ATCSA s24

18 *A and others v Secretary of State for the Home Department (2002)* (SIAC) Lawtel 1 August 2002

19 *A, X, Y and others v Secretary of State for the Home Department*, [2002] EWCA Civ 1502: http://www.bailii.org/ew/cases/EWCA/Civ/2002/1502.html

20 SI 2001/3644

reasons - first, because they considered that the part 4 powers were discriminatory in that they only applied to foreign nationals, and secondly, because they were not proportionate as a response to the threat that we faced from terrorism.[21]

In response to the House of Lords judgment, the Home Secretary Charles Clarke made a statement to the House of Commons saying that the detainees would continue to be detained, in accordance with SIAC's rulings on the grounds for the certificates themselves (see below), until Parliament decided whether or how to amend the law:

> It is ultimately for Parliament to decide whether and how we should amend the law. The Part 4 provisions will remain in force until Parliament agrees the future of the law. Accordingly I will not be revoking the certificates or releasing the detainees, whom I have reason to believe are a significant threat to our security, a judgment upheld by the Special Immigration Appeals Commission, chaired by a High Court judge.
>
> […]
>
> I will be asking Parliament to renew this legislation in the new year but in the meantime we will be studying the judgment carefully to see whether it is possible to modify our legislation to address the concerns raised by the House of Lords. [22]

The Government's position was extensively questioned in the House of Commons the following Monday.[23] Then on Wednesday 26 January Charles Clarke made a statement about the future of the detention powers in Part 4 of ATCSA.[24] He accepted the House of Lords judgment but repeated that his judgment was that there remains a public emergency threatening the life of the nation. He therefore proposed that the Part 4 powers should be replaced by two things: (1) deportation of foreign nationals on condition that the governments concerned give assurances for their safety, and (2) a new mechanism - control orders - for containing and disrupting those who cannot be prosecuted or deported, whether they are British or foreign citizens. The Home Secretary envisaged independent judicial scrutiny involving the hearing of evidence in open and closed session against the imposition of any order or any subsequent variation of an order, with special advocates in the closed sessions.

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21 http://pubs1.tso.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm

22 HC Deb 16 Dec 2004 cc151-2WS: http://www.publications.parliament.uk/pa/cm200405/cmhansrd/cm041216/wmstext/41216m03.htm#41216m03.html_sbhd2

23 HC Deb 20 December 2004 cc1913-21: http://www.publications.parliament.uk/pa/cm200405/cmhansrd/cm041220/debtext/41220-07.htm#41220-07_head0

24 HC Deb 26 January 2005 cc305-324: http://www.publications.parliament.uk/pa/cm200405/cmhansrd/cm050126/debtext/50126-04.htm#50126-04_head0

Because a Bill to give effect to control orders might not be passed before the Part 4 powers lapse on 14 March 2005, the Home Secretary was initially minded to seek to renew the part 4 powers for a limited time. A draft statutory instrument to continue the Part 4 powers for nine months beginning with 14 March 2005 was therefore laid before Parliament,[25] and an Explanatory Memorandum is also available.[26] However, Peter Hain has now suggested that, because of the Law Lords' judgment, it is not possible simply to renew the powers.[27]

On Tuesday 8 February 2005 the Liberal Democrats used their Opposition Day to debate a Motion on the House of Lords judgment about the lawfulness of ATCSA detention.[28]

E. Who are the detainees?

The identities of the individual detainees are protected by a court order issued by SIAC and as a result, their names and other identifying features are not included unless the individual in question has chosen to release his details into the public domain.

The Home Office website has a table showing the people who have been certified and detained under the Act and providing an update on their current position current status.[29]

- Seventeen people in total have been certified under Part 4 ATCSA
- Eight people ("A", "B", "E", "H", "P", Abu Qatada, "I" and "K") are currently being detained in prison under those powers, but A and P have applied for bail
- Mahmoud Abu Rideh has been granted bail, but is still being detained in Broadmoor until the conditions of his bail have been set.
- "S" is being held under other powers
- No information has been released about "Q"
- "G" has been released on bail under strict conditions
- Two have left the UK voluntarily ("F" and Jamal Ajouaou)
- A Libyan known as "M" was released when the SIAC decided that his certificate should be cancelled (the Court of Appeal did not allow the Home Secretary to appeal against this decision)
- Two detainees (an Algerian known as "D" and an Egyptian known as "C") were released when the Home Secretary decided there was not enough evidence to maintain their certification as a terrorist suspect.

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25 Draft *Anti-terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2005*: http://www.hmso.gov.uk/si/si2005/draft/20051797.htm

26 http://www.hmso.gov.uk/si/si2005/draft/em/uksidem_0110517970_en.pdf

27 HC Deb 21 February 2005 c22

28 HC Deb 8 February 2005 cc1408-1462

29 http://www.homeoffice.gov.uk/docs3/atcsa_detainees.html

The *Telegraph* has published profiles of each of the detainees.[30]

Ten appeals against certification under ATCSA as suspected international terrorists were heard by the SIAC in May to July 2003, up to eighteen months after most of those certified had been detained. It rejected them all in a 'generic' judgment of 29 October 2003. In two cases, where the detainees had left the UK voluntarily and so had their certificates cancelled, the SIAC held that it had no jurisdiction to hear their appeals from abroad.

The ten detainees concerned appealed (on points of law) to the Court of Appeal. It upheld the certifications in its judgment of 11 August 2004. Further SIAC reviews of these ten certificates began six months after the appeals process for this first round of challenges was exhausted.

In one case the SIAC has allowed an appeal against certification. On 8 March 2004 it decided that the assessments in the case of a Libyan national referred to as 'M' were not reliable, and that reasonable suspicion of terrorist activities was not established. It therefore allowed the appeal against deportation and against certification, and cancelled the certificate. This was the first time that it had allowed an appeal of an individual detained under the 2001 Act. The Secretary of State applied to the Court of Appeal for leave to appeal against the SIAC's decision, but permission was denied because the Court decided that there was no prospect of an appeal succeeding.

A table of the outcomes of ATCSA cases before SIAC is available on the Court Service website.[31] This includes links to the open determinations made by SIAC on these cases, which give some information about each of the detainees.

