



# SECURITY WITH LIBERTY: is there a liberal response to terrorism?

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## Security with Liberty: Is there a liberal response to terrorism?

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## Introduction: Nick Stadlen QC

The natural first instinct when people are frightened is self protection. While understandable, this often leads them to overreact in ways they later come to regret. In the context of terrorism it encourages tabloid newspapers to demand simplistic solutions and populist politicians to offer them.

The danger is that it makes things worse which, of course, is what the terrorists want. By hunkering down into a siege mentality, and at the same time lashing out at stereotyped perceived enemies, society risks creating innocent victims of miscarriages of justice and throwing away long established liberties. This in turn, apart from being wrong in principle, runs the risk of creating martyrs and alienating whole sections of the population who are wrongly portrayed as fellow travellers of the enemy. In time this risks becoming a self fulfilling prophecy.

You only have to look at the troubles in Northern Ireland to see the dangers. It is often forgotten that the British army was sent in in 1969 to protect the Catholic civil rights protesters from the Protestant B Specials. Within a couple of years the IRA was able to mount a campaign that could not have been sustained for thirty years if large parts of the Catholic population had not only felt threatened by their Protestant co-citizens but, rightly or wrongly, unprotected and, to some extent, even threatened by the British army.

It's always easier to see the mote in someone else's eye. But if you compare the world wide tide of sympathy for America in the wake of 9/11 with the isolated position it finds itself in now, it's hard to resist the conclusion that the words Iraq, Abu Ghraib and Guantanamo have played a large part. In each case two questions arise:

- (i) What happened to the rule of law?
- (ii) Where was the voice of opposition?

Looking back at the invasion of Iraq without a second UN resolution, the black hole of Guantanamo, in which prisoners are protected neither by the Geneva convention nor the scrutiny of the courts, and extraordinary rendition, described by former law lord Lord Steyn as a fancy phrase for kidnapping, was it not obvious that abandoning the rule of law would act as a recruiting sergeant for Al-Qaeda? Where was the Democratic Party while all this was going on?

In the film 'Goodnight and Good Luck' they show the footage of the army counsel who finally stood up to Senator Joseph McCarthy and said "Senator, have you no decency?" It was the moment when the spell of McCarthyism and the awful years of witch hunts was broken and the American people woke from their dream to remember who they are and what are the true values of their democracy. On Guantanamo we have had to wait 5 years for that moment. Perhaps it has come with the Supreme Court decision.

If one wanted to identify the two most important objectives of policy going forward it might be summed up as:

- 1) We ignore the rule of law at our peril.
- 2) Borrowing from Corporal Jones in Dad's Army: Don't panic.

As Lord Hoffmann famously said in his judgment in the Belmarsh case: I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

A brief survey of the last few years gives little cause for complacency.

It is instructive to compare the record of the judges and the politicians in upholding the rule of law. Three episodes in the last 5 years stand out.

- i) In the 2004 Asylum and Immigration Bill the Government tried to introduce an ouster clause which would for the first time have excluded any appeal or judicial review of an executive decision even on the grounds of manifest illegality. The then Lord Chief Justice, Lord Woolf, later revealed in a lecture in Cambridge that the judges had advised the Government that a clause of that nature was fundamentally in conflict with the rule of law and should not be contemplated by any government. The Government ignored that advice and only withdrew the ouster clause when Lord Irvine, the former Lord Chancellor, put his name down to speak against the clause in the House of Lords. If the Government had not backed down, it could have precipitated a constitutional crisis with suggestions by some distinguished senior members of the judiciary that in a contest the Government's ace of parliamentary sovereignty might be trumped by the supremacy of the judges' duty to preserve the rule of law. The disturbing aspect of it was that it was not even in the field of counter-terrorism or security and it shows the force of the slippery slope argument.

- ii) The second episode concerned the 2001 Anti Terrorism and Security Act which was rushed through Parliament two months after 9/11. The Act gave the Home Secretary unprecedented powers to detain indefinitely foreigners suspected of supporting terrorism who could not be deported to countries where they might be tortured or killed. In the landmark Belmarsh decision in December 2004, a nine judge panel of Law Lords declared the Act to be incompatible with the European Convention and the Order purporting to derogate from the Convention on grounds of national emergency to be disproportionate and unlawful.

In the event, the Government again backed down and did not seek to implement the 2001 Act. But it was a close call. In one of those quirks of history, the House of Lords judgment was handed down the day after David Blunkett resigned over the affair of the nanny's visa, and the decision to accept the judgement was taken by his successor Charles Clarke. In my interview with David Blunkett for the Guardian he revealed that if he had remained in office he would probably have taken the Act back to Parliament and invited the Law Lords to face it down. As it was the Act was replaced by control orders, which allow the Home Secretary to confine a suspect to his home with severe restrictions on whom he can contact for renewable periods of up to a year. The first orders made by Charles Clarke were held by the court to be unlawful and in breach of the European Convention.

Although the 2005 Prevention of Terrorism Act allows some judicial scrutiny neither the suspect nor his lawyer has the right to attend a hearing or to be told the evidence that is relied on by the Crown. Most recently the Government tried without success to increase the period allowed for detention without charge of people suspected of terrorism to 90 days. Perhaps it is a sign of a change in the mood in Parliament that this was the first defeat for the Government in 9 years.

- iii) The third episode is the recent announcement that, quite independently of the prospects of conviction, an apparent threat by the Saudi Government to withhold cooperation in counter-terrorism intelligence meant that it was not in the public interest to conclude the investigation into allegations of bribery surrounding the securing of arms deals by BAE. The implication that there are some people whose power and influence may put them above or beyond the reach of the law is hard to reconcile with the principle *Fiat Iustitia Ruat Caelum* or, as Lord Denning put it, *Be Ye Ne'er so High, the Law is Above You*. It is perhaps a reflection of the cynical times in which we live how little and muted was the public and political reaction. Much to their credit, it was left, as so often on these

issues in recent years, to the Liberal Democrats in the House of Lords to call for a debate on the topic.

