In this lecture, I want to consider the question of secrecy in justice, and I want to examine how an excess of it might imperil our ability to develop a mature oversight of our security and intelligence agencies beyond the somewhat feeble mechanisms that exist at present.

Of course, secrecy in justice and oversight of our security and intelligence agencies, were linked in the recent Justice and Security Act.

And in fact there are all sorts of good reasons why these two things should be linked.

But I am not sure the government, in drafting this legislation, saw the good reasons. I think Ministers probably saw one as a trade off for the other: the introduction of CMPs into our justice system largely at the behest of the agencies might be more palatable to the natural opponents of such a development, particularly those opponents in Parliament, if those agencies themselves were at the same time being subject to more rigorous scrutiny.

So, I want to consider Part 2 of the Justice and Security Act, recently passed by Parliament, which introduced so-called Closed Material Procedures into civil justice for the first time.

And I wish also to consider also the provisions of Part 1 of the same Act, which introduced reforms into the structure and remit of the Intelligence and Security Committee, whose job is to provide some Parliamentary scrutiny of MI5, MI6 and GCHQ.

Will any misdeeds on the part of our security and intelligence services be more or less readily apparent in the light of this legislation, so that they may be confronted and dealt with?

In particular, what impact might CMPs, the introduction of a greater degree of secrecy into our civil trials, have on our ability to hold our security and intelligence services to account in those security cases in which they are applied?

Will the loss of public gaze in those cases be compensated for by sharper parliamentary scrutiny? It seems to me that it is critical it should be, if one effect of CMPS, through a lessening of the public gaze, is to weaken political pressure on the agencies in the face of any misconduct.

But I think, in order to understand the sometimes murky pressures in play, we need to start by examining how it was that the discovery of apparent UK complicity in American excesses during the war on terror led to a ministerial response which, far from celebrating the court processes that uncovered this misbehaviour, demanded instead more secrecy in those tribunals that had so cogently dissected the issues.

It is illuminating, perhaps, that the instinct for greater secrecy appeared stronger than a wish to take any potential miscreants in hand.

And all this in a context where recent revelations in the Guardian, the New York times and other newspapers have suggested that some agencies may have expanded their capabilities and practices far beyond

anything understood in Congress or in Parliament, let alone by the public.

Again, rather than confronting the suggestion of a hidden growth in capacity on the part of GCHQ, some politicians and commentators have called for the Guardian to be prosecuted for reporting it.

But let's start with Binyim Mohammed.

Binyim Mohamed was a UK resident who was picked up by the Americans in northwest Pakistan in the early years of the war on terror. He claims he was in that part of the world to get over a heroin problem, as Scotsman I can say is a little like visiting Glasgow to get away from alcohol.

But never mind. In the event, he was transported, probably illegally, to various so-called dark sites around the world, usually to jurisdictions where torture and prisoner abuse were routine, indeed institutionalized. Doubtless these places were chosen by his captors, the Americans, for that very reason.

In these dark prisons, his genitals were mutilated, he was held in stress positions for days on end and he was threatened and psychologically abused. We know all this happened for sure because, long before the case came to the English High Court, a US federal judge had found it to be proved.

According to her, Mr Mohamed's torment went on for two long years. She said he was forced by torture to inculpate himself and others in various actions against US interests.

And it was during the torment that Judge Kessel described, that our own security services became aware of Binyim Mohamed and of the fact that he was in US custody.

Indeed during this sorry period British security services, denying they knew of his mistreatment, visited him and seem even to have supplied the Americans with questions to put to him during what were undoubtedly abusive interrogations.

Eventually, the Americans transported Mr Mohamed to Guantanamo Bay and locked him up there without trial. After some years, with no evidence whatsoever against him, they sent him back to the UK.

I should declare an interest and say that before they did so they tried to make it a condition precedent that UK prosecutors would undertake to commence proceedings against him on his return to this country.

We declined to give any such indication on the grounds that we could discern no evidence against him, and that even if there were some, his torture meant that we would not use anything the Americans had claimed to obtain from him.