F. Why are they not deported or prosecuted?

Some people cannot be deported for practical or legal reasons, for instance if travelling to the country is too difficult, or if its authorities refuse to recognise someone as a national of their country. And, crucially, the UK cannot deport people to their country of origin or to a third country unless their human rights would be protected in that country - particularly the right to be free from torture or inhuman or degrading punishment under Article 3 of the ECHR - because removal to a country where these rights would be at risk would in itself be a breach of the UK's obligations under the ECHR.[32]

ATCSA created the power to detain indefinitely suspected international terrorists who could not be deported or prosecuted. They could not have been detained under previous

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30 "The dozen detainees at the centre of a legal storm", *Telegraph* 17 December 2004: http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2004/12/17/nterr317.xml

31 http://www.courtservice.gov.uk/judgments/siac/outcomes.htm

32 *Chahal v United Kingdom* (1996) 23 EHRR 413

legislation because the powers to detain immigrants are ancillary to other immigration decisions, such as deportation, and although there is no statutory time limit on immigration detention, excessive delay, or detention pending removal when there is no practical prospect of removal, will render the use of the power unlawful.[33]

In deciding whether to use the Part 4 powers, the authorities must have regard not only to the likelihood of securing a prosecution under anti-terrorism legislation or other criminal law, but also the extent to which the likely sentence would address the potential threat posed by the suspect. Where successful prosecution is not thought likely, or the potential sentence is thought to be insufficient but the person concerned is considered to be a threat to national security, the Security Service can recommend that the person be deported from the UK, on the basis that his presence here is not conducive to the public good for reasons of national security. If the person cannot in fact be deported (because of ECHR considerations or practical difficulties), the Security Service can then recommend that they should be certified and detained under Part 4.

Therefore not everyone who falls within the scope of Part 4 has actually been certified and detained; but all those who have been detained under these powers are being detained because they cannot be deported.

This does not stop them from leaving the UK voluntarily. Two detainees have indeed done so (for France and Morocco), and their certificates have therefore been revoked.

II Control orders

A. The Government's proposals

In February 2004 then Home Secretary David Blunkett published a discussion document, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*.[34] He rejected Lord Newton's recommendation that the Part 4 powers be revoked, but pending the House of Lords judgment on the legality of Part 4 did not make any concrete proposals.

After the House of Lords had given their judgment, the Home Secretary Charles Clarke made a statement on the future of the *Anti-Terrorism Crime and Security Act 2001*.[35] He said that the detention powers had been justified but he accepted the Law Lords' declaration of incompatibility with the ECHR. He went on to set out his alternative proposals, for deportation where possible and otherwise for a range of 'control orders', imposed by the Home Secretary rather than the courts:

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33 *R v Governor of Durham Prison, ex p Hardial Singh* [1983] Imm AR 198

34 http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf

35 HC Deb 26 January 2005 c307

> The Government believe that the answer lies in a twin-track approach: specifically, deportation with assurances for foreign nationals whom we can and should deport, and a new mechanism—control orders—for containing and disrupting those whom we cannot prosecute or deport. …
>
> The Government have therefore decided to replace the part 4 powers with a new system of control orders. We intend that such orders be capable of general application to any suspected terrorist irrespective of nationality or, for most controls, of the nature of the terrorist activity—whether international or domestic—and that they should enable us to impose conditions constraining the ability of those subject to the orders to engage in terrorist-related activities. Control orders would be used only in serious cases. The controls imposed would be proportionate to the threat that each individual posed. Such orders would be preventive and designed to disrupt those seeking to carry out attacks—whether here or elsewhere—or who are planning or otherwise supporting such activities. They would be designed to address directly two of the Law Lords' concerns: discrimination and proportionality.
>
> I turn to the key features of the scheme. The Secretary of State would consider whether, on the basis of an intelligence assessment provided by the Security Service, there are reasonable grounds for suspecting that an individual is, or has been, concerned with terrorism. If the answer to that question is yes, and if the Secretary of State considers such action necessary for the purposes of protecting the public from terrorist-related activities, he or she would impose controls on that individual. There would be a range of controls restricting movement and association or other communication with named individuals; the imposition of curfews and/or tagging; and restrictions on access to telecommunications, the internet and other technology. At the top end, control orders would include a requirement to remain at their premises. The controls to be imposed under the new scheme will not include detention in prison, although I intend that breach of a control order should be a criminal offence, triable in the usual way through the criminal courts and punishable by imprisonment.

The proposals have been described as "house arrest", a phrase which Mr Clarke says he has not used, and one which does not have any precise definition (see below).

A few days later, on 9 February 2005, Charles Clarke gave evidence on the new proposals to the Joint Committee on Human Rights.[36] Much of the session focussed on how the terrorist threat should be assessed, and by whom, specifically the respective roles of the Home Secretary and the judiciary.

A *Prevention of Terrorism Bill* was announced in a Business Statement on Monday 21 February 2005 which listed it for debate on second reading two days later, on Wednesday

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[36] *The Government's Response to the House of Lords' Belmarsh Judgment: Uncorrected transcript of Oral Evidence given by Rt Hon Charles Clarke MP, Secretary of State for the Home Department,* 9 February 2005: http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/uc334-i/uc33402.htm

23 February, and Committee and remaining stages on Monday 28 February.[37] The Bill was published on Tuesday 22 February. There was considerable anger across the House of Commons about the timetable for debating the Bill.[38]

The Home Secretary made a statement to the House of Commons on 22 February, to accompany the introduction of the Bill. He said that the Bill was necessary and urgent because, following the Law Lords' judgment, simply renewing the Part 4 powers was not an option as it would create an "uncertain" regime subject to challenge in the courts. Without either a new Bill or a renewal of the existing powers, the current detainees would have to be released. He suggested that a derogation from the ECHR would be required for those control orders which involved "house arrest" but not for other aspects of the Bill. The Bill apparently reflected revisions that had been made to the original proposals, following discussion with the opposition parties.

He emphasised that prosecution or deportation would remain the Government's preferred option.

The Bill is accompanied by a series of four background briefing papers on the following areas:

1. the nature of the threat from international terrorism
2. the Government's strategy to counter the threat
3. the balance between personal liberty and national security
4. actions taken by the Government to enhance the UK's protection against terrorist attack and to minimise any consequences.

