SIR WILLIAM DALE LECTURE

Repentance at Leisure: The Politics of Legislation and the Law of Unintended Consequences

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It is a great pleasure to be back at the Institute and a very daunting honour to give this lecture in Sir William Dale's name, not least with Lady Dale present. You have heard the list of some of the very eminent previous speakers in this series and I do hesitate to follow them. As Director of Liberty I am really a campaigner now which makes me to some extent a lawyer in recovery or at least in partial remission. There are litigators at Liberty who routinely scrutinize legislation in the courts and there are brilliant young policy lawyers at Liberty who actually do the day to day engagement with the legislative process. I am the Director – I have had to some extent deskill as a lawyer but I just could not resist the opportunity to talk about a process that has been such a central feature of my career. I would also like to say that I think the work of the Centre is incredibly important. I think that the process of legislative policy and drafting is incredibly important in any democracy and the art and ethics of legislation are really not studied or promoted enough and that's one of the reasons why, even though I have been to the Institute quite recently, I could not resist the temptation to come back.

My engagement with the legislative process probably began to some extent as a law student and a pupil barrister always with a predominant interest in public law, both constitutional and administrative law. So much of the law that one studies in that discipline is the study of seminal litigation which has turned of course on the interpretation of statutes. Some of those statutes are inevitably contentious from the beginning; other seminal litigation arises, if you like, from unintended consequences to which we can return. My second major engagement with the process and possibly the most formative or even relevant for the purposes of this discussion relates to the five and a half years that I spent in the dark tower – that's what we affectionately call the Ministry of the Interior or the Home Department. And I want to say that, contrary to certain media reports, I had a very, very happy and interesting time in the Home Office. I learnt for the most part my Human Rights Law there and learnt so much about the nexus between law, policy and legislation from Government lawyers, from senior mandarins if you like, and relevant to our discussion, from Parliamentary draftsmen who are really quite amazing people. I had the pleasure to work with a number of them because in the five and a half years that I spent at the Home Office I worked on

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over a dozen acts of Parliament which I think is rather telling in itself and that means with a large number of Parliamentary Counsel, incredibly clever people who have to familiarize themselves with the policy and the relevant law in all sorts of different disciplines and try to turn often, and increasingly I am afraid, quite rushed and ill thought out policy into something that could be vaguely coherent on the statute book. In my day at least – I hope this is continued – they were a bit like the Jedi and they always travelled in pairs – a master and an apprentice and I think you had to work there for at least ten years before they would let you carry a pencil and then after a little longer they would let you sharpen the pencil and possibly look up the relevant volume of *Halsburys* for your master. I suppose the internet has probably lessened the ceremony of that process and I joke, but only slightly, because that kind of ritual and some of the rituals around the whole practice of moving from political idea to the statute book are actually incredibly important. Slowing the process down would be very desirable because it is in time and space that greater thought and scrutiny would occur.

My third engagement with the legislative process is of course as a lawyer and then subsequently a Director of Liberty, now in its 75th year. Even a slight reflection on Liberty's history will demonstrate the extent to which it has always had to engage with legislation from its birth as Government announcement to its publication and through its Parliamentary passage to ultimate application and, inevitably, subsequent litigious contest in the courts. I think it is fair to say today that legislation has never been so political and politicized, in particular where it touches upon fundamental rights and freedoms more generally and therefore some kind of discussion about the art, the ethics and why the public understanding of legislation and the process of formulating it is incredibly important.

I have titled this talk *Repentance at Leisure:* (which is something that is normally said about marriage but I think it can be said even more strongly about legislation) *The Politics of Legislation and The Law of Unintended Consequences*. My sentiment probably speaks for itself. My general view of the legislative process is that when things go wrong, generally speaking, although not always, it tends to be more cock-up than conspiracy but nonetheless that is no 'get out of jail card' for those who have been responsible for putting a lot of bad legislation on the statute book with increasing frequency in recent years. I am not blaming the draftsman, I am not shooting the messenger. The problems have more to do with the sheer pressure that comes from politics the politicization of the legislative process the lack of time and thought, and the consequences following. That is really what I am trying to explain in this talk.