The judges have emerged with great credit. Their decisions have been neither popular nor welcomed by the Government. The Belmarsh decision of the House of Lords was a landmark decision which ranks with Lord Atkin's dissenting judgment in *Liversidge and Anderson* (the Regulation 18B case in the middle of the Second World War) as a beacon for the affirmation of principle over expediency and the primacy of the rule of law. In the USA, although it took 5 years, which was pitifully and damagingly slow, the Supreme Court finally articulated what had long been obvious to the world: indefinite detention without trial is anathema to the rule of law.

By contrast the two main political parties have emerged with less credit. Both the Conservative and the Labour parties have libertarian traditions going back a very long way and yet the voice of opposition on these issues seems on many occasions to have been stilled.

It is a truism that civil liberties once given up are hard to restore. Politicians in office are prone to throw out constitutional safeguards which, in opposition, they were the first to support. There are no votes in civil liberties. More Daily Mail than the Daily Mail appears to have been the watchword for both New Labour and the Tories. Never allow yourself to be outflanked on the Right on issues of law and order, security or sentencing. To this list one now has to add immigration and asylum.

It is a strange and perhaps unhealthy new world in which the most vociferous opposition to the excesses of populist authoritarianism has come from the judges, and in some cases even the police and heads of the security services. They are not subject to the pressures of election and are accordingly less inhibited from pointing out that the emperor is wearing no clothes.

Again is it not obvious – not only with the benefit of hindsight – that the threat to our national security is far greater from quiet teaching assistants in Dewsbury who think, however misguidedly, that this country has become their enemy or English teachers in Birmingham who describe Britain as a police state for Muslims than ever it was from Saddam Hussein's feared arsenal of WMD? The more we descend into a vicious circle of reacting to terrorist outrage by ever more draconian responses, the more we risk alienating large sections of the Muslim community and giving the minority of extremists the protection within their own communities without which they cannot operate.

In the field of criminal justice there are many who believe the time has come to call a halt to the pattern of laws which keep adjusting the balance in favour of the state against the rights of the individual. It is easy to forget that the true balance is between the rights of the victim and the rights, not of the offender, but of the suspect or the defendant, who may actually be guilty of no offence.

In the darkest moment of the Second World War it was Churchill himself who said: "The power of the executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgement of his peers, is in the highest degree odious, and the foundation of all totalitarian government whether Nazi or Communist."

Of course none of these issues is easy and we are very fortunate to have two speakers who have given a great deal of thought to how they should be tackled: Henry Porter and Sir David Omand, followed by a discussion of the issues between Alan Rusbridger, the Editor of the Guardian, and Nick Clegg, the Lib Dem Shadow Home Secretary.

*Nick Stadlen was named Barrister of the Year in the 2006 Lawyer Awards, and Banking and Finance Q.C. of the Year in the Chambers Awards. He led a large team in the Bank of England's successful defence of allegations of misfeasance in the BCCI litigation. His 119 day address to the Court was described by Mr Justice Tomlinson as a tour de force. A former President of the Cambridge Union and winner of the Observer Mace Student Debating Championship, he founded the British Irish Association, a charity dedicated to promoting dialogue between opinion-formers in London, Dublin and both sides of the divide in Northern Ireland.*

*He is a Crown Court Recorder and Chairman of the Bar Caribbean Pro Bono Committee which sends barristers to assist in murder trials in Jamaica. He is Chairman of Trustees, Volunteer Reading Help and a former member of the Bar Council Public Affairs Committee. He recently interviewed David Blunkett on New Labour's record on civil liberties and the rule of law for the Guardian. The interview, which can be heard on the Guardian website, is the first in a series of hour long podcast political interviews.*

## Henry Porter

Over the last year you may have noticed some government ministers and law officers making adjustments to their position on human rights. For example last May, the Attorney General, Lord Goldsmith, said of Guantanamo: "Its existence remains unacceptable. Not only would it be right to close Guantanamo as a matter of principle, it would also help remove what has become to many – rightly or wrongly – a symbol of injustice."

A few weeks ago, the Director of Public Prosecutions, Sir Ken Macdonald, made a speech attacking both the idea of "the War on Terror" and the Government's opt-out on the European Convention of Human Rights to push through detention laws. He said: "The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement."

Finally, the Lord Chancellor Lord Falconer bustled to the human rights pulpit. Speaking at the Royal United Services Institute last Wednesday, he said: "Allegiance to the Rule of Law is the keystone of our society. It is *non-negotiable*. Protection under the law is something that every one of us shares, regardless of region or religion, background or beliefs."

So, that's all right then. All is well in the country that Voltaire once called "the land of liberty". What could be more reassuring than law officers in 21<sup>st</sup> Century Britain lining up to signal their commitment to international conventions on human rights and the unwritten constitution?

The trouble is that these speeches give a profoundly wrong impression of the actual state of affairs in Britain. You may think that, after many lapses, they demonstrate a genuine interest in a return to the norms of our democracy - I hope you're right – or that these men now feel free to distance themselves from the policies of the Prime Minister – I am sure that's true. Either way, it's undeniable that the Government has forced measure after measure through Parliament in defiance of the Rule of Law.

Since 9/11, the Prime Minister has maintained that it is his first duty to protect the public against terrorism and that it is reasonable to suspend a few people's rights in that cause. He has often said that civil liberty arguments were "made for another age" and he has edged very near to the continental way of thinking, which was described by Eve Steiner at a Chatham House conference in 2005. "The French", she said, "would say that the ability to move safely around in the collective public space is a citizen's first freedom – more important than individual rights."