The Government will give judges some involvement in the process. The Home Secretary said to the Joint Committee on Human Rights that his proposals already include provisions on:

> the ability of the judiciary to judge any decision the Home Secretary makes on appeal and go through the process to establish where it is. I can even see a case possibly for different levels of judicial involvement according to the kind of order that was described. […] If there were to be, for example, deprivation of liberty, a different level of judicial involvement than might otherwise be the case, I can see the case for that. What I am concerned about, however, is that the Home Secretary, the Government of the day, has a responsibility to look at the security of the nation, and that is not the responsibility that any non-executive person has. The principal responsibility of the judiciary is to justice and to the liberty of the citizen properly carried through, but not to the security of the nation. I think it would be wrong for a Home Secretary to delegate that responsibility somewhere

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37 HC Deb 21 February 2005 cc21-30
38 *ibid*

> else. I do accept that there is a very strong case for judicial involvement in that process to deal with it. [39]

B. Some reactions

According to press reports, the Attorney General, Lord Goldsmith, has warned ministers that the control order proposals run the risk of being overturned by the courts.[40]

Michael Howard has indicated that he will oppose plans to put terrorist suspects under house arrest.[41] A Conservative party press release describes the proposals as "fundamentally flawed", and sets out their alternative proposals for suspected terrorists:

> While they await trial they must be detained in prison. Their innocence or guilt must be determined by a court of law - not by the Home Secretary. If they are found guilty, they must be detained in a prison cell, not their living rooms. The same argument applies to intermediate control orders. If there is a case for them, they should be imposed by a judge not by the Home Secretary.[42]

The Liberal Democrats are also concerned about the level of judicial oversight of control orders:

> It is wrong in principle, and dangerous in practice, to allow British citizens to be locked up in their own homes on the say so of a politician. Controls on suspects' movements and communications should only be made by a judge on the application of the Home Secretary. [43]

They had set out their preferred approach on 8 February 2005:

> Our preferred approach would be to allow the use of intercept communications and to bring the cases to court. We would allow security-cleared judges to prepare sensitive cases, and consider new processes of jury selection to guarantee that security concerns were met.
>
> "We would consider limited control orders in certain circumstances, but only issued by judges on the basis of a high standard of proof. Serious thought also

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39 *The Government's Response to the House of Lords' Belmarsh Judgment: Uncorrected transcript of Oral Evidence given by Rt Hon Charles Clarke MP, Secretary of State for the Home Department*, 9 February 2005: http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/uc334-i/uc33402.htm

40 "Cabinet warned house arrest plan may be illegal" 30 January 2005, *Sunday Times*

41 "Howard will fight terrorist house arrests", *Telegraph* 19 February 2005: http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2005/02/19/nterr19.xml

42 "Labour's house arrest proposals are 'fundamentally flawed'", 21 February 2005: http://www.conservatives.com/tile.do?def=news.story.page&obj_id=119869

43 "Government Must Listen To Opposition On Control Orders – Oaten", Liberal Democrat press release 22 February 2005: http://www.libdems.org.uk/index.cfm/page.homepage/section.home/article.8256

> needs to be given to making terrorist intent an aggravating factor in sentencing and closing any loopholes in the present terrorist offences.[44]

The *Financial Times* has reported that the Home Secretary argued that "a very small handful of suspected terrorists" would be placed under house arrest and, according to the *Guardian*, the Government is now facing opposition on three fronts:

> Suspects detained at Belmarsh prison and Broadmoor high security hospital have launched a case at the European court of human rights that could wreck the government's plan to replace detention in prison with house arrest, the Guardian has learned. The case challenges the policy of indefinite detention without charge or trial. By questioning the assumption that terrorism poses an emergency threatening the life of the nation, it could also strike at the heart of the house arrest proposals.
>
> The move means that the government is facing opposition to its anti-terror proposals on three fronts. In addition to the Strasbourg challenge, there is opposition from the Tories, Liberal Democrats and Labour backbenchers, as well as a chorus of calls for phone tap evidence to be allowed in terrorist trials.[45]

The Times has criticised "house detention", citing overseas examples:[46]

> Totalitarian states have traditionally resorted to house detention as a way to silence dissent without the bad publicity of criminal proceedings, so creating a form of extralegal limbo that indicates guilt on the part of a suspect without having to go to the trouble of obtaining a conviction. As the fate of the late Zhao Ziyang demonstrated so chillingly, house arrest imposes lingering, silent political death. The purged Chinese Communist leader could leave his home rarely and then only with the permission of the party bosses. Thus was he consigned to a purgatory of impotent anonymity, and occasional golf, for 16 years. When Saddam Hussein came to power in 1979, he placed his enemies under formal house arrest, and murdered them later when no one was watching. Nikita Krushchev, deposed in 1964, vanished into the Siberia of home detention for seven years until his death. […]
>
> For the term "house arrest" is, in the end, a sly political euphemism intended to imply leniency while ensuring imprisonment, rendering a suspect guilty until proven guiltier. Given this Government's mania for euphemism, it is surprising its spin-doctors have not come up with a new PR term for this method of incarceration: "domestic detention", "community-based custody", or perhaps "homemade porridge". Charles Clarke has argued that house arrest is preferable to detention in Belmarsh, but that is only a difference of circumstance, not of

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44 "Liberal Democrats Unveil Alternative Security Package", Liberal Democrat press release 8 February 2005: http://www.libdems.org.uk/index.cfm/page.homepage/section.home/article.8182

45 "Terror laws face new court test: State of emergency to be challenged" 7 February 2005, *The Guardian*

46 January 29, 2005 "Guilty until proven guiltier"

> essence. Indefinite detention without charge or trial remains just that, whether the suspect is banged up behind bars, or trapped in his own bedroom.
>
> The terrorist threat plainly requires tough measures, including temporary detention of suspects in some instances until their cases can be tested in a courtroom, but the open-ended threat of house arrest goes much too far. Under the new measures detention could be indefinite; the decision to detain will be made by a politician, not a judge or jury; there is no threshold of evidence, just those nebulous "reasonable grounds for suspicion" as adjudged by the Home Secretary. All of these definitions are open to abuse, as they have been abused by the powerful down the centuries.