In any case, when he was eventually returned to London, Mr Mohamed did what he was fully entitled to do under the law, and brought legal proceedings against the UK government to seek some redress for his

mistreatment, and what his lawyers claimed was UK complicity in that mistreatment.

And it was during the course of this case that the UK government and the security services tried to prevent the details of the abuse he had suffered from becoming known. They said that to reveal what had happened to Binyim Mohamed at the hands of the Americans would threaten our national security.

This was for a number of reasons, not least of which was that any onward disclosure of this intelligence about his experiences in US custody, which had been passed to the British by the Americans, would breach the so-called control principle.

This doctrine states that when one state passes intelligence to another, the donor state retains control of that intelligence: it may not be further disclosed without the consent of the donor.

The problem for the British government in mounting this argument in the present case was that the material it was seeking to protect had apparently already been revealed to Judge Kessler in US Federal Court proceedings. Its further dissemination in an English court could do no conceivable further damage to US or to UK security and no real violence to the control principle.

So the Court of Appeal disagreed with the government. It seems likely that the Court's view was that what the material that the Foreign Secretary sought to withhold would not so much threaten national

security, as cause blushes to the security services. The judges did not think that was a good reason to keep this material from the public, still less from the claimant.

Indeed the then Master of the Rolls' draft judgment made clear a view that, in the course of the case, the agencies may not always have been entirely candid in their dealings with the court. That may have been to understate the position.

But, generally speaking, so far, so good.

What had happened was on any view a little shameful, but the law and the courts had proved themselves properly independent of the executive and the security establishment. They had shown themselves capable of great courage in a case of real sensitivity. The Lord Chief Justice and his brother judges were much praised.

But not, it has to be said, everywhere.

For what was the reaction to this sequence of events from the security services and the government? Well not much praise from those quarters.

Indeed, following intense lobbying, very strongly supported by the Office for Security and Counter Terrorism in the Home Office, the government came up with a Green Paper.

This made a revolutionary proposal: in future national security cases, a minister should be permitted, in effect, to direct a court to go into closed

session, excluding claimant, press and public, to hear secret evidence which the claimant would never see and yet which he, the judge, might then take into account in deciding the case.

It was entirely foreseeable that a judge might be placed in the invidious position of having to explain to a claimant that he had lost his case and that he, the judge, could not tell him why. And this following a ministerial direction.

Even allowing for a tactical over-bidding by the government in the Green Paper, this seemed to amount to a complete break with the post war trend in PII cases in which courts had moved away from a position in which the minister's view on a question of national security was, in effect, determinative, to one where, with due deference, the court would ultimately make its own judgment.

It seemed, if you like, a pre-Duncan and Cammell Laird view of the world. And I don't mean that as a compliment.

And this was a process, according to the Green Paper, that would apply in the case of any material that was said to touch upon issues of national security.

Where a national security issue was identified, a Judge must, on the request of the Minister, go into closed session. In particular, he was not allowed to consider the wider interests of justice, nor even the question of the effect of closed justice upon the fairness of the proceedings.

National security was never defined. It appeared to be something that a minister would find himself naturally empowered to identify.

Well, of course, there was an intense debate- and when the Justice and Security Bill was published, it was claimed that the government had listened. Now, we were told, it was the *judge*, not the minister, who would decide whether a court should go into closed session.

Except it wasn't really, because a close analysis showed that notion of judicial discretion in the Bill was so fettered as to be meaningless.

In essence, where he found that an issue of national security arose, the judge *had* to go into closed session.

True it was the judge, rather than the minister, who now made the judgment as to whether national security was engaged, but once he concluded that it was, any discretion evaporated. There was no question of balancing the interests of justice or fairness in the particular case.

The judge *must* exclude the claimant, the press and the public and go into private session with, inevitably, only the government's lawyers for company.

There followed a classic period of parliamentary horse-trading, first to give the judge a real discretion, and secondly over the test to be applied by the judge in coming to a conclusion as to whether a closed material procedure should be adopted.

And the test that Parliament eventually settled upon was that the Judge will go into closed session if the fair and effective administration of justice in the particular case requires it.