I suppose the first proposition to the politics of legislation is why so much? That is something that everybody says: why so much? My Liberty colleagues estimate that there is an approximate average of 2,500 pages of primary legislation that were passed between 1990 and 1999 (now you can probably do your own calculation if you are very sad and have nothing better to do of an evening) and 3,200 pages on average per annum between 2000 and 2006. Now that's primary legislation – acts of Parliament, that isn't the oceans of statutory instruments and

orders and regulations and so on. That is a lot of statute law! That's not just a lot to draft for the people in Parliamentary Counsel's Office, that's a lot of legislative policy that is supposed to be formulated, interrogated and scrutinized before traditionally Parliamentary Counsel are even instructed, though that process has been, I would argue, truncated a great deal in recent years. You can contrast that approximate figure with about 750 pages of primary legislation in 1950 and I think maybe about 2,000 pages in 1975 where you got a kind of spike.

How can we explain the growing flood of legislation? I suppose you could argue that the modern welfare state and regulating it and giving people benefits and entitlements and all sorts of good post war things is going to require some legislation so that's fine, but is that really what all of these thousands and thousands of pages are about? Well not in the Home Office, they're not, certainly not the hundreds of pages that I worked on. A lot of that was really about regulating private life not about regulating the benefits and entitlements and responsibilities of the empowering post war welfare state and I think that really needs to be considered. Why is it that politicians and governments feel the need to just churn out so much of this stuff? I guess some people would say that traditional governmental power has migrated or traditional power in the land has migrated either to multinational companies or international institutions and governments and parliamentarians are just looking for something to do. I guess that's possible. And I think others would say that the power and intensity of modern media scrutiny is constantly inviting some kind of response to events or to concerns and I think there some truth in that as well. Moreover, and not for the first time, I'll say that I think that legislation has become a kind of cheap, quick and addictive drug, quite literally. I don't know what Professor Nutt would say about this, where on the list of dangerous substances would you put legislation and criminal justice legislation in particular? Above or below alcohol? Above or below cannabis? But it has become a kind of drug of choice and criminal justice legislation – that is anti terror legislation in particular – is the super drug – that's the macho super drug for the really full on, tough guy politician.

More generally and seriously I think that in a whole host of statutes, not just coming out of the Home Department, the Ministry of Justice, you can chart the rise of criminal sanctions as the lever of first resort. Governments are trying to change peoples' behaviour or affect peoples' behaviour in a whole host of areas – health and safety or metrication – all sorts of things – mostly perfectly laudable. But how often do we see criminal sanctions as the lever of first resort? Think about the alternative possibilities. You could start with mere exhortation on the one hand, the Government would urge people to do x – that's a start isn't it? Then maybe some education, some public information and education – that would be a possible lever to try and affect behaviour perhaps. Then maybe an incentive, how about that, maybe a positive, financial incentive to do something the Government thinks is a good, beneficial, social good thing to do. And then possibly moving into a slightly more punitive way of affecting behaviour with some kind of regulatory regime, some kind of civil lever or sanction, ideally, in my view, leaving

the criminal sanction and the *imprisonable* criminal sanction really as the lever of last resort so that it means something, so that it isn't discredited. But I am sorry to say that if you look across the statute book not just in the world of Home Affairs or criminal justice you will see these criminal sanctions being churned out more and more.

Another thing we have to bring up when discussing the politics of legislation is the point about kneejerk immediate responses to concerns or crises. There are so many examples of this. Dangerous dogs bore me, I am not really an animal lover, so it is a bit hackneyed now to talk about dangerous dogs. Instead, let's talk about loutish behaviour. I wonder if you remember the former Prime Minister Blair, who stunned students in Germany in the summer of 2000 when he said he had had enough of young louts with their foul mouths uttering expletives into the night air and really what ought to happen is that they ought to be marched to a cash point – off to the cash point and out comes the cash on the spot. Instance justice – great idea. Until some poor old officials start thinking how exactly this would work. Let's not even talk about the kind of legal, human rights sort of post-due process issues. Just think in practical terms. Here is a drunken lout – better a whole group of them – and you are going to march them to the cash point when they are drunk in the middle of the night and then you are going to say "Excuse me Sir, would you type your pin number into the cash point" and of course they're going to do it, aren't they! And out will come the hundred quid ... well anyway mercifully there were sensible officials working in that department who were quick of wit and sound of mind and that particular, wonderful bit of spin got transmogrified into a metaphor for fixed penalty notices for loutish behaviour which actually weren't that desperately outrageous and authoritarian because all they do is they give you the opportunity to buy your way out of going to court like with a driving matter where you can go to court if you want to or you can pay your way out. But it was a very interesting exercise in almost instant legislation. The Prime Minister has a great idea, gives a tough speech in a foreign land, and people in Whitehall have to run around like headless chickens inventing metaphors and drafting legislation which actually might not have been that bad in the end but it's a funny old way to do business.