A *Liberty* press release of 21 February 2005 is strongly critical:

> Commenting on Government proposals to rush 'control orders' through Parliament despite growing opposition Shami Chakrabarti, Director of Liberty, said:
>
> "Eight hundred years of the right to a fair trial in this country could be overturned within fourteen days.
>
> The presumption of innocence, like innocence itself, is easier lost than regained.
>
> There has rarely been a more important time for people of all parties and none to stand up for Britain's democratic traditions."[47]

C. "House arrest"

1. Possible definitions

The exact meaning of "house arrest" has not been explained. Shami Chakrabarti, Director of Liberty asked the question: "Where does a curfew end and house arrest begin?".[48]

"House arrest" is a term used to describe restriction of a person's liberty which does not involve confinement in a custodial institution. It has different meanings in various jurisdictions round the world. It usually means that the person is confined to his or her own home. The restriction may be a penal sanction, but may also be used to restrict a person's movements during an investigation or prosecution, or in other circumstances. Arrangements for enforcement may vary, but the use of electronic equipment is now common. This section does not attempt to provide a definition of "house arrest, but gives

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47 http://www.liberty-human-rights.org.uk/press/2005/control-orders-to-be-rushed-through.shtml. See also: http://www.liberty-human-rights.org.uk/issues/internment.shtml

48 Liberty press release 11 February 2005: http://www.liberty-human-rights.org.uk/press/2005/security-services-oppose-anti-terror-plans.shtml

an outline of when restrictions which could be described as “house arrest” may be imposed in this country.

The term “house arrest” is not used in English law. It is used in some other jurisdictions, but does not appear to have a universal meaning. For instance under Cuban law, “house arrest” can be imposed on a suspect for up to 20 days, by which time the district attorney is required to rule on the matter: police serve a house arrest warrant.[49] But in, for instance, Florida, the term is used to refer:

> to the condition of supervision requiring confinement of an offender to an approved residence except for one half hour before and after the offender's approved employment, public service work or any other activities approved by their officer. [50]

Recent discussion of Home Office proposals for new anti-terrorism powers to replace Part 4 of the *Anti-terrorism Crime and Security Act 2000* suggest that “house arrest” is understood to mean restrictions under which the person cannot leave his home at all and cannot contact other people, at least without supervision.

In their submissions to SIAC during recent bail hearings for two ATCSA detainees, legal representatives rejected ‘house arrest’ as a bail condition, but did outline a number of restrictions which they would regard as acceptable:

> Terror suspects detained without trial will choose to remain in prison rather than be granted bail on the condition that they live under house arrest, a special court was told yesterday.
>
> Ben Emmerson QC, who was representing two detainees seeking bail, said the pair would prefer to remain behind bars in Belmarsh if the alternative was the isolation and claustrophobia of house arrest. Speaking at a hearing in London of the special immigration appeals commission, Mr Emmerson said he believed other suspects who are detained without charge would take the same course…
>
> Details of Mr Abu Rideh's bail conditions will be hammered out at a future hearing but he has previously told the Guardian he does not want to be held under house arrest be cause he fears he would not get proper medical treatment and is worried his family could suffer.
>
> The developments underline the controversy over proposals made last week by the home secretary, Charles Clarke, for "control orders" after the law lords ruled that the act under which the detainees are held was incompatible with the UK's obligations under the European human rights convention. Human rights campaigners have attacked Mr Clarke's proposals as "draconian"….

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49 http://www.cpj.org/news/2001/Cuba12apr01na.html

50 http://www.dc.state.fl.us/facilities/comcorinfo/definitions.html

> But Ian Burnett, representing the home secretary, said A and P should be held under similar conditions to a 12th detainee, G, who was bailed on mental health grounds and is held under house arrest. Mr Emmerson insisted neither A nor P wanted to be bailed under such conditions, and several other detainees were likely to have the same attitude.
>
> They knew what life had been like for G, who has been confined to a tiny one-bedroom flat with his wife and child since his release in April last year. He had no contact with the outside world and suffered from isolation and claustrophobia. The barrister claimed that A and P would be like "guinea pigs" for Mr Clarke's proposed scheme.
>
> Mr Emmerson said there would be "no difference" for the detainees between a cell in Belmarsh and a council flat in Bermondsey, south London.
>
> He told the hearing that P, a double amputee who is accused of providing logistical support for Islamist networks, had no family and had a serious depressive illness. It would be "inhuman and extremely dangerous [to] lock him up indefinitely in a tiny flat with no contact with the outside world".
>
> Mr Emmerson said A, who is suspected of belonging to the Algerian terrorist group GSPC, had five children from whom he had been separated for five years, and would be put "on the horns of an agonising dilemma" if he was offered bail only if he accepted house arrest.
>
> The barrister put forward eight bail conditions which he said would be acceptable to A and P, including wearing an electronic tag, going out only at specified times, observing a curfew and being banned from contacting named individuals. Their phones could be monitored and they could be denied access to the internet. Mr Emmerson accepted that an "army" of security officers would be appointed to watch them….
>
> In submissions to the court which seem to undermine Mr Clarke's argument, the government said that even if he was under house arrest he might be able to abscond or could smuggle in communications equipment.[51]

2. Electronic monitoring

Electronic monitoring in England & Wales is currently used both as a sentence in its own right and, towards the end of a custodial sentence, as a form of transition from prison back into the community.

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[51] "Suspects spurn house arrest: Detainees prefer Belmarsh to Clarke conditions", 1 February 2005, *Guardian*

a. Home detention curfew

Since 1999, some offenders sentenced to between 3 months and 4 years imprisonment have been eligible to be released (between 2 weeks and 4.5 months) early on a curfew with electronic monitoring.[52] The minimum curfew period is 9 hours a day but in practice almost all run for 12 hours overnight. Offenders aged under 18 who are sentenced to DTTOs between 8 and 24 months may also be released, one or two months early on a curfew.

b. Curfew order

Since 1999 it has been possible to sentence offenders aged 16 or over to a curfew order with electronic monitoring.[53] The maximum length of order is 6 months. The curfew period is 2-12 hours. Since 2001 it has been possible to sentence offenders aged between 10 and 15 to a curfew order up to 3 months.[54]

c. Bail

Conditional bail with curfew (where the conditions include residing at a particular address between specified hours) has been in use for some time. An extension of this set of conditions is to use technology to monitor the curfew – that is, to use electronically monitored curfew as a condition of bail. Bail tagging for juveniles (12-16 year olds) was introduced nationally on 1 June 2002 under ss 131 and 132 of the *Criminal Justice and Police Act 2001*. Bail tagging for 17 year olds was initially introduced in 10 areas in July 2002, and extended nationally in January 2004. Section 131 amends section 3 of the *Bail Act 1976* and inserts a new section 3AA in that Act to give the court the explicit power to impose electronic monitoring on 12-16 year olds to ensure compliance with bail conditions. Section 132 amends section 23 of the *Children and Young Persons Act 1969* and inserts a new section 23AA in that Act to allow electronic monitoring of 12-16 year olds who are remanded to local authority accommodation. Section 131 (2) adds a new section (3AA) to the *Bail Act 1976*. This sets out four conditions which must be satisfied before a court can impose electronically monitored bail. These are as follows:

- The child or young person must have attained the age of 12.
- He/she must have been convicted of or charged with a serious offence or must have what the court considers to be a recent history of committing repeated imprisonable offences while on bail or remanded to local authority accommodation.
- The court must have been notified by the Secretary of State that appropriate electronic monitoring arrangements are available in its area

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52 *Criminal Justice Act 1991*
53 *Criminal Justice Act 1991*
54 *Powers of Criminal Courts (Sentencing) Act 2000* s 37

- The relevant youth offending team must have informed the court that in its opinion, tagging is suitable in the particular case.

Electronic monitoring is only available to the courts. It is not available in cases of police bail.

d. Immigration cases

Most people held in detention under immigration powers, are entitled to apply for bail. Whether or not an application for bail is likely to be successful depends on a number of factors which it not easy to generalise about because each person's situation is likely to be different. Applications can be made to a Chief Immigration Officer or, if he or she has jurisdiction, to an Adjudicator.

Section 36 of the *Asylum and Immigration (Treatment of Claimants etc) Act 2004* deals with monitoring. The effect is summarised in the Explanatory Notes:

> 167. Section 36 makes provision for the electronic monitoring of persons subject to immigration control who are at least 18 years of age in the following circumstances:
>
> where a residence restriction is imposed (subsection (2));
>
> where a reporting restriction could be imposed (subsection (3)); and
>
> where immigration bail is granted subject to a recognizance or bail bond (subsection (4)) (except where bail is granted by a police officer) (subsection (1)(d)(ii)).
>
> 168. A person subject to electronic monitoring in accordance with these provisions is required to cooperate with arrangements for detecting and recording his location at specified times, during specified periods of time or throughout the currency of the arrangements. The electronic means employed in connection with such arrangements may include voice recognition technology, the use of a "tag" to confirm the presence of absence of the person from a specified location and in the future "tracking" technology to monitor the person's whereabouts on a continuous basis.

e. The equipment

The Probation Service website describes the equipment used for electronic monitoring:

> **Electronic monitoring equipment**
> The technical equipment uses radio frequency transmissions. It consists of a transmitter, which is usually worn round the ankle, and a receiver unit which is either connected to a landline telephone or which incorporates mobile phone technology. The receiver unit communicates with a central computer system at the contractor's monitoring centre. The transmitter sends signals to the receiver at

> regular intervals and these are sent on to the central computer. The signal strength of the transmitter is calibrated to the receiver so that if the subject goes out of range (generally this means outside the building where the receiver is located), there is a break in signal and this is also registered by the central computer which generates follow-up action.
>
> The transmitter can be removed only by breaking its strap. This interferes with the fibre-optic circuitry inside the strap and is immediately registered as a tamper, also generating follow-up action.
>
> Voice verification technology operates in a different way. The equipment registers the voice print of the subject and this is stored centrally. When the subject is supposed to be attending a programme or at a specified address he or she can be prompted to telephone the monitoring centre at random intervals and answer a number of computer-generated questions. The voice print is checked against the record so that the identity of the subject can be confirmed or denied. [55]

III The Bill

The Bill deals only with the proposed control orders: the power to make them, their duration, offences of breaching them, and challenges and appeals against them. The Government's Explanatory Notes provide some background and explanation.

A control order could be made against any individual – not just foreign nationals. The requirement is that they should be or have been "involved in terrorism-related activity" and that it is necessary to make an order to protect the public from the risk of terrorism. "Terrorism-related activity" is defined by **clause 1(8)** and "terrorism" has the meaning given by the *Terrorism Act 2000*:

> 1 **Terrorism: interpretation**
>
> (1) In this Act "terrorism" means the use or threat of action where—
> (a) the action falls within subsection (2),
> (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
> (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (2) Action falls within this subsection if it—
> (a) involves serious violence against a person,
> (b) involves serious damage to property,
> (c) endangers a person's life, other than that of the person committing the action,

[55] http://www.probation.homeoffice.gov.uk/output/Page137.asp#Equipment

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

By contrast, ATCSA had referred to "international terrorism".

Control orders would be made at the discretion of the Secretary of State (**clause 1**), though the courts would have certain powers in relation to them (**clause 2(2) and clauses 7 to 10**).

Controls which may be imposed (**clause 1(3)**) include:

- prohibitions or restrictions on the possession of specified articles, use of specified services or facilities, or carrying on specified activities;
- controls on whom he may associate with
- restrictions or prohibitions on movement;
- controls on an individual's place of residence or place of work;
- other restrictions on their ability to travel including surrender of passports;
- duty to allow searches and comply with monitoring and reporting requirements including electronic tagging
- duty to supply information

It is envisaged that only some control orders would amount to an infringement of a person's right to liberty under Article 5 ECHR. Such a control order (a "derogating control order") would under **clause 2** require:

- a derogation order (derogating from Article 5 ECHR) to be in force;
- a higher standard of proof of involvement in terrorism-related activities ("balance of probabilities" rather than "reasonable grounds"); and

- notification to the court for consideration within seven days of the grounds for making the control order.

"Non-derogating control orders" would not be subject to this initial court scrutiny.

Presumably it would be for the Home Secretary to decide whether or not a particular control order amounted to an infringement of a person's right to liberty and therefore attracted these tighter controls. This decision would however be open to challenge. According to **clause 9**, control order decisions could be challenged only in the High Court or Court of Session. SIAC would no longer be involved.

A derogating control order would last for six months (rather than twelve months for non-derogating control orders) and could not be renewed, though it could be replaced by a subsequent order. It would cease to be valid if the derogation order had been made or renewed (by statutory instrument) over twelve months ago (**clause 4**).

Breach of any order would be a criminal offence, for which the police may arrest without a warrant (**clause 6**).

The **Schedule** to the Bill sets out a framework for the detailed rules on control order appeals and challenges in the courts. This envisages that there may be 'closed' hearings taking place in the absence of the controlled person or his legal representative, and that some material may not be disclosed to them. However, special advocates would be appointed to represent the interests of the controlled person.