Certainly all of us agree that liberty cannot exist without security. But to say this and move on – as so many do – misses a crucial point. Security cannot exist without liberty.

We cannot be secure if our rights and freedoms are scooped up and held in trust for us by a central authority until the crisis passes. For one thing the crisis never passes - governments are rarely happy to return liberty to the people. For another, liberty and a system of rights protect us from ourselves as well as from the ambitions and sometimes madness of government.

A system of rights only works if it is universal and if there is acceptance that when one person's rights are removed or infringed we all suffer. *Their* rights are in fact *our* rights, even if we don't think we will ever need them. The neglect of this principle may seem a small sacrifice to make in an age of horrific terrorist attacks, but we must remember that, apart from trying to make reasonable efforts to protect ourselves, we are also defending a social democracy that is defined by its respect for the Rule of Law. The moment we make exceptions, we diminish the virtue of our cause and the quality of our society.

I will argue this afternoon that in the last five years the government's terror laws are self-evidently in defiance of the Rule of Law and further that they can only be properly seen in the context of a general erosion of rights and liberty. What was held to be reasonable exceptionalism in the "War on Terror" has come to colour – in my view stain – many other areas of the law. Precedents that are created in the distinct area of terror legislation – where few dare to question the motives or judgement of the Government – quickly spread outwards to infect laws concerning demonstration, privacy, and the rights of defendants.

I know I don't have to lecture this room about the meaning of the Rule of Law, but it's worth remembering what the British constitutional expert A.V. Dicey wrote in 1885. "We mean in the first place that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." I agree: It's not very *modern* – in New Labour terms – to be quoting a Victorian academic, but in the absence of a written constitution his words stand between us and the arbitrary detention and house arrest seen in dictatorships the world over. That's why we must be glad that the Lord Chancellor went out of his way to say the Rule of Law is non-negotiable and the keystone of our society.

Yet I can't help thinking that he has got himself an entirely different definition of the Rule of Law, or that he is having it both ways – appearing

to stand up for liberty while at the same time being an influential part of a government that actively attacks the unwritten constitution – and not just in terror cases.

Let me quickly deal with the some of the terror laws.

Twenty eight days pre-charge detention is unquestionably a punishment if no charges follow, for a person is deprived of their liberty, their living and their family life without a court deciding that the law has been broken. That is a *de facto* breach of the Rule of Law, yet the Home Secretary is pressing the cabinet for 90 days on the basis that police cannot be asked in complicated terrorist cases to bring charges within a month. Now, depressingly, Gordon Brown has indicated that he is willing to look at the arguments again.

Control orders are another case in point. Some of you may have seen the recent Channel Four Dispatches programme in which a number of controllees, as they are known, were featured. It was illuminating, not because it made any particular comment on the likely guilt or innocence of the subjects, but because it painted a picture of what would be recognised by the Burmese military junta as plain old house arrest.

Though not found guilty by any court of law, these men are confined for anything up to 22 hours a day. They cannot live at home. They are tagged, forbidden to use a mobile phone or the internet, not allowed to meet friends outside and must have permission from the Home Office to receive visitors. When they appear in front of Special Immigration Appeals Court – SIAC – they are not allowed to hear the evidence against them and they can only be represented by a lawyer appointed by the court. One of these court-appointed representatives, Ian Macdonald QC, candidly expressed his doubts at the way the SIAC functioned and how intelligence was accepted as evidence. There is also a suggestion from Lord Carlile, the government's independent reviewer on terror law, that the police use control orders as an excuse to abandon gathering evidence, while continuing to claim that there is no possibility of realistic prosecution.

This is wrong. If intelligence is firm enough to deprive a man of his liberty in Britain, it certainly can withstand examination in the normal conditions of an ordinary court. But no. We are told that in an open hearing, methods and sources may be betrayed and so there is no option but to accept the word of the Security Services.

Generally I am not one for disparaging the work of MI5. I covered the July 7 bombings and worked at Ground Zero just after the attacks, and I really do appreciate what is at stake and the scale of their task. I also believe that MI5

and the police have done a truly excellent job over the last five years, adapting rapidly to this vicious new strain of terrorism. But intelligence is no a substitute for evidence in legal proceedings and it never will be.

We would do well to remember that when we last accepted the word of intelligence chiefs – instead of insisting on evidence – we were taken to war on completely false information.

It is undeniable that, in both pre-trial detention and control orders, people suffer, in Dicey's words, "in body and goods" without "a distinct breach of the law" being proved. SIAC is clearly not "the ordinary court of the land" and the hearings there are conducted in a far-from-the "ordinary legal manner". So with due respect, I think the Lord Chancellor should spare us his lectures on the Rule of Law.

The British government's failure to oppose Guantanamo from the start and its obstruction of inquiries into rendition flights do not make Lord Goldsmith's views on Guantanamo particularly convincing. Still, I suppose it's better late than never.

Over the last year I have been arguing in The Observer that, during the War on Terror, the balance between the state and the individual has been drastically altered by the Blair government, yet with very little actual result in the struggle against Islamist terror. The sense of crisis evoked by the phrase "War on Terror" has allowed Blair to push laws through parliament with the minimum of opposition and scrutiny. These measures are presented as tools in the all important task of fighting terror, although on close inspection it becomes clear that they do little more than extend the reach and power of the state at the expense of individual liberty, rights and privacy. After watching the process for some time I conclude that this is no accident, but a kind of reflex opportunism on a very grand scale indeed.

So, we have Walter Wolfgang hauled out of the Labour conference for exercising his democratic right to shout "rubbish" at Jack Straw. We see people arrested for wearing anti-Bush & Blair T-shirts. Now, under the Serious Organised Crime and Police Act, people are being arrested outside Number 10 for carrying quotations by George Orwell without having first gained permission to demonstrate within a kilometre of Parliament Square.