And then we get into the really serious stuff – emergency legislation. I think there has been so much emergency legislation in recent years that one really has to begin to unpack what we mean by emergency and what we mean by emergency legislation. I have said many times before that an emergency has to be something truly different from the norm. If we are all told that we are living in a very, very dangerous world all the time, well that is not an emergency. It may even be, for all I know, that we are living in a very, very dangerous world for much of the time but that is still not the same as an emergency. In the English language an emergency has got to denote a departure from the norm. Emergency legislation that requires swift Parliamentary passage and exceptional interference with individual rights and freedoms has got to be justified by something that is a grave departure from the norm. Of course, it is understood that in democracies where different

branches of the Government play their respective roles, it is, for the most part, the Executive who has the discretion of choosing when the moment comes to press the button and to say "Now is a state of exception – we've seen the secret intelligence, and you haven't." However, we also know, if you cry wolf too often the people will lose trust in the Executive, in politics, in the institutions of the State.

Clearly, the Twin Towers attack was an atrocity of extraordinary dimensions. It was a gross violation of human rights. But did it really create a state of emergency in the United Kingdom that justified internment under the Anti-terrorism Crime and Security Act of 2001? The House of Lords did not want to go there when they eventually impugned Part 4 of the Anti-terrorism Act in 2004. They dealt, as you will remember, with the relevant provisions by way of discrimination principles because of the illogic of locking up foreign nationals indefinitely on the basis of suspicion when British nationals who were equally suspected walked free. And of course that discrimination judgment, based on the illogic of that proposition, was tragically borne out by events in 2005 when London was attacked by suicide bombers who were British, who would never have been subject to detention under the 2001 Act. In spite of all the terrible things that have happened, I still wonder whether you could really say that we are in the middle of something akin to a war or similar public emergency, threatening the life of the Nation as intended by Article 15 of the Convention on Human Rights. I think a conventional war and a cataclysmic moment in a conventional war is different from metaphysical wars and difficult times, however longstanding. And I mean constitutionally different because if you are asking people to enter into an undefined, permanent long term state of emergency, that is not a state of emergency at all – that is a new normal, to quote Donald Rumsfeld: "the long war, the new normal". Additionally, how will we, the people, know that the war is over? Presumably we wait for Hillary Clinton the 52nd or George Bush the 83rd to say "One more push, guys, and the War on Terror is over"? Therefore, I don't think that we should allow Governments to say that there is a state of emergency just because we are living in dangerous, difficult times. There are all sorts of consequences that come from being too casual about states of emergency and the ensuing kind of legislation. And look at what followed: control orders in 2005, terrorism acts of 2006 and 2008 – what? still under the same emergency? Every time a new atrocity happens does that denote a new emergency? I don't think so, at least not necessarily. But what it does seem to invite is a new legislative response, even if, as in 2001, a large comprehensive piece of consolidating terrorism legislation had literally just been brought into force. That is the politics of knee-jerk legislation.

Another aspect of this kind of phenomenon is the way that routine powers are dressed up as exceptional reserve powers. That is something we noticed during our recent campaign against 42-day pre-charge detention at Liberty last year. It became apparent very quickly that the Government was really onto a sticky wicket with the basic argument for locking up suspects for 42 days or 6 weeks or 1000 hours in a police station without charge, without knowing why – not pre

trial, not, as people often are, for a year or two pending trial while you prepare your defence, but pre charge! You don't really know why you are locked up! When the case started collapsing, the Government began to dress up its legislation with this drafting device of calling it an exceptional reserve power triggered by a grave terrorist threat. But when you looked at how 'grave terrorist threat' was defined in the draft legislation, this was a test that could be met in any individual case where there was an operational need to lock the person up for longer. So the routine is being dressed up as the exceptional – a drafting trick if you like but clearly politically motivated in order to help the passage of very difficult legislation. Deliberate complexity being used for the purpose of selling something politically as something quite different indeed.