The Bill incorporates a duty on the Secretary of State to report to Parliament every three months on the use of his control order powers, and to appoint somebody to review the operation of the system annually (**clause 11**). This latter provision mirrors Lord Carlile's review of the detention powers in Part 4 ATCSA.

The detention provisions of ATCSA (along with some connected measures) would be repealed as of 14 March 2005, though existing appeals under those provisions could be continued.

If it is passed, the Act would come into force on Royal Assent, because there is no commencement provision.

IV Other countries

The Home Office discussion paper on counter-terrorism powers describes some of the measures taken by other countries:[56]

> **France**
>
> 56. France does not have an offence of terrorism(nor a specific definition) but has a list of specific offences linked to terrorism. France does however have a crime of 'association with a wrongdoer' which is used (but not exclusively) for terrorism. It is intended as a preventive measure and was introduced in the 80's and amended in the 90's, following a series of terrorist attacks in France.
>
> 57. Under the Criminal Code, a person may be prosecuted for an 'association' with a group preparing a criminal act. The definition of the offence is sufficiently wide to allow the successful prosecution of someone with only a passing interaction with a terrorist group and has been used in France for several years. The offence is much wider that the English law of conspiracy enabling a greater number of prosecutions.
>
> 58. Once someone has been arrested they can be detained by the police for an initial 96 hours without charge. Following this they must be presented to a judge who can extend the detention for a week. The case is passed to an examining magistrate (juge d'instruction) who assembles the case against the individual. The decision on whether to detain is taken by a specialised judge at the request of the examining magistrate. Once 'under instruction' the person can be detained 'indefinitely' with the regular agreement of the judge.
>
> 59. The result is that terrorist suspects are almost always successfully prosecuted, but can spend a considerable length of time in custody prior to prosecution.
>
> 60. French authorities believe that those involved in terrorism are reluctant to stay in France once they have come to the attention of the authorities. It is, however, relatively easy to lose track of an individual as they can travel relatively easily around the Schengen area.
>
> 61. France will prosecute where possible but will also deport individuals. In deportation cases decisions are taken on a case-by-case basis. They do not deport individuals to countries where they would face a death sentence, and they do take into account the destination country's record in terms of democracy, human rights and international conventions. They do not consider that Algeria, Jordan, or Egypt present problems of principle, and they have returned suspected terrorists to Algeria in a number of high profile cases.

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[56] Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper*, Cm 6147, February 2004: http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf

Germany

62. Germany has recently made changes to its criminal code in the aftermath of 11 September. One change has been to remove the geographical limitation of the criminal code covering certain crimes, including notably terrorism. Previously, terrorist acts overseas would need to have targeted German citizens or interests before the suspect could be charged in Germany. Now, the nationality of the victim of the attack is no longer a limiting factor. Thus, as long as the dual criminality provisions are met, a person could be charged and prosecuted in Germany for their actions overseas.

63. In Germany there is a general offence of terrorism - it is a criminal offence to be a member of any terrorist association, including foreign terrorist associations. Anyone accused of participating in terrorist activities can be punished according to the general criminal provisions, depending on what specific crimes have been committed (murder, manslaughter, kidnapping).

64. It is also an offence to form a terrorist association, to be a member of a terrorist association and to support or recruit members or supporters of a terrorist association. Supporting a terrorist who is not a member of an officially proscribed group can be punished under the provisions on aiding and abetting.

65. The general rules of procedure of the German Code of Criminal Procedure apply and in deciding the sentence, the German courts will take the terrorist motivation of a crime into account as an aggravating factor.

66. It is possible for court hearings to be heard in camera and the court may exclude the public from the hearing if state security interests are at risk. The courts decide when to apply these provisions.

67. The procedures for granting asylum in Germany have been tightened to deal with ECHR deportation problem cases. An applicant can be restricted in their movements through the issue of a geographically restricted identity card. This restriction might be to a single area, or even a single town or city. Any breach of these restrictions themselves make it easier for the security and other services to keep asylum seekers under close observation

Other European Countries

68. Austria, Switzerland, Netherlands, Norway and Portugal have provisions to deal with asylum seekers but have had limited experience in dealing with suspected terrorists seeking asylum. Norway has enacted legislation to prevent terrorist suspects invoking asylum procedures.

69. Sweden has extradited two individuals, who were denied refugee status, to Egypt to face trial on terrorist charges. The Egyptian Government provided assurances to Sweden that the individuals would not face the death sentence or be subject to torture.

Canada

70. Canada, like the UK, does not have a specific offence of terrorism, but a list of specific terrorist offences. A more general offence relates to conduct which involves a specific motivation, the intention to intimidate, and the intention to cause some form of serious harm, such as death, serious risk to health or safety, substantial property damage or disruption of an essential service.

71. Membership of or association with a terrorist group is not an offence as the Canadian Charter of Rights and Freedoms guarantees the freedom of association.

72. Canadian judges can hear proceedings in closed court when necessary, for example to protect witnesses, but there is a strong presumption against this and closed proceedings are infrequent.

73. The 2001 Anti-Terrorism amendments permit the withholding of materials from a court based on national security concerns, but this may lead to staying of charges or other constitutional remedies if the right tomake a full answer and defence to charges is compromised.

74. The Anti-Terrorism Act provides a power to arrest and detain on a preventive basis, but there are significant safeguards and limits. Warrantless arrest is permitted, but only in exigent circumstances – otherwise, arrest requires the consent of the Attorney General and an arrest warrant. Detention and recognisance proceedings are similar to those which apply to the release on bail of a criminal accused pending trial.

Following arrest, the subject is brought before a judge and the State must show cause why he or she should not be released. If the decision is against release, the subject is asked to enter into a recognisance and terms and conditions are set. If the subject agrees to the recognisance, they must be released, otherwise they can be held in custody for a maximum of one year.

United States of America

75. In October 2001, America introduced the USA PATRIOT (the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act as a response to the 11 September attacks. The Act is a complex, lengthy piece of legislation which includes the following provisions relevant to the debate.