This was obviously an important advance on the Green Paper.

But improvements aside, we have nevertheless, as a direct result of the Binyim Mohammed case, in which open court processes revealed apparent security service complicity in serious misconduct, introduced closed procedures into our regular civil justice system.

Now, I don't want to be naive about this. There is, of course, a much broader context for all these developments than simply one case in the English High Court.

This new century has seen a surge in the need for pre-emptive, international security action. And this has been accompanied by a relentless demand for intelligence gathering. Intelligence has become the Holy Grail.

No country, it seems, is immune from terrorism or from organised crime. And the threat of terrorism in particular comes from scattered and diffuse groups whose religious motivation appears to render them impervious to any conventional human reluctance to face personal demise. This makes the protagonists particularly dangerous.

Among the more sinister totems of this current period has been that chilling taunt 'You love life, we love death'.

Not surprisingly, perhaps, this more or less random and apparently untouchable motivation appears to have led, in those of us who are targeted, to harbour very broad feelings of insecurity, even to a perception that the world is now so unsafe, that we cannot trust our fellow citizens.

Did the alarming nature of these threats really mean that certain traditional rights, as Mr Blair famously proclaimed in 2005, 'belong to another age'?

In fact, I think the most dramatic manifestation of this unsettling feeling was not the welter of anti terror laws brought in during the latter stages of the Blair government after 7/7, though some of those were radical enough.

Rather, it has been important non-legislative developments that have taken place entirely, it would seem, in secret and decidedly away from Parliamentary gaze.

It is obviously axiomatic that security operations and intelligence gathering should generally escape public gaze, but GCHQ's Operation Tempora is unprecedented in its scope and ambition.

And what appear to have been the both manner of its conception and the government's response to its being revealed, are each troubling for the light they cast on oversight and democratic accountability when it comes to the supervision and governance of our security agencies.

They point, perhaps, to an excessive and therefore damaging devotion to secrecy that appears to trump the rights, even of Parliament to have a basic say in our security arrangements.

Many of you will recall that one of the grander projects of the Blair era was the proposed creation of a gigantic database, holding all electronic communications metadata, that would then be available for inspection by the security agencies, the police and others.

At the time the Conservative and Liberal Democrat opposition parties expressed horror on the basis that such a data bank, even if it included only metadata, would be deeply intrusive not just into the questionable privacy of suspected criminals, but into the entirely legitimate privacy of *all other* citizens, too.

For opponents of the government's plan, it was precisely the idea that *all* citizens' communications were to be captured for potential examination that was seen as the real game changer.

Conventionally, the communications of people suspected of crime might, according to law, be targeted for inspection. But now the government was talking of storing everything. This seemed to suggest surveillance on a very different scale. It seemed to suggest an ambition that was very grand indeed.

Indeed in late 2008, Sir David Omand, a former head of GCHQ and the SIC in Whitehall for many of the years that I was DPP, wrote a Report for

IPPR which spoke of the great possibilities of data mining in this context.

That is to say, the mining of vast banks of data to detect suspicious contacts, sequences of communication and so on. Innocent data could be trawled to discover patterns of interest for further investigation that might lead to less innocent data.

Not surprisingly, all this led to very significant fears not just about the impact that targeting *everyone* would have on how *everyone* viewed the activities of the security agencies, but also about what the access mechanisms would be, and indeed about the basic security of the databank. What about leaks or unlawful access?

The Labour government lost the election and the proposals were shelved.

Fast forward to the Data Communications Bill this very year. This Bill brought forward by the coalition, composed of those same parties that had fought the proposed giant data bank, proposed an obligation on all communications providers to keep metadata for a prescribed period, during which it would be accessible by the security agencies, the police and others.

On one analysis this proposal called for no more than that which mobile phone companies do at present- that is to say they retain billing date for a period, during which time the police may use the law to gain access to those records.

But on another analysis, it was a direct descendant of the Labour Government scheme, only in privatised form and scattered between providers.

These proposals were also shelved, after a very rough ride in Parliament before the all-party Public Bill Committee, which produced one of the more scathing parliamentary reports of recent years, and the intervention of the DPM.