And here is another trick: I hope everyone here is on the side of the angels because if there are Government lawyers here you are going to hear it all now, how to pass draconian legislation and get away with it!. Another obvious little political trick is what I call Plan A, Plan B, where you prepare your difficult, contentious legislation with concessions already in mind so you have got a little back pocket second string. I see a few people nodding, they must be Government lawyers, they have been there before. So 90 days is where you start but you are prepared to go to 60 or 40 or maybe 28 and then 28 days of pre-charge detention is supposed to make me feel that we won? It is a kind of Dutch auction in which policy makers or politicians deliberately start the legislative process with some really outrageous stuff they can easily compromise on. And aren't they so reasonable because they heard our concerns and they met with those civil liberty campaigners and those rebel back benchers and so on! Another element of that kind of strategy can be the friendly rebel. This is a back bench member of Parliament, usually, rather than a Peer. The House of Lords is another country, they do things differently there, I am glad to say. But in the House of Commons you get a friendly rebel who is really not a rebel at all, who is really on a promise for a Government job at some stage or other but is prepared to make a little bit of noise about concerns about whatever the legislation is so that at the eleventh hour his or her amendment will be produced and the Home Secretary or the Lord Chancellor, or whoever it is, are miraculously able to welcome the amendment and our friendly rebel will then hopefully lead some other Members of Parliament, who had concerns about the original draft, into the Government lobby. This is all dirty political stuff but it is highly relevant to the legislative process and I am sure that those of you who have been Parliamentary draftsmen or Government lawyers are familiar with it.

Another routine feature of the politics of legislation is the use of schedules and in particular regulation-making powers as great places to bury bad news. And whilst my talk is full of bad news, there is actually some good news as well, namely that the public and the media and truly independent Parliamentarians are waking up to this and are feeling less and less inclined to go along with this little trick. Two bits of evidence for that: I think the Coroners and Justice Bill of 2009 originally contained a breathtaking order-making power in relation to sharing data between

Government departments and private persons. It was an order-making power in which a minister could basically amend any primary act of Parliament, any rule of law, including the Common Law, to share anybody's data with anyone else if that was in the public interest. A sweeping order making power that was mercifully ultimately withdrawn because of public clamour and media scrutiny and Parliamentary dissent so that is one for the good guys. And more recently, in the Policing and Crime Bill of 2009, the Government thought it would respond to last year's European Court of Human Rights judgment in the case of *S & Marper v. United Kingdom*.[1] The case was about DNA retention, about the United Kingdom maintaining the largest DNA database in the world, full of DNA data of innocent people, including children. After the European Court declared this broad scale DNA retention illegal,[2] the Government thought it would respond by way of putting a regulation-making power into the Policing and Crime Bill. Now this is really interesting because it is a bit like saying that we have an emergency because we lost a court case. No seriously, that happens sometimes, both in relation to saying that we need an order making power suddenly to be snuck into a bill that is currently going through Parliament or we actually need a primary act of Parliament to be rushed through in two days – for example the Witness Anonymity Bill last year – because we lost in the House of Lords. We did something, the House of Lords says it is wrong, so we scream "emergency" – almost like after a terrorist attack. Interesting, isn't it? A Law Lord's ruling as justification to legislate in a hurry! In the DNA retention case the Government thought it would deal with the highly contentious issue of finding the appropriate balance between personal privacy in relation to your DNA and the laudable, necessary purposes to which DNA is put in the criminal justice system by giving itself the power to issue regulations at a later date. I am sorry but I have to say that thinking that you can get away with something like this makes you, in my mind, someone not who does not need your DNA tested but your head tested. Sure enough, Mr Johnson, the new Home Secretary, did not need his head tested and very sensibly withdrew the proposition. Interestingly the Government already knew what it wanted to put in the regulations; the Government had already announced its views on a consultation and the plan was this: we are going to keep your DNA if you have been arrested for anything in either the last six years or the last twelve years depending on what you were suspected of. They were pretty clear about their intentions, so why hide behind regulations at some later date? Why not put the whole package on the face of the bill, argue it out in Parliament, where Parliamentarians can engage in and

1 European Court of Human Rights, Judgment of 4 December 2008, Application Nos. 30562/04 and 30566/04.

2 The Court found a violation of Art. 8 of the Convention: "In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society."

open and transparent debate, have lengthy scrutiny, table amendments and so on? We all know the reasons, of course. Regulations typically pass in a hurry, with just a vote of yes or no, without serious debate. So the Government can put the Parliamentarian in the uncomfortable position of having to make a cataclysmic choice: either no DNA retention at all, if you vote against the regulations, or go with what the Government is proposing for everyone's protection against crime. This illustrates just one of the many, many problems with making contentious law that way. Of course, you could argue, the mother of all regulation-making powers is in the famous Civil Contingencies Act of 2004. It really would be the end of the world as we know it, if they were ever actually invoked, but let's not dwell on that.