76. An offence of harbouring or concealing terrorists: if a person harbours or conceals a person he knows or has reasonable grounds to believe has committed, or is about to commit, certain terrorist offences. It is punishable by a fine or up to 10 years in prison or both. Offence of material support for terrorism: this prohibits the provision of material support or resources where it is known and intended that it be used to prepare for, or carry, out certain terrorist related

> crimes. The Act specifically expands the definition of support or resources to include monetary instruments and expert advice or assistance.
>
> 77. The Act also tightens grounds for refusal of entry/visa to the United States, based on terrorist activity. It also broadens the definition of "terrorist organisation" to include a group of two or more people, whether organised or not that commits or incites terrorist activity with intent to cause death or serious injury or prepares or plans terrorist activity or gathers information about potential targets.
>
> 78. The Act also extends the provisions of the Racketeer Influenced and Corrupt Organisations Law to federal terrorist crimes, enabling multiple acts of terrorism to be dealt with as a form of racketeering. This enhances range of investigative powers (and sentences) available.
>
> 79. The Act also allows the Attorney General to detain aliens if he certifies that they are deportable or inadmissible for the reasons given above, or that they pose a threat to national security. Removal or criminal charges must follow within seven days or the person released. If the person cannot be removed, the Attorney Generalmust review his detention every six months. The detention is only permitted to last as long as the person is judged to be a threat.
>
> 80. The US also makes use of "material witness" status. This allows a person to be detained indefinitely as a witness to offences. Estimates of numbers so detained have been put at over 1000.

A Daily Telegraph article from 27 January 2005, "How Europe treats suspects", also describes how some other European countries deal with terrorist suspects.

V Intercept evidence

Both the Conservative party and the Liberal Democrats want to intercept evidence, such as that obtained from phone-tapping, to be allowed in court, as they consider that would allow more terrorist suspects to be brought to trial.[57] The Conservative leader, Michael Howard has said that he finds ministers' refusal to allow this "unpersuasive":[58]

> I entirely reject that notion. Phone tap evidence can and should be used in court. Of course we need to protect sensitive intelligence, and its sources. That is why I have proposed that a judge be given responsibility for assessing the evidence and ensuring that a balanced case is presented to the court.

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57 "House arrest plan 'is too hasty'", BBC news online, 21 February 2005: http://news.bbc.co.uk/1/hi/uk_politics/4284559.stm

58 Conservatives, *Labour's house arrest proposals are 'fundamentally flawed'*, 18 February 2005 http://www.conservatives.com/tile.do?def=news.story.page&obj_id=119869

The Liberal Democrats have said that the Government should "urgently move to allow the use of intercept communications as evidence in criminal cases" so that cases like the Belmarsh ones could be brought to trial in the normal way.[59] However, at a meeting between the Prime Minister, the Home Secretary and the leaders of the two parties on 18 February 2005, Charles Clarke ruled out changing his mind to allow this.[60]

The Government launched a review of the evidential use of intercept material in July 2003. In general, the reservations which have been expressed about the proposal to allow such evidence in court have tended to be more concerned with the risk of disclosure of "sensitive capabilities" rather than defendant oriented. The issue arose recently in the context of the *Serious Organised Crime and Police Bill 2004/05* which completed its passage through the Commons and passed to the Lords on 8 February 2005. The White Paper which preceded the *Serious Organised Crime and Police Bill* concisely summarised the arguments for and against the use of intercept evidence.[61]

> On the one hand, the evidential use of intercept may hold out the prospect of prosecutions in some cases where they would not otherwise have been possible, and might encourage earlier guilty pleas. On the other hand, there is a concern that the evidential use of intercept would reveal capabilities which could undermine the effectiveness of intercept and damage the co-operation between our intelligence and law enforcement agencies in tackling and preventing terrorism and serious crime.

The UK's internationally unusual blanket ban on the use of intercept evidence has come under particular scrutiny in the context of terrorism. It has been argued that if such evidence could be used in prosecuting terrorism suspects, that might obviate any need for the detention provisions in Part 4 of the *Anti-terrorism Crime and Security Act 2001*. In their Report on that Act, published in December 2003, the Privy Counsellor Review Committee explained their reasons for considering that the balance (between the public interest in prosecuting particular cases and the public interest in maintaining the effectiveness of intelligence gathering techniques and capabilities) has not been struck in the right place if intercepted communications can never be used evidentially:[62]

> 210. The Regulation of Investigatory Powers Act 2000 forbids the use of domestic intercepts in UK court proceedings. There is, however, no such bar on the use of foreign intercepts obtained in accordance with foreign laws. Nor is

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59 Liberal Democrats, *Belmarsh ruling: Clarke must make statement to the House*, 16 December 2004 http://www.libdems.org.uk/index.cfm/page.homepage/section.home/article.7991

60 "'Phone-tapping' evidence vetoed", BBC news online, 18 February 2005: http://news.bbc.co.uk/1/hi/uk_politics/4277175.stm

61 *One Step Ahead: - a 21st Century Strategy to Defeat Organised Crime*, March 2004, http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf, paragraph 6.2.2.

62 Privy Counsellor Review Committee (the "Newton Committee"), *Anti-terrorism, Crime and Security Act 2001 Review:Report*, December 2003, at: http://www.homeoffice.gov.uk/docs3/newton_committee_report_2003.pdf

> there a bar on the admission of bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping, even if they were not authorised and were an interference with privacy. There is no bar on foreign courts using British intercept evidence if the intelligence and security services are prepared to provide it.
>
> 213. Relaxing the ban would not place an obligation on the prosecution to use intercepted evidence. We can also see the case for modifying the normal rules governing the disclosure of evidence so that, for example, the prosecution would not be obliged to disclose intercept evidence, or even its existence, unless they chose to rely on it. This would need to be done with care to minimise the risk of miscarriages of justice, but those risks should not be greater than under the present system where the prosecution is forbidden from disclosing intercepted communications, even if they are exculpatory.
>
> 214. Consideration could also be given to having different classes of warrants authorising the interception of communications, some allowing evidential use of the product and others not. This is the approach taken by some other countries (where interception by the police and investigating judges in particular can be used evidentially). Secondly—perhaps this is the main argument—in a fast-moving communications industry, it is vital that the existing capability is protected. Exposure of interception capabilities would or might educate criminals and terrorists who might then use greater counter-inception measures than they presently do. We believe that it is vital that the existing capability is protected and that the exposure of interception capabilities, which would result, as night follows day, from a repeal of the prohibition, would educate criminals and terrorists. They would certainly use greater counter-interception measures than they presently do and the value of interception as an investigative tool—it is a valuable investigative tool, particularly against the most serious criminals and terrorists—would be seriously damaged. For those reasons, we are not convinced that a change to an evidential regime would involve a rise in criminal convictions in any more than the short term. Criminals and terrorists would become "wise" to it.
>
> 215. It is important that making intelligence available for prosecution does not compromise the collection and use of intercepted communications for intelligence purposes. We hope that the current review can devise a system which meets both needs.