But it was only after the Snowden revelations that we discovered something that very few people knew at the time, very few members of the National Security Council, very few members of the Cabinet and *none* of the DCB Public Bill Cttee.

They never knew that, even as the databank and DCB debates were raging, GCHQ had *already* developed the capacity to scoop up everything, all the metadata, all the conversations, all the web browsing, everything passing through those undersea cables that carry the internet around the world- and the capacity to store it for examination.

And that they were doing it.

Routinely.

They were sucking up this all this material and keeping it for a period, and they were data mining it. Just as Sir David Omand had proposed back in 2008, and just as the government was proposing we should legislate for in the DCB this year.

This process was already occurring. It was a fact. Most of what the government had argued for, and had been forced by public and parliamentary debate to retreat from, was already being done by the security agencies.

Now the all party Public Bill Cttees for each Bill before Parliament are important institutions in our constitution. They exist to scrutinise legislation. They take evidence and deliberate. They issue reports to Parliament that have real status among Parliamentarians. These reports are cited in debates on the floor. The PBC's are entitled to be treated with respect.

But this PBC wasn't treated by the government with nay respect al all. It was treated with something close to contempt.. The PBC's members were never told that they were scrutinizing a Bill empowering the security agencies to do *less* than they were already doing *without* any legislation.

On one analysis, we were witnessing the creation of a very broad surveillance scheme by the backdoor, *at the very same time* that successive governments were *failing* to persuade parliament that such schemes were justified or desirable.

And a simultaneous growth in capacity and ambition on the part of GCHQ in the complete absence of debate, still less legislation.

Deeply unconvincing attempts have since been made to suggest that Project Tempora, in all its scope and majesty, is implicitly authorised by

an obscure clause in RIPA, enacted in 2000 when the Internet was in its infancy.

Section 8(4).

But this, I think, is desperate stuff designed to deal with a crucial issue- that this huge development in intelligence capacity and practice has been wholly unconsidered by Parliament.

So we don't know whose idea it was, who authorised it, or how its legal framework operates. And this situation seems to be the antithesis of the rule of law.

I am not here making a point about the desirability or otherwise of Tempora. It is perfectly possible that an informed Parliamentary debate would conclude that Tempora is a desirable, even a necessary programme. There are certainly perfectly respectable arguments to that effect.

I am making, rather, a point about how this train of events seems to indicate the importance of scrutinising some types of government behaviour that occur under the cloak of national security or, to put it more plainly, of keeping a beady eye on the executive.

And no doubt that's why the senior judiciary has tended to make plain in recent years its attachment to open justice, particularly in cases where the government's conduct is in question. Many of us who aren't judges hope that this will extend to great caution in concluding that cases of misconduct in het darkest parts of the State should be litigated

not only away from the gaze of one of the parties, but also away from the gaze of the public.

It seems to me that the fear of terrorism has made it all too easy for us to lose sight of the imperative for the good governance of our security agencies. No doubt this imperative has become eroded by the clarion calls of the all the new 'wars' we seem to be waging– against terrorism, immigration, drugs, crime and the rest.

But these banners of security and public safety can too easily lead to worrying accumulations of state power.

It recent years, particularly during the Americans' war on terror, it began to seem that the balance between security and personal liberty was tilting in ways not previously imagined, so that around the world democratic legislatures might even lose sight of what we're actually trying to protect: namely our values and our democratic institutions, our way of life.

So I think it's important that we remain vigilant against any incremental creep towards the kind of authoritarianism we have traditionally sought to distinguish ourselves from.

And it seems to me that one key safeguard in this is the maintenance of control over security action, both at home and abroad. This control, of course, comes in a number of forms. It can be executive, it can be judicial and it can be democratic. Indeed, it ought to be a combination of all three.

Obviously, J&S Act does little to undermine executive control. It hands marginally more power to the ISC and makes it a little more independent of the executive, in ways I shall examine in a moment.

But it also offers government the potential comfort of closed hearings in which not just evidence, but also the rationale for a judgement, may be concealed. And in the most sensitive cases where agency activity is likely to be under scrutiny.