There was a vague implication that SOCPA updates police powers in the age of terrorism, but what it actually does is to deprive the British people of their inalienable right to bring their grievances to the centre of power without first asking a policeman's permission. It may be regarded as a small sacrifice to

make, but all these small sacrifices add up to a very large change in our society.

In this understandable anxiety about security, we have made many such concessions. ID cards were presented initially as a useful tool in the war of terror – until it was pointed out that the Madrid train bombers all had ID cards.

We accepted the network of ANPR cameras which covers all British motorways and town centres and retains journey information for up to two years. That this network came into being without Parliamentary debate did not seem to concern us unduly. That the ID card represents the greatest possible contempt for our personal privacy simply did not bother us.

The effect of the War on Terror legislation is truly insidious.

We were promised that Control Orders were exceptional measures to deal with foreign suspects who could not be returned to countries where they were likely to be tortured. But now the model of the Control Order is being applied to suspect criminals. The new Serious Crime Prevention Order will mean that without being found guilty by a court of law, a person may have his bank account frozen, be prevented from working or remaining at home, meeting people, using a mobile phone or the internet. In other words, practically the same conditions as a Control Order. The standards of proof for this civil order will be much lower than in an ordinary trial and, in effect, it will be enough for the state merely to suspect someone is guilty before the order is granted.

The pattern is clear. Terror legislation is acting as a template for the reduction of defendants' rights in areas where the government feels frustrated. It is a convenient way of replacing evidence with intelligence.

I don't want to be alarmist, but that was exactly the procedure followed in the courts of East Germany. The Stasi, the East Germany secret police, also operated an enormous apparatus for eavesdropping on their citizens. So now does Britain.

Yesterday the Commissioner for Interception of Communications revealed that 439,000 requests were made by scores of government agencies and local authorities to monitor people's telephone calls, emails and post. Of course, under the terms of the Regulation of Investigative Powers Act - RIPA - none of the subjects have the slightest idea who is looking at their private communications or for what purpose. This piece of legislation began as a honed response to terrorism. But then the extension to RIPA allowed pretty

much any bureaucrat from the Food Standards Agency or the Environment Agency to read your mail without your knowledge.

How on earth did we let this happen? What was going in the minds of MPs when this order was being debated in the House of Commons? I'll tell you what – the War on Terror was on their minds. Few objected because of this government's demonic gift for spin and the very real risk of appearing soft on terror.

Liberals like me are easily dismissed as being impractical in the face of the terrifying modern threat of suicide bombers. This is wrong. I am as determined as Sir David to catch and prosecute terrorists, for the very good reason that they are the greatest possible threat to this extraordinary social democracy that we live in. But I am equally determined that the response to terrorism – the War on Terror – should not become the second greatest threat to this democracy. Currently, that is a distinct possibility.

So, I make a few practical suggestions:

- First, we must renew our respect for the principles of the Rule of Law, to affirm our own culture in the face of this threat. Rights are indivisible and they cannot be allotted according to perceived merit, ethnicity or religion. This is an important message to send to the British Muslim community, 84% of which believe that they are treated fairly in British society. Let us increase that percentage, rather than allowing the disenchantment with British institutions and values to grow.
- I agree with Nick Clegg's piece in the Guardian this morning that the Commons should vote against an extension of control orders tomorrow.
- We should never again seek to opt out of the European Convention on Human Rights by claiming that the life of the nation is threatened by the War on Terror.
- We should urgently seek ways of converting intelligence into evidence. This is not alchemy, but a practical problem of producing intercepts in court without giving away important secrets.
- The move to extend the 28 days to 90 days should be resisted.
- The House of Commons Joint Committee on Human Rights has suggested that compensation should be available to those held for the maximum period if no charges are brought. That seems right to me.

- I agree that the state has positive obligations to prevent terrorism, but in all cases justice must be seen to be done. That is not currently happening in the *sub rosa* proceedings of the SIAC.
- We should ditch for all time the phrase “War on Terror”. It dignifies what the Director of Public Prosecutions calls the “deluded narcissistic inadequate” as soldiers. They are not. They are criminals.
- Finally, we should guard against the infection of our laws and culture by the rushed and substandard measures that have been produced by this government. They are no model for the rest of our law. To this end we need a written constitution and a curriculum that teaches every child of whatever religion or background their guaranteed rights in our free society.

In the final analysis the speeches by Lord Falconer and Goldsmith and Sir Ken Macdonald QC were a welcome sign, for whatever the politics and manoeuvring that is going on, all three men do seem tacitly to accept that without liberty, security is a fantasy.

*Henry Porter has written for most broadsheet newspapers. He now writes a column for the Observer, where he has concentrated on the issue of the erosion of civil liberties in the last decade. In the spring of 2006, his campaign provoked a reaction from the Prime Minister who asked to debate him in a public exchange of emails. The following week the then Home Secretary Charles Clarke attacked him and two other journalists writing on this subject as “pernicious, even dangerous poison”. Henry Porter represents the American magazine Vanity Fair in Britain. Last year he conceived and edited the magazine’s green issue. He also writes on politics for the magazine.*

*He has published four novels in some fifteen languages. The first part of his children’s series, The Master of the Fallen Chairs, appears in the autumn. He has written one work of non fiction about truth in journalism - Lies Damned Lies. Last year he made a film for More4 on the surveillance society called Suspect Nation. He lives in London and Gloucestershire, and is at work on a new novel set in post-Blair Britain.*

**Sir David Omand**

Perhaps I ought to start with a point of agreement about principles, rather than just plunging into potential disagreement. The best way that I can do this is to cite a well-known quotation from the then President of the Israeli Supreme Court – a body that has stood up in difficult circumstances for the rule of law – and he put the point thus: “Sometimes democracy must fight with one hand tied behind its back, nevertheless it has the upper hand. Preserving the rule of law and the recognition of individual liberties constitutes an important component of its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”

That puts it very well – you would not find a single member of the British security establishment who would disagree with the sentiment. However, there is a “but”, as expressed in a remark by the Nobel prize winner Elie Wiesel, who said that the problem of this century, the 21<sup>st</sup> century, is the same as the problem of the last century – it is how to deal with fanaticism armed with power.