A very different conclusion was reached by the Hon Mr Justice Butterfield in his Review of criminal investigations and prosecutions conducted by HM Customs and Excise following the collapse of the London City Bond cases.[63] His view was that there was no realistic scope for the use of intercept material for evidential purposes in criminal proceedings.

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[63] Review of Criminal Investigations and Prosecutions conducted by HM Customs and Excise, July 2003 http://www.hm-treasury.gov.uk/newsroom_and_speeches/speeches/statement/butterfield03_report_index.cfm,

The subject was raised in the second reading debate on the *Serious Organised Crime and Police Bill* by the Shadow Minister for Home Affairs, Andrew Mitchell:[64]

> We shall also want to know why the use of intercepts has not been included in the Bill. We are concerned by the lack of reference to them and we have called consistently for the Government to lift the ban on intercept use in courts. It is clearly odd to confine the fruits of intercepts to intelligence only. The UK is one of the few countries in which intercept evidence is not admissible and we hope that the Minister will explain why she is not changing that situation in this Bill.

In response the junior Home Office Minister Caroline Flint said, "There is ongoing discussion about that complex issue, but we do not intend to introduce any such clause in the Bill." (c1132)

A Written Ministerial Statement on 26 January on the Interception of Communications announced result of the Government's review on this subject (HC 26 January 2005 cc 18-19WS):

> **Interception of Communications**
>
> **The Secretary of State for the Home Department (Mr. Charles Clarke)**: I am announcing today the Government's conclusions on the review on the evidential use of intercept material in criminal proceedings. This accompanies the announcement I intend making on counter-terrorism legislation following the House of Lord's ruling on the use of Anti-terrorism, Crime and Security Act 2001, Part 4 powers.
>
> My right hon. Friend the Prime Minister commissioned the review in July 2003. Its remit was to examine the benefits and risks of using intercept as evidence to secure more convictions of organised criminals and terrorists. In doing so, the review was tasked with considering how a legal model, providing for the use of interception for evidential purposes, could be deployed in a way which is compatible with the ECHR, addresses the practical concerns of the intercepting agencies and takes account of developments in communications technology.
>
> The review, which was the most thorough and far-reaching of five reviews on the subject in the last 10 years, reported last summer. It concluded that evidential use of intercept would be likely to help secure a modest increase in convictions of some serious criminals but not terrorists. The preferred legal model for evidential use of intercept would comprise three types of interception warrant—intelligence only, non-evidential and evidential, the latter requiring authorisation by a judge. Intelligence only and non-evidential warrants would continue to be authorised by the Secretary of State and would provide criteria-based protections against

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64 HC Deb 7 December 2004 c1130

disclosure in court of the most sensitive interception capabilities and techniques. Set against the benefits that this approach might deliver, the review identified a number of serious risks that evidential use of intercept would entail for the intercepting agencies and their present capabilities in fighting serious crime and terrorism.

The review did not make agreed recommendations for or against lifting the prohibition on evidential use of intercept but invited Ministers to consider, in the light of the evidence presented on the balance of benefits and risks, whether or not to do so. Further work on what might be done to mitigate the risks identified in the review report was completed shortly before Christmas. This showed that there was no immediate prospect of removing the main risks, partly because of the difficulty of assessing the impact of major changes expected in communications technologies over the next few years.

The Government have from the outset made it clear that we would change the law on evidential use of intercept only if we could be satisfied that the benefits of doing so clearly outweigh the risks. We have therefore concluded that it would not be right to legislate now to remove the existing prohibition. We will continue to keep these issues under review.

The review report is a classified document which cannot be published in the ordinary way. It will however be made available to the Intelligence and Security Committee to which I will give further evidence if requested to do so. A summary of the report's main findings is set out below:

- there is no easy or risk free way of keeping what our "intelligence only" approach—with its uniquely close working relationships between law enforcement and intelligence agencies—delivers now and adding to this the benefits that evidential use of intercept could deliver. Evidential regimes in other countries provide useful pointers on the latter but are of little help on the first point;
- the ideal of allowing intercepting agencies unfettered freedom to choose when to go evidential is not an option as it would be open to "cherry picking" and therefore fails to meet the requirements of ensuring fairness in criminal proceedings;
- evidential use of intercept would be likely to help convict some serious criminals;
- intercept evidence would be unlikely to assist in prosecuting terrorist targets and would not have made a critical difference in supporting criminal prosecution of those detained under ATCSA (Part 4) powers;
- a legal model providing for three types of interception warrant—intelligence only, non-evidential, and evidential—appears to offer the best basis for evidential use of intercept. Substantial further work would be needed on the details of the legal model before it

> could be introduced. Major changes expected in communications technologies over the next few years mean that the model potentially has only a very short shelf-life.[65]

An article published in the *New Statesman* on 7 February 2005 reported that the Director of Public Prosecutions, Ken Macdonald "sees no reason why evidence from telephone intercepts should not be admissible".[66] However, in a letter to the *Independent*, the former Director General of the Security Service (MI5), Sir Stephen Lander, states:[67]

> For my part I have reluctantly come to the conclusion that due to the changing nature of telephone technology and the importance, during a period of change, of not sensitising terrorists and serious criminals to particular capabilities that will be important for the future, there are indeed good reasons not to remove the bar on the use of intercept in our courts.

The Intelligence and Security Committee is going to be looking in detail at the use of intercept evidence, and the Home Secretary has promised to keep the matter under review.[68]

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[65] http://www.publications.parliament.uk/pa/cm200405/cmhansrd/cm050126/wmstext/50126m02.htm#50126m02.html_sbhd0

[66] "Guantanamo was a legal black hole, says the DPP, but he stands up for Belmarsh and Blunkett", *New Statesman*,7 February 2005, p35. See also "DPP takes on Clarke over phone-tap evidence", *Independent*, 4 February 2005.

[67] "Tapping and terror", *Independent*, 7 February 2005

[68] Home Secretary's statement to the House of Commons, 22 February 2005