Indeed It is easy to imagine circumstances where this process will inevitably include concealing from public knowledge wrong doing on the part of the government or of other institutions of power, including the security agencies.

This is not, I think, a process likely to improve or to strengthen oversight.

Of course the J&S Act doesn't obliterate judicial control, which, thanks to the parliamentary battles I have mentioned, retains some potency.

Judges will still make judgments in cases where allegations of misconduct are made against the security services, even if parts of the evidence and parts of the judgement may no longer be given in public.

It is also true that more cases may be in future be heard in circumstances where previously the government would have been obliged to settle for fear of revealing material which would genuinely threaten national security.

Although I must say I think this argument has always played down the extent to which PII procedures, explained so painstakingly by Lord Bingham, could deal with the vast majority of problems.

And it is also arguable that one beneficial effect of closed hearings may be that some evidence that wouldn't otherwise be available for consideration, may now be evaluated by a judge, albeit in the absence of one of the parties.

This may mean that judges are in future empowered to come to more fully informed decisions about cases involving the security agencies.

The question as to whether a decision can be fully informed if it is based at least in part on material untested by one of the parties cannot entirely defeat this point.

But I do think that there is a serious and inadequately recognised concern that CMPs could act as a powerful consolidator of executive power in the area of security action, precisely because CMPs are bound to rebound to the disadvantage of the third pillar of control: that is to say democratic control.

And this is a matter of concern because it is precisely this third pillar of oversight, the democratic pillar that is already the weakest in the UK.

I think CMPs will inevitably weaken democratic control, because they will have a tendency to keep from the public and from the great mass of parliamentarians, material which the public, which Parliament may

need in order to come to informed conclusions about aspects of the agencies' performance.

In particular, about the *integrity* of their actions, which could hardly be a more important topic for public consideration and democratic debate.

In my view, an element of democratic accountability is particularly crucial in the context of covert operations and intelligence gathering, where the state has to act entirely out of public view: in other words, in the darkest places.

The point about Tempora is that it seems to show that accountability to a minister is emphatically not the same as democratic accountability. One assumes that the Foreign Secretary, as the minister responsible for GCHQ, must have known about Tempora. But if Chris Huhne is to be believed, the Cabinet, the National Security Council did not. They were never told.

And I think the former Secretary of State must be believed because no one has denied it.

President Eisenhower once described the activities of the CIA as *'a distasteful but vital necessity'*. This may have been a little unkind- but there is a major democratic responsibility to put limits on just how distasteful security activities are permitted to be.

This may be better understood in the US than in the UK, where both President and Vice President, along with very senior members of Congress, including Jim Stessenburger, the author of the Patriot Act,

have all called for a debate about and reform of, oversight mechanisms in the light of the Snowden revelations.

But of course, the task of establishing effective democratic accountability for the security services is not at all straightforward. Political developments across the world have shifted our classic approach to security, from a state-centred view to a concern about more individual threats.

Terrorists, once state-funded, have become their own paymasters and this has led to an unmistakable increase in the connection between common crime and terrorist activity. Money laundering, fraud and drug trafficking are all routinely committed by terrorists and their sympathizers to raise funds.

In this sense, terrorism has become a classic securitising force, and legislative and operational measures to counteract terrorism have inevitably drawn in a wider and wider range of behaviours.

In particular, anti-terrorism legislation has developed very significantly and become much broader. And since there is no point trying to arrest a suicide bomber after he has detonated his vest, the purpose of some of this legislation has been to empower police and prosecutors to intervene earlier and earlier in the gestation of a conspiracy.

Clearly this makes sense. But it also means that the law relies on concepts, tools and mechanisms that are more and more intrusive.

This, in turn, makes it inevitable that increasing numbers of citizens will be subject to the attentions of security agencies. Indeed, since 1998, the surveillance of communications by the security agencies has more than trebled.

Leading, as we have seen, to Prism and Tempora.

It seems to me that, in the context of these increases in security activity, a number of important issues arise.