One of the hardest parts of statecraft is doing just that. Countering jihadist terrorism is hard; it needs clear analysis, backed by good intelligence, it needs a strategic cast of mind and it certainly needs strong nerves. It is best conducted in a bipartisan spirit and, speaking personally, the sooner parliament can get back to a bipartisan consensus – or multiparty consensus – on these matters, the better. It is best advanced without screaming headlines, and without, if I may say to Henry Porter, overstatement and wild comparisons.

Nick referred to the problem of dealing with instinctive reactions when faced with terrorism such as the natural instinct to lash out when you’re hit and that is the psychological characterisation of how our American friends felt about that dramatic event on 9/11. It was a catastrophic event in terms of their collective psyche, as well as on the lives and wellbeing of those directly affected. From that perspective, the categorisation of their response as the “War on Terror” is explicable.

My reading of the UK response is different. It is not the reaction of someone punched in the face by a stranger and wanting to punch straight back. We are more like an individual that wakes up to discover they are suffering from a very stressful, possibly debilitating disease to the body politic – you don’t punch yourself. The British strategy should not be categorised as a “War on Terror”, and it never has been. The phrase is sometimes used in political debate, despite the pleadings of most of those on the inside that its use is

counterproductive. The British approach is actually very different and I want to make some points about what our strategy involves.

But before doing that, I ought to remind you of what we're up against. What we are facing, from what one might call the al-Qaeda front that bin Laden and al-Zawahiri created, are three powerful forces.

- Firstly, a compelling narrative of global victimhood and fanatical religious righteousness, of which the highest form is martyrdom.
- Secondly, we are dealing with dispersed networks of radicalised jihadists, including many in the United Kingdom, who can provide practical support and, to some extent at least, organise attacks themselves.
- Thirdly, we are dealing with a core of trained terrorists of many different nationalities who are able to inspire, plan and mount complex terrorist operations against what they describe as the "far enemy", of whom we are part.

Those terrorists have the stated intention to cause serious harm to our way of life, including by acquiring and using unconventional means, i.e. chemical, biological, radiological or nuclear. Thankfully, they have not yet succeeded in this ambition, but they have that stated intention. One of the best scholars in this field said to me at a conference recently, "bin Laden is a man of his word: he says what he means and he means what he says." We should take seriously what the leaders of the al-Qaeda movement have actually said about their intentions.

I don't believe in taking the worst case as our guide for everyday living; we should plan on going about our business on the most probable assumptions. However, we should have in the back of our minds what might happen in order to inform contingency planning. Lord Hoffman's minority judgment about the extent to which terrorism represented a threat to the life of the nation, which Nick quoted, would be dramatically invalidated were such radiological, chemical or biological means to be used. Lord Hoffman's statement was given, as far as I know, without his taking or assessing evidence on the subject.

I agree entirely with Henry and Nick that those who are engaged in this activity are criminals; they need to be brought to justice through the proper process and, if convicted, punished according to the law. They need to be deported in cases where they have abused the asylum process, having obtained assurances from the countries to which they are being sent of fair treatment. But criminal justice on its own is not going to protect the public

adequately. It is not going to bring this international menace to an end. Self-evidently, suicide bombers are not going to be deterred by the threat of terms of imprisonment. We are dealing with a global phenomenon, with threats to our interests overseas as well as in the UK.

Criminal justice is an essential part of the solution but it can't be the solution on its own. So what we need, and what I hope we are, as a nation, feeling our way towards, is a comprehensive national security strategy to counter this particular menace. It is going to have to involve both hard power and soft power, to use the terms that Professor Joe Nye has introduced. It is going to have to involve working to reduce the threat and working to reduce our vulnerability as a society to that threat. In line with that approach we have, as you will all know, developed a national counterterrorism strategy.

The strategy involves a significant element of *prevention*, in working to prevent the radicalisation of another young generation. It also involves the *pursuit* of the current networks, both working abroad with our allies and partners denying the terrorists safe havens and supporting governments afflicted by terrorism, and at home in identifying and bringing to justice those guilty of terrorist offences. It involves reducing our vulnerability through the *protection* of society. Finally, it involves adequate *preparations* on the part of the emergency services for atrocities when, inevitably, the terrorists get under the security radar.

So, to repeat, we need a comprehensive national strategy with those four 'P's as I have summarised them. The criminal law is only a part of what is necessary to respond adequately to the threat, and new domestic legislation should not necessarily be our first recourse when the threat goes up.

There is, however, one element underpinning the whole strategy, which poses a particular dilemma for liberals. This element is key to the successful execution of a balanced strategy – not a "War on Terror" – but a balanced strategy of the kind the UK has set out to implement. That is secret intelligence.

Why do I say that? Firstly, pre-emptive secret intelligence directly protects the public because it stops bad things happening, it prevents criminal acts before they occur, which is surely desirable. Certainly, when we are talking about the more extreme forms of terrorism such as mass murder, it is quite essential to uncover those plots and nip them in the bud.

Secondly, it lowers the level of violence and therefore lowers the political temperature, thus lowering the radicalisation pressure and the risk of the counter-reaction in terms of more draconian measures that governments may

feel forced to adopt. Good pre-emptive intelligence buys time for the longer term prevention measures to take effect. We should be realistic and recognise that we are talking about years to make an impact on the roots of radicalisation.