Moving to the law of unintended consequence then – you have got all these brilliant political motives like looking tough on terror and responding to your own illegality in a House of Lords judgment – and you've passed all this very good law but maybe you didn't quite get it right on the journey from the bright policy idea to the statute book. The law of unintended consequence then kicks in. I think an obvious category of this type of case would be what we call over breadth where a power was drafted for actually perfectly sensible reasons but it's just over-broad in what it covers and consequentially doesn't have sufficient safeguards, precision etc. etc. An example would be Section 24 of the Terrorism Act of 2000. This is the anti-terrorist stop and search power that allows people to be stopped and searched in certain circumstances without reasonable suspicion of any criminality and the power is triggered when a Chief Constable, or in London the Met Commissioner, thinks it is expedient to preventing terrorism. *Expedient* – not necessary, not essential, not proportionate, just *expedient*. This is also an example of another type of very fashionable legislative trick, which is effectively sub delegating legislative decision-making to an administrative or executive person. It could be the Minister but increasingly it could be the Chief Constable or someone like that and the Chief Constable thinks that we need to stop and search without suspicion in a particular area and he turns on the power and now the normal law of the land in relation to police powers and stop and search, which as you know is triggered by reasonable suspicion, has been turned off and replaced in the area – an area by the way not defined in the statute. Talk about over-breadth and lack of precision! The moment the Chief Constable turns on this power in a given area, you can stop and search people without suspicion of any criminality because it is expedient to preventing acts of terrorism.

I will concede that a power like that may actually have a laudable purpose. I can think of one right now. The normal paradigm of stop and search with reasonable suspicion is fine in a situation where I see somebody and I think they are behaving suspiciously and I think they might want to do something. I want to prevent it, so I stop and search them. But what if it's the day of the Queen's Speech, the day of the opening of Parliament, and I've got intelligence of a possible threat and there are just people everywhere and I do not know who the suspect is. I will concede, as someone who subjects myself routinely when I enter Parliament on

an almost daily basis or when I go to the airport or whatever, that there are circumstances where it might be proportionate to ask people to be stopped and searched politely and without offence. Now why is it that that's OK? I think it's OK because when I enter Parliament or when I get on a plane, I can see that it might be proportionate to do a bag search and an outer body search. So I don't complain. I can see the proportionality of doing it. I can see the case has been made. Secondly, everybody is treated the same. I am not being singled out because I am a protester or because of my race or because of any factor like that. Everybody is being treated the same and it seems to me that if there are situations like that, special events like the opening of Parliament or special bits of intelligence, there is an argument for the ability to have ring fenced stop and search powers without suspicion for everybody without singling certain people out. However, as I say, legislative disaster – no safeguards, over breadth and what happens? This is the power that perhaps more than any other that has been routinely used against peace protestors, whether at the Excel Centre in London or poor old Walter Wolfgang, who was famously carted out of the Labour Party Conference. This makes it an excellent example, I think, of something going wrong between intention and execution on the Statue Book. And again I am sure it wasn't the drafters but just a lack of care in the policy development and a casual approach to this kind of law on the part of ministers.

RIPA stands for the Regulation of Investigatory Powers Act. Ironically, some popular newspapers now call it the 'snoopers' charter', although it was actually originally designed as a piece of Human Rights safeguarding legislation to regulate intrusive powers that were previously largely unregulated in English law. What did the present Lord Chancellor, former Home Secretary, say about it when it was going through Parliament nine years ago? He was talking about the various powers of intruding on peoples' privacy for criminal investigation purposes. "Drug trafficking is just one example", he said, "some of the powers underpin vital national security operations. They are also key to tackling serious and organized criminals involved in money laundering, human trafficking, paedophilia [always a good one], tobacco smuggling and other serious offences." It wasn't just terrorism, as it is sometimes portrayed in the newspapers, it was "other serious crime" as well, but the powers in this act, some of them quite intrusive surveillance, have now been used to police school catchment areas. That kind of problem, in my view, is not akin to terrorism, human trafficking, paedophilia and so on. Sold for one purpose, used for another, because the powers are just broad enough to be so used and we learned just earlier this week that it is being suggested that local authorities and others should be able to use confiscation powers as well.

Another obvious example for lack of precision or safeguards is the issue of summary extradition. I am sure that many of you have heard the case of Gary McKinnon. Summary extradition was originally intended to speed up an extradition process that, I will concede, had become incredibly long and convoluted. Too much ministerial discretion and therefore umpteen judicial reviews, every time a minis-

ter tried to extradite a suspect to another country. It really did need streamlining. But instead of just taking the discretion from the Executive to the Judiciary where it probably belonged, our extradition agreement with the United States and the Extradition Act that governs that the European arrest warrant have basically taken discretion out of the process altogether. Now we are parcelling people off who ought to be dealt with here and we are parcelling people off who are vulnerable. Passed again after 9/11 and used for a hacker with Asperger's syndrome like Gary McKinnon rather than the terrorists that we were told that this was all about!