Firstly, it is clear that the quality of sensitive information and intelligence sources needs to be more carefully considered. The propensity to stretch the reliability or the veracity of information for political purposes was addressed in the inquiries into the war in Iraq.

The Butler Committee, inquiring into the misuse of intelligence in the run up to war, noted "*the vital importance of effective scrutiny and validation of human intelligence sources and of their reporting to the preparation of accurate JIC assessments and high-quality advice to Ministers*".

Secondly, there are obviously significant human rights implications relating to intelligence gathering methods. It may be too easy to disregard some of the unsavoury methods of evidence gathering

occasionally used by other states, despite the prohibitions of international law.

And cases like former Guantánamo Bay detainee Binyam Mohamed do raise profound questions about the workings of intelligence agencies and have plainly highlighted problems with their current oversight mechanisms.

Guantanamo, Lord Steyn's 'legal black hole', provides the clearest evidence that security agencies have certainly not been immune from post 9/11 myopia.

Thirdly, technological advances are now so rapid that they may easily outrun the capacity of existing legislation to govern the uses to which they are put. This may be very convenient for the agencies in question, since it relieves them of the burden of regulation and oversight that up to date, fit for purpose legislation may threaten. It may even suit government. But it certainly should not suit Parliament.

As I argued in a piece in the Guardian some weeks ago, in this area the law needs to be the master of technology and not the other way around.

Fourthly, and talking of Parliament, oversight of intelligence meets obstacles that are not usually present in the process of democratic scrutiny in other subject and policy areas.

These difficulties do not simply relate to secrecy constraints, but also to the somewhat surprisingly limited interest in intelligence oversight on the part of the majority of parliamentarians.

So it is against this background that I'd like briefly to consider our present mechanisms of democratic accountability and the ways in they might be improved.

Democratic oversight

The key feature of democratic control, of course, is some form of Parliamentary oversight. This is doubtless capable of amounting to independent scrutiny – if it works.

But there is no point in creating the illusion of oversight with none of the benefits. Any committee that cannot undertake effective impartial scrutiny might easily end up becoming complicit in misconduct.

Arguably, that is precisely what happened to our old pre J&S Act ISC.

So democratic oversight has to focus on two key areas; *firstly*, it should make the intelligence agencies more accountable; and *secondly*, it must regulate the covert relationship between the agencies and the executive to prevent abuse. The importance of the second is not to be underestimated.

It is worth remembering that transparent and accountable processes protect the security services too, enhancing their independence.

But, how do we best ensure effective democratic accountability through parliamentary oversight? How do we provide democratic control of executive agencies whose operations must, in order to achieve their objectives, remain secret?

This may partly be a question of form. The international norm is for oversight by way of a specialized parliamentary body but success will always depend on the mandate and the powers granted to that body.

For example: who should be on the committee? How can the committee's impartiality be guaranteed? Who has control over appointments? Who does the committee report back to? How much secret information does it have access to? Can it control its own publications? Can it compel evidence? Can it hear from external witnesses? Does it do any of its work in public?

The ISC

In the UK, our parliamentary oversight has traditionally come in the form of a statutory committee, the ISC, established by the *Intelligence Services Act in 1994.*

Traditionally, the ISC was not a parliamentary committee as such but, in an oft-quoted phrase, 'a committee of parliamentarians'. It is not clear

what the intention of this distinction can have been if it was not the exercise of some form of extra-parliamentary control of this body.

And I suppose that this extra-parliamentary control can only, in the end, have been exercisable at the behest of the executive.

And while the ISC shared some of the characteristics of a select committee and its mandate, to examine the 'administration, policy and expenditure' of the intelligence and security services, was designed to reflect the remit of a traditional select committee, *it was very far from ever being one.*

Select committees are appointed by the Houses of Parliament and report back to them. They sit in Parliament with control over their own agenda, within the terms of their mandate. They can call witnesses, produce reports and are supported by independent, Parliamentary staff.

Select Committees are intended, partially, to redress the balance between parliament and the executive by allowing backbenchers from all parties to scrutinise an area of Government policy and inform parliament of their findings.