Pre-emptive secret intelligence can also provide, and does today provide, the leads for criminal investigation and evidence collection that can lead to prosecution. Intelligence is not evidence – Henry is absolutely right about that – but it can often be the only starting point for an investigation in which the police can gather the necessary evidence. That, in turn, reassures the public, reduces the threat and shows that the law is being upheld.

There is another dimension to this argument. Secret intelligence enables the security authorities to achieve another objective, which is to operate in ways that can reassure the communities in which the terrorists seek support and not alienate them. It is what I have described elsewhere as replacing the bludgeon of state power with the rapier. You are not going to need to have extensive stop and search, pass laws, house to house searches, mass arrests, if you know where to go and you know for whom you are looking. Pre-emptive secret intelligence is, I would maintain, a key element in a civilised approach to countering a major menace to our daily life.

Where do you get such preemptive intelligence from? Two directions; the first is modern, professional intelligence collection using all the human and technical tradecraft of which we are capable, and the second is information freely volunteered from within the community, in rejection of the extremists and their ideology.

To make the former possible, we do have to accept the necessity of intrusive surveillance and investigation – under proper oversight, I emphasise. By so doing we are gaining greater security, even if at the expense of some aspects of privacy rights. It's the opposite conclusion to the current calls to curb the so-called 'surveillance society'. But if I, as an ordinary citizen, have to make a choice over what I should concede in order to help counter jihadist terrorism, that is where I would make my choice. It directly supports the strategy and reduces the pressure to alter the rule of law, to introduce draconian legislation, to invent special terrorist courts and all the rest of it. But, speaking to a liberal minded audience, you can't have it both ways – there are choices that have to be made and libertarians have to recognise the nature of those choices.

To maintain the latter flow of intelligence – the information freely volunteered from the community – means maintaining community confidence in the actions of the state. That includes confidence in the protection that

will be provided by the framework of human rights and the quality of justice. So my argument, as it were, comes around in a virtuous circle to support the underlying thesis that Henry Porter was putting forward, that the community must have confidence in the rule of law, confidence that it is not being applied in a way that is partisan, and that individual communities are not being discriminated against.

Now, I have dwelt on that point because it is an important dilemma. We risk dealing with issues of privacy in a separate box from issues of counterterrorism and civil rights; it is important to remember that relationship. We have to accept, and for a liberal audience this may be difficult, that secret intelligence is information that other people want to stop you from having.

It follows that the realm of intelligence operations is a zone where the ethical rules that govern our everyday behaviour can't apply. It's the equivalent of breaking everyday moral rules such as reading other people's mail, listening and peeping at keyholes, encouraging indiscretion and breaches of confidence, or masquerading as what you're not. That's how you get secret intelligence.

Effectiveness also means cooperating with regimes overseas, some of whom may have methods that we disapprove of, that we may regard as crude and ethically doubtful. Acquiring life-saving intelligence means using modern technology to sift large quantities of personal information about the innocent as well as the suspect in order to identify the latter. This raises clear issues of oversight, individual privacy, and the distaste which we all share for state prying. The value of success in that area, I suggest, more than outweighs the penalty that you may have to pay.

Does the value of such intelligence justify any method to acquire it? I know my old colleagues inside government would say no, there are very clear lines we do not want to cross, and quite apart from the ethical arguments there are very practical arguments based on the need not to undermine our own strategy. I refer here to the alleged use by the US of methods such as deep interrogation techniques – for example, the 5 techniques banned for the UK by Edward Heath in the early 1970s and not used by British forces since. Techniques of that type, of course, we have seen used in the so-called US "War on Terror". My belief is that more ground is now being lost through the international use of methods such as extraordinary rendition and indefinite detention by the US than has been gained in short term relief from terrorist attacks.

That is not to say that immediately after the intervention in Afghanistan, with large numbers of people in terrorist training camps being rounded up, that it was not necessary to detain and question them – I believe it was. What has gone wrong is the failure to put in place subsequently a proper legal process for dealing with people in that limbo situation, neither prisoners of war nor accused of criminal offences. The ability of the United States to use its soft power around the globe has been compromised by their actions and that hurts us.

Turning just very briefly to domestic issues, I simply do not know whether control orders will turn out to be a permanent and useful part of the UK counter terrorism armoury. The jury is still out as to whether they are actually effective in reducing the risk to the public or not. I suspect it needs careful review, following Lord Carlile's report, as to whether the benefits in security terms will continue to be worth it.

I would also ask you to remember the situation the government found itself in when the Belmarsh judgment was announced. The government had used immigration law to maintain its "three sided prison" for foreign nationals meriting deportation on counterterrorist grounds, where it was judged that expulsion to their country of origin would not be safe in terms of the risk of subsequent mistreatment. The foreign nationals concerned were, of course, free to walk out at any time they chose to leave the country. The government woke up to discover that it was not allowed to maintain this three-sided prison because it was discriminatory in human rights terms –the argument was that foreign nationals shared the same rights as British nationals in the UK, and since only foreign nationals were liable to be detained in this way pending deportation the government's policy was discriminatory. The government was left therefore with the dilemma of what to do with people who, it had reasonable cause to believe, were a security risk, but who could not lawfully be deported. Were they simply to allow them to walk the streets?

The response of the government was not, I'm pleased to say, to legislate to extend detention powers to British citizens as well and thus effectively introduce a form of internment. It was to ask whether, absent evidence that could justify prosecution, it was possible to devise restrictions in the ability of these individuals, whatever their nationality, to conduct acts which might be preparatory to terrorism – for example by restricting their access to the internet, their movement after the hours of darkness, electronic tagging and so on. The jury is still out as to whether control orders will prove a sensible way of trying to reduce the risk to the public short of mounting a criminal prosecution, but it was above all a judgement about risk management. We

should remember why, in those circumstances, the government chose to go down the control order route.