This is the kind of over-broad legislation that is passed for one purpose and used for another. There is another problem in terms of unintended consequence and that's what we call the contagion of going down a particular legislative route in one area of the law, making an exception and then finding that that exceptional legislative process spreads to other areas of law and administration. One example would be the plethora of quasi-civil orders that seem to be replacing and have replaced traditional criminal due process in our country. ASBOs and parenting orders in 1998 for example, whatever you think of them, and they have been contentious. You start down a road that continues to control orders in 2005. In both cases what is your policy problem? Your policy problem is that there is someone who you suspect is up to no good or has been up to no good but proving it is difficult. So instead of taking them through the conventional criminal justice process with the criminal standard and burden of proof, proving the person has committed an offence, you seek to obtain a civil order on a slightly lower standard of proof, with lesser safeguards in the court room because it is a civil order, and then what you pass is a very broad and sweeping and often ill defined injunction banning them from certain activities and then the person walks on the cracks in the pavement and *bang* it's a criminal offence. You start with ASBOs and you end up with control orders. What's the difference between an ASBO and a control order? It's kind of ASBO met SIAC – it's a kind of secret National Security ASBO – that's a control order. And the second would not have been possible if it weren't for the first because you created this scheme that is then cut and pasted and developed over the years and there is a straight continuum that starts with the ASBO in 1998 and goes to the in a sense more terrifying prospect of the control order. Subsequently we have had gangster ASBOs, – they are the new one – serious crime prevention orders, and violent offender orders too. It is always the same idea: quasi-civil injunction orders because it is too difficult to give someone the presumption of innocence and the right to a fair trial in the conventional sense.

The second part of the contagion I have already alluded to is the creation of secret courts or secret tribunals. Secrecy really spreads like a contagion. It is very natural in Government; it has its place but if it is allowed to mushroom in the way it currently is, we see some really quite terrifying results. A little bit of personal responsibility in this regard, I worked on the Special Immigration Appeals Commission Act of 1997 as a young government lawyer. I thought I was doing good. It doesn't matter whether I thought it or not but I did. I thought I was doing good. The

Home Office was implementing a Court of Human Rights judgment in a famous case called *Chahal v. United Kingdom 1996*. People being deported on national security grounds were getting nothing, no appeal, no due process, they were getting nothing. We created this scheme that includes special advocates appointed by the Attorney General to test the case against you that you will never see in your interest. We created that scheme supposedly to give some protection to people who have nothing. But look what then happened with this idea of special advocates. Internment after 9/11, how was it dressed up? "There are special advocates and control orders. It isn't secret quasi-justice, it isn't a kangaroo court, it isn't unfair because there are special advocates." And the latest part of this process is that in litigation, ordinary civil litigation, brought on behalf of *Binyam Mohamed* (Binyam Mohamed who was rendered for torture) and a number of other people in a similar position, who are suing the security services and the Government for collusion and complicity in their torture, the Government is arguing that instead of having a normal, civil trial with normal rules of discovery, the Court should invent, without any statutory authority, the Court should invent a closed evidence procedure and appoint special advocates. This isn't traditional public interest immunity where the Government asserts that material shouldn't be disclosed to the other side because in that proposition the Government wouldn't be able to rely on that material either. This is the Government saying "We can do this behind closed doors. We can shut the claimants out of these civil claims for damages for torture because we can use a closed procedure which the Court can invent of its own volition and one party can be outside the room. That is literally how it works. I have been to proceedings that involve special advocates. One party literally sits outside the courtroom all day while Government lawyers argue in court. And this is the continuum of a road that I began on as a young, idealistic Government lawyer in 1997.

So there I am again, speaking gloom and doom. However, there is some good news along the way I think. Some of these battles were won, some of these outrages were defeated, but nonetheless I think there are lots of reasons to be constantly vigilant, not just about the basic propositions of human rights and civil liberties, but to pay much closer attention to legislative detail, legislative drafting, to the ethics – as I said – the ethics and the art of legislation. And for those of you that are Government lawyers and draftsmen, I think you do an incredibly important job. For those of you that aren't, there is no more important enterprise for citizens in this country at this time, than to understand this process a little better.