Their impartiality is seen as absolutely key to their functions. This is important because they frequently conduct detailed investigations, taking evidence from a variety of sources including experts and other concerned individuals and their conclusions need to be credible.

Indeed, Select Committees produce well-researched reports that really do have significant impact on the policy and practice of government. They also allow Parliamentarians to gain an expertise which would otherwise be impossible from routine Parliamentary debate- and they can go on to share this knowledge with the House as a whole.

In comparison, until the passage of the J&S Act, the ISC was appointed by, and reported to, the Prime Minister. Until very recently, it met within the Cabinet Office and was staffed by Cabinet Office officials rather than by parliamentary clerks.

It comprised nine Parliamentarians drawn from both the House of Commons and House of Lords.

The ISC published Annual Reports and occasional Special Reports such as the report on the London terrorist attacks of 7 July 2005.

The it was the Prime Minister who always determined when the publication of a report should take place, which obviously permitted the PM, should he so wish, to dampen its impact by delaying release for political reasons.

Indeed, members of the ISC often complained about unnecessary delays in the release of their findings, so there are good grounds to suspect that this is exactly what happened.

The access that the committee had to the agencies was governed to a great degree by the trust between the committee members and the Agency in question.

This was obviously an insufficient mechanism in a scrutineer, and the result was that Chairs of the committee tended to be trusted former Ministers with security experience from the Home Office, the Foreign Office or Ministry of Defence.

In other words, politicians who, as ministers, had enjoyed responsibility for the very agencies in respect of which the ISC was supposed to provide oversight.

This looked, and looks, very cosy.

There were, during its pre J&S Act lifetime, a number of criticisms that were made of the ISC.

When he was considering the use of intelligence in the run up to the Iraq war, Lord Butler said:

'*limitations of intelligence' are "best offset by ensuring that the ultimate users of intelligence, the decision-makers at all levels, properly understand its strengths and limitations and have the opportunity to acquire experience in handling it".*

But the ISC's reports were persistently criticised for offering information on priorities but not educating the reader about the nature of intelligence. It was said that "*ISC reports read more like those from management consultants than parliamentary critics*".

The more serious criticism was that the committee '*sees itself more as part of the Whitehall machine for the management of the security intelligence community rather than its* overseer*'.*

Another academic noted that in the ISC's work "*major issues are sometimes identified… but they are rarely addressed or explored in any depth"*.

For example, in its report on intelligence on Iraqi WMD, the ISC was critical of the Government's presentation of the intelligence but it failed to recommend how intelligence material should be placed in the public domain in future.

And this was despite acknowledging that the Government's need to brief the public using intelligence information was almost certainly likely to increase.

Additionally, although the ISC conducted a number of reviews into Extraordinary Rendition, it is clear that it was at all equipped to obtain the right answers.

According to a leading NGO, "*it is embarrassing that the ISC's Rendition report was riddled with errors, and shameful that intelligence personnel were happy to play along with those errors until the High Court forced them to admit the truth.*"

And finally the old ISC could actually be seen as an *obstacle* to accountability in the sense that it prevented potentially more effective scrutiny by other committees. It certainly resisted cooperation with them.

Successive Secretaries of State refused to allow other Select Committees, such as the Foreign Affairs Committee, to have access to the intelligence agencies, on the grounds that Parliamentary scrutiny was conducted by the ISC.

The frustration caused by this increased as intelligence work encroached more clearly on the domain of other committees. Some Select Committees emphasised that this denial of access prevented them from doing their job.

The Joint Committee on Human Rights said in 2006 "*we have no desire to obtain access to State secrets, but we do consider it to be a matter of some importance that the head of the security services be prepared to answer questions from the parliamentary committee with responsibility for human rights."*

They continued "*There is an increasingly urgent need to devise new mechanisms of independent accountability and oversight of both the security and intelligence agencies and the Government's claims based on intelligence information. In addition to more direct parliamentary accountability, the Committee considers that in principle the idea of an "arms length" monitoring body charged with oversight of the security and intelligence agencies, independent of the Government and those agencies, and reporting to Parliament, merits consideration in this country".*

So was an extension of form or mandate or both the answer?