Which leads me on to the final point I want to make. I have outlined the basis of UK counterterrorism strategy, which balances the different elements of prevention, pursuit, protection and preparation. We should be proud of the fact that the UK is pursuing a rational strategy to manage down the risk from jihadist terrorism. Why is it, therefore, that ministers find it hard to stick to the logic of the strategy when it comes to counterterrorism legislation?

I do not think it is because Ministers have an innate authoritarian streak and they are just itching for wider reasons to get something tougher on the statute book. It is simply because they feel very heavily, as do their officials, the weight of their responsibility to protect the public. They know that if they are not seen to have done everything that is in their power, they are in for a media firestorm when plots are uncovered or attacks take place. So part of your debate, I hope, will begin to focus on what are the dynamics that push a government in directions which may actually run slightly counter to their own strategy. If you like, it is part of what has been described as the 'Daily Mail' factor leading, as Henry Porter has suggested in his remarks, to the need for Labour politicians never to be outflanked on public security from the Right. These are dynamics within the body politic, within Parliament and within the media, and they deserve closer examination, which would also help clarify the underlying issue over civil liberties that Henry identifies.

*Sir David Omand GCB was the first UK Security and Intelligence Coordinator, responsible for the professional health of the intelligence community, national counterterrorism strategy and "homeland security". He was the Government's chief crisis manager for civil contingencies.*

*He was Permanent Secretary of the Home Office for three years and before that was Director (Permanent Secretary) of GCHQ. Most of his career has been in the Ministry of Defence, and, as MoD Deputy Under Secretary for Policy, he was particularly concerned with long term strategy, the British military contribution in restoring peace in the former Yugoslavia and the recasting of British nuclear deterrence policy at the end of the Cold War. He was Principal Private Secretary to the Defence Secretary during the Falklands Conflict and UK Defence Counsellor to NATO from 1985 to 1988. He served in total for seven years on the UK's Joint Intelligence Committee in three different capacities.*

*He is now Visiting Professor at the War Studies Department, King's College, London and strategy adviser to the Society of British Aerospace Companies. He is Deputy Chairman of the Windsor Leadership Trust and a Trustee of the Natural History Museum.*

## **Alan Rusbridger in conversation with Nick Clegg MP**

Alan Rusbridger:

I can't imagine there are any people in the audience who are not Guardian readers, but in case anybody has wandered in by mistake, there was a very telling piece in the Guardian this morning by Nick, in which he revealed he would be voting against the extension of control orders tomorrow. Could I ask you to summarise it and to outline some of the measures that you suggested in place of control orders?

Nick Clegg:

To start with control orders, we have always advocated, and continue to advocate, a reform of the control order regime. This includes facilitating a greater role for judges, a higher burden of proof and implementing a mechanism to test whether the evidence is available for prosecution. We have no means (in the House of Commons) tomorrow to make that argument; we have no means to amend the measure. I would go so far as to say that we have been deliberately forced into a corner where we have to say "yea" or "nay". This has not happened overnight. We made exactly those arguments when the first legislation was passed and the same arguments when we failed to push it to a vote a year ago.

Those of us who questioned the specific design of the control orders were told then, "yes, we will look at all this, it'll be caught up in the general review of terrorism legislation, that will be published by x date". That x date was then pushed back by 12 months because of 7/7. We accepted that. Now, the review seems to have dribbled into the sand and been lost somewhere between John Reid and Tony Blair. If you believe the newspapers, it is now wholly dominated by whether or not we split up the Home Office. I don't want to speculate on when Lord Carlile sent his report to the Home Office, but I find it extraordinary that his report is published by the government yesterday, and that the government's press release stated that "it shows we need control orders, and therefore you should support them on Thursday." There has to be a bit of context here.

I get irritated because we are not being naïve about this. We are not blind to the fact there are people about whom you might have very serious concerns that they might wish to do harm to us and to the British people. We must do something to keep tabs on them. But for heaven's sake, the Government has been saying this for 2 years. We put forward quite reasoned, thought out, detailed proposals for the reform of control orders. This week, once again, we have been bounced into saying there's no other option than saying yes, just accept the status quo, ignore the arguments we have been making over the last 2 years.

I don't know about you but I feel, as an opposition politician, it is incumbent upon me and my party to say no, we are not going to continue to play this game. We are going to start shouting a bit louder and we are going to start voting against. Now, it is no secret beyond these four walls that it is unlikely we will win the vote on Thursday. This is because, although large numbers of Conservative MPs share many of our increasing concerns about control orders, as do a number of people in the Labour benches, they are too scared that it will be used, as undoubtedly it will be, by John Reid tomorrow to bait me with a stick as if to say: you're namby-pamby, soft, lily-livered liberals who do not understand the hard realities of terrorism. You can, as an opposition party, be continually cowered by that, or at a certain point you can say no. There is a whole range of complexity about this argument which has been lost by the very simplistic, stereotypical options which we are being forced to decide upon.

Alan Rusbridger:

Given that this is the nature of our politics – it is simplistic, it is a yes or no answer – I wonder whether there is anything you have heard today from the two people with the most intimate experience of dealing on the inside with the difficult issue that has changed your mind?

Nick Clegg:

I wholly agree that intercept evidence is no panacea. I don't think for a moment that there is one magic bullet alternative to control orders, which is why I repeat again, we would ideally like to see reforms to the control order regime to make them more accountable, more in the hands of the judiciary rather than politicians. However, in the absence of that, there are a range of other incremental changes that could be made to the criminal justice system, which would not make it perfect, and would never be nimble enough to deal with the sheer velocity of the kind of threat we are dealing with, but they are important changes nonetheless. There is a strong case to look at the so-called threshold tests the Crown Prosecution Service uses when deciding whether to bring charges in terrorism cases. There is also a strong case for looking at the circumstances under which questions under charges can take place, which would relieve a lot of pressure on this endless, highly politicised debate, over 28 days, 90 days and so on.

