



HOUSE OF COMMONS
LONDON SW1A 0AA

10 June 2008

Dear Jacqui,

Thank you for your letter of June 9th. Could I just clear up some points of confusion which remain in my mind?

On the definition of the threat I am not at all clear what kinds of threat fall between the definition of a 'grave exceptional terrorist threat' which you now propose and the Convention words: 'a public emergency threatening the life of the nation'. Are you saying that 'the July 2005 bombings, a plot to blow up a shopping centre or a plot to commit terrorist atrocities overseas involving serious loss of life' are all examples which would fall within the former definition, but not the latter? What about the examples in your letter to Parliament of 'disruption of energy supplies or transport facilities'?

I understand the undesirability of going down the route of derogation (which would of course be caused by the undesirability of having to deal with terrorist threats of the type we face!!), but I don't understand why a non-derogating route requires a much tougher parliamentary process than derogation. Why is the process of redacted reports, information by statute to Select Committee chairs, 'independent' legal advice, tighter parliamentary timetables etc all needed for the less serious non-derogating route but not for the derogating route?

Your letter to Parliamentary colleagues stated that 'the Home Secretary would have to obtain "independent legal advice" on whether she could properly be satisfied that there was a grave exceptional terrorist threat ..etc'. The clear implication is that the "independent legal advice" is to the Home Secretary and would form the basis of her decision. On the other hand your letter to me states that the "independent legal advice" is to Parliament and that the Home Secretary would continue to use the 'normal processes' of getting independent legal advice, from a variety of sources. I take it that the phrase "independent legal advice" in the third paragraph of this section of your letter to me has a different meaning to that in the amendments which you are proposing.

You say that your proposals could be said to be an 'expression of the idea' that Parliament should have its own source of legal advice, as mentioned in para 3.13 of the consultation document of the role of the Attorney General. This deepens my worries. Are you not setting a precedent with big implications, for example for Parliament's consideration of the Secretary of State's certificate of ECHR compliance on any legislation? If not, how will you stop your proposals in this Bill having such wider applicability?

Finally, your letter to Parliamentary colleagues stated that the Home Secretary's 'declaration that the reserve power is exercisable... would be subject to judicial review'. On the other hand your letter to me stated that 'there is no prospect of judicial review proceedings being brought...' and you cite the Bill of Rights 1689. I am afraid that I do not grasp why the Home Secretary's Statement and the prospect of judicial review are separate matters. If the Home Secretary makes a declaration that the reserve power is exercisable, and makes a Statement to Parliament, is it not the case that Parliament has to approve the Home Secretary's decision by the processes which you establish in your amendments, and judicial review can also apply. Does Parliament or the judiciary take precedence? I am aware that I am asking you this question without benefit of legal advice - independent or otherwise - so I may have got this wrong, but I'd welcome your clarification.

I remain very concerned about the possibility of ever using this power to extend to 42 days, so that the whole process is worthless from the point of view of national security, but I hear your view and will reflect on what you have said.

Meanwhile I would be grateful for your answers to the questions I raise here. Because of the overlaps I am copying the whole correspondence to the Secretary of State for Justice and the Attorney General.

I look forward to hearing from you.

Best wishes,

Charles Clarke

Rt Hon Jacqui Smith MP
Home Secretary