Reform

While I have argued in this lecture that open court hearings represent a critical mechanism in the democratic oversight of the security agencies consistent with the rule of law, it remains clearly unsatisfactory that we seem presently to learn more about the agencies' activities through litigation rather than through proper oversight.

The ISC's claim in 2005 that the Security Services "*operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training*" might now look a little incomplete.

Indeed it seems to me, in the light of the Snowden revelations that reforms in the J&S Act did not go far enough, and I agree with other

commentators and senior parliamentarians that we need to consider the extent to which RIPA can be said to remain an adequate mechanism for regulating surveillance.

In this context, it seems to me that further reforms should include the following:

Firstly, the ISC should become a full Joint Parliamentary Select Committee. This was hinted at by Gordon Brown's Governance of Britain' Green Paper but not followed through.

The Joint Committee on Human Rights has previously made this recommendation, as has the Foreign Affairs Select Committee, way back in 2004. The J&S has done half the job, but now we need to complete it.

Secondly, the ISC should be appointed by, and be responsible, to both Houses of Parliament.

Thirdly, it should have specific powers to obtain evidence. These should include the power to obtain information, by summons, from outside parties, lay experts, ministers, and civil servants- as well as from security chiefs.

Fourthly, it should have an independent secretariat and independent legal advice. It should have access to all information. Select committee procedures already allow the exclusion of material whose publication might be harmful and the disclosure of secret material is a serious criminal offence.

Fifthly, its Chair should be a member of the opposition, and should not be someone who has previously has responsibility for any of the security agencies.

Finally, we need to increase institutional expertise to ensure that human rights are at the heart of policy and strategies in this area. This needs to be more than rhetoric. We need to consider how such a committee could develop a wider role in educating parliament as a whole, and consequently the public.

The first chapter of the Butler report explains in some detail what is meant by intelligence, acknowledging that while '*a great deal of such information may be accurate… much is at best uninformed whilst some is positively intended to mislead*'. Any oversight body should really take on an educative role in this sense.

Reform of oversight, after all, is not just a matter of academic debate. It could be said that the ISC's failure to educate parliament or indeed the public about intelligence contributed to the failure of parliament effectively to scrutinise the previous Government's case for war in Iraq.

It was not merely the case that parliamentarians were not in full possession of the facts about the threat posed by Iraqi WMD, but also that, when presented with the evidence, many of them did not have the necessary understanding to scrutinise it in any meaningful way.

It seems to me that in the absence of reforms of this sort, and a new legislative framework for surveillance, Part 1 of the J&S Act, with its partial and incomplete reforms to the ISC, can never provide an adequate counterbalance to Part 2, the introduction of closed material procedures, as the government claimed it would.

And this leaves us in a very unattractive position.

For if I am right, the Act has, unwittingly or not, actually weakened democratic oversight of the security and intelligence agencies through the introduction of closed hearings into our civil justice system in national security cases, while simultaneously failing to strengthen the structures of direct Parliamentary oversight in any meaningful way.

In this sense, I think that Binyim Mohammed and Operation Tempora combine. And the risk they portend is simply a further weakening in democratic and Parliamentary oversight- less pressure to behave.

And this risk will grow unless the Courts are vigilant to ensure that secrecy in justice is never be allowed to become a damaging alternative to integrity in these most sensitive areas of our public life.

In a recent issue of the London Review of Books, Sir Stephen Sedley described ‘a statutory surveillance scheme shrouded in secrecy, part of a growing constitutional model that raises the question as to whether the tripartite separation of powers, legislature, judicial and executive

still holds good'. He identified a situation in which in many democracies 'the security apparatus is able to exert a measure of power over the other limbs of state that approaches autonomy'.

In this sense, it can procure legislation, it dominates decision making in its sphere of influence and it even seeks to lock its antagonists out of judicial processes.

It seems to me that in this troubling situation, and in the absence of any serious or rigorous public scrutiny of its work, the very last thing we should add to this potent brew is a still stronger dose of protective secrecy.