There is a lot to be learnt from other countries about the way you can use plea bargaining in a much more active way, as we are now starting to do. SOCA is starting to deal with serious crime, to draw people in from the fringes of those communities where terrorists are active; we could do much more on that. We could look at the examples of Australia. I was reading an article the other day about the way in which Australia has codified the

circumstances in which sensitive evidence can be presented in court. I am no lawyer but, if I understand it correctly, there are lots of different provisions that are rather dispersed and badly codified under British law, where you can circulate and examine sensitive evidence. It seems to me that there are many incremental steps that we can take. I cannot tell you whether together they would provide a sufficient answer to the specific issue that control orders deal with, and the reason I do not know that is because I do not know what this control order is about. Lord Carlile has written a fantastic report but, as he rightly urges, more has to be done to involve people like me, and the public, in this debate.

Now, let me let you into a secret. Last summer I had a long telephone conversation with John Reid at the height of all of the alleged Heathrow bomb plots. I said to him, and I don't mind making it public now, can you please get me and my team into the Home Office, as soon after the summer recess as possible, to be exposed to some of the information that you are using to inform your decisions? We may disagree, we may find logical differences, but you must accept I want to be well-informed. I have never been invited. I have had subsequent conversations where I have been told "yes, we can give you a briefing", but it has never been provided. Ignorance breeds precisely the misunderstandings that can fracture this debate, that prevent the bipartisan, multiparty consensus that everyone wants to see.

So, amongst all of this, there are a number of incremental changes that are not being examined because they are eclipsed by the political obsession with things like control orders and the debate about 90 days. At the same time, opportunities are being missed to circulate greater information amongst the public and the political parties as a whole.

Alan Rusbridger: Who do you speak to? Do you talk to intelligence services?

Nick Clegg: No, not in any formal or structured way, no.

Alan Rusbridger: So, you are saying that as an elected representative, you are effectively voting on matters that you do not know enough about? I know that was a cheap pop, but there is a substantive point behind that about the nature of democratic scrutiny.

Nick Clegg: I think you are right. Speak to David Davis and you will get the same response. One has to scratch around to try and get the information which is necessary to make an informed choice. This should not become a highly rancorous political discussion. I believe passionately that the one issue the British public does not want politicians to fall out about is something as important as terrorism. There are no votes in me trying to tear strips off John

Reid. I do not think I can get any votes, quite the reverse actually, by voting against control orders. There is a massive political incentive to try and create greater consensus but, frankly, the people who are able to engineer this consensus, or facilitate it, and lubricate it with information, are in the government and the security services, and they do not do enough.

One of the reasons, and this is a highly party political thing to say, but I say it with some feeling, and this is where I strongly disagree with David Omand, is this idea that ministers and officials are reflecting in a somewhat fearful but entirely objective and innocent manner on the political effect of the debate on anti-terror legislation. This can be confounded by just looking at the things that Tony Blair and John Reid say about the relative positions of political parties on anti-terror legislation. They are explicitly using it as an instrument to gain party political advantage. They have taken a strategic decision. They took it several months ago. It is a straightforward decision, and you can almost map out the more the Home Office has plunged into decay and disorder, the more the rhetoric – particularly against the Conservatives, where the Labour party feels the greatest threat on anti-terror legislation – has accelerated. It is their political decision, and it is a conscious one taken by Number 10 and the Home Secretary. To repair what is an increasingly fractured and political debate on anti-terrorism is going to be quite a job, I certainly know that as far as my party is concerned we stand ready to join in, but you cannot do so without the information.

*Alan Rusbridger has been editor of the Guardian since 1995. A graduate of Magdalene College, Cambridge, he began his journalistic career on the Cambridge Evening News. He first joined the Guardian in 1979 as a reporter, subsequently working as a columnist and feature writer. In 1986 he became a critic for the Observer, moving to America the following year to be the Washington Correspondent of the London Daily News.*

*On returning to the Guardian he launched the Guardian Weekend magazine and G2 - Britain's first compact sections in the quality market. He was appointed editor by the Scott Trust, which has owned the Guardian since 1936. His editorship has been notable for pioneering the development of the paper's digital edition, twice voted the best newspaper website in the world, as well as for launching the paper in the popular European "Berliner" format in 2005.*

*He is also noted for fighting, and winning, a number of high-profile legal cases involving free speech issues and corruption in government. In 11 years as editor he has won Newspaper of the Year several times, as well as several awards as Editor of the Year. He is a visiting fellow of Nuffield College, Oxford and a Visiting Professor at Queen Mary College, London.*

*Nick Clegg MP was educated at Westminster School and Cambridge University, and has postgraduate degrees from the University of Minnesota and the College of Europe, Bruges. Nick started his career as a trainee journalist in New York in 1990. He subsequently worked as a political consultant and then worked for the European Commission, becoming adviser to Commissioner Sir Leon Brittan from 1996-1999.*

*In 1999 Nick won election to the European Parliament as MEP for the East Midlands. In the European Parliament he was the Liberal Democrats' senior Trade & Industry spokesperson. He stood down as an MEP at the 2004 European elections to contest the Westminster parliamentary constituency of Sheffield in the General Election of May 2005. Nick held the seat with a majority of 8,682 votes.*

*A speaker of five European languages, Nick was appointed spokesperson on foreign affairs under Sir Menzies Campbell in 2005 and, after Sir Menzies' election as party leader, Nick was promoted to be Shadow Home Secretary. Nick is a prolific author, journalist and pamphleteer, and has been a part-time lecturer at Sheffield University.*