



Pre-Charge Detention in Terrorism Cases

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Author: Alexander Horne and Gavin Berman

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The current counter-terrorism legislation (the *Terrorism Act 2000*, as amended) allows the police, in certain specified circumstances, to arrest individuals reasonably suspected of being terrorists. Once arrested, these suspects may be detained, without charge, for extended periods to allow the police to obtain, preserve, analyze or examine evidence for use in criminal proceedings.

Extended pre-charge detention of terrorism suspects was introduced in permanent legislation by section 41 and Schedule 8 of the *Terrorism Act 2000*. The period of detention was increased from 7 days to 14 days under the *Criminal Justice Act 2003*. It was further extended, to a period of 28 days, under the *Terrorism Act 2006*. The 28 day detention period was introduced as a compromise as the Government had initially sought a 90 day period, but this was defeated in the House of Commons. In addition to increasing the pre-charge detention limit from 14 to 28 days, the 2006 Act introduced a series of new procedural protections for suspects. It was also subject to a further safeguard, insofar as it provided that the maximum period of pre-charge detention would reduce to 14 days, after one year, unless renewed by an affirmative order.

The extended pre-charge detention limit was subject to sustained criticism by NGOs and others. The Labour Government had sought to extend detention limits even further, to 42 days, under the *Counter-Terrorism Bill* of 2008. In June 2010, the Coalition Government announced its intention to renew the 28 day period for “a period of six months” and laid an order to that effect. It also indicated that it would be conducting a review of the counter-terrorism legislation and that “the 28-day maximum period should be a temporary measure and one that we will be looking to reduce over time.” The *Draft Terrorism Act 2006 (Disapplication Of Section 25) Order 2010* was debated on 14 July 2010.

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Although the counter-terrorism review had been due to be published in November 2010, this did not occur. The effect of the 2010 Order expired on 25 January 2011. In answer to an urgent question on 20 January, the Home Office Minister, Damien Green confirmed that the Government would not be seeking to extend the order allowing the maximum 28-day limit, and accordingly the current order lapsed on January 25 and the maximum limit of pre-charge detention **reverted to 14 days**.

The [Counter-Terrorism Review](#) reported on 26 January 2011. It concluded that the limit on pre-charge detention for terrorist suspects should be set at 14 days, and that limit should be reflected on the face of primary legislation. At present, an order making power (contained in s 25(2) of the 2006 Act) could be exercised at any time to restore extended 28 day pre-charge detention - if the Government laid a draft of the order before Parliament (and it was approved by a resolution of each House). The Government has indicated that should an emergency situation arise, it would like to replace this procedure with emergency powers contained in primary legislation.

Draft legislation was published on 11 February 2011 as the *Draft Detention of Terrorist Suspects (Temporary Extension) Bills*. The Explanatory Notes to the Draft Bills indicate that both would have the effect of extending the maximum period of pre-charge detention to 28 days for a period of three months, should either of them be introduced and approved by Parliament. "One bill could be used immediately while the order-making provisions of the 2006 Act are still in force and the other once those provisions have been repealed." The Order making power contained in the 2006 Act is due to be repealed by provisions in the [Protection of Freedoms Bill](#).

The draft legislation was subject to pre-legislative scrutiny by a Committee of both Houses, which reported at the end of June 2011. The Committee was critical of the practicality of proposals. The Government made some amendments to the *Protection of Freedoms Bill*, but did not accept the entirety of the Committee's conclusions.

Extensive material about the earlier debate on extended pre-charge detention can be found in the Library Research Papers prepared for the various stages of the *Counter-Terrorism Bill*, copies of which can be located in the 'Further Reading' section at the end of this note.

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1 Background

Once a person has been arrested, their pre-charge detention can only be authorised on the grounds that it is necessary to obtain, examine or analyse evidence or information with the aim of obtaining evidence. It is not the purpose of pre-charge detention to prevent terrorism – rather it is used to secure sufficient evidence for use in criminal proceedings.

The *Police and Criminal Evidence Act (PACE)* 1984 gives the police a power to detain those suspected of an offence under the general criminal law for up to 36 hours before charges are brought. With the authority of a magistrate, this period can be extended to a total of 96 hours. Since 1974 additional detention powers have been available to the police in respect of terrorism suspects. The *Prevention of Terrorism (Temporary Provisions) Acts* permitted police detention of a person suspected of involvement in acts of terrorism for up to 48 hours following arrest (72 hours in Northern Ireland), and for a further period of up to five days if approved by the Secretary of State.

1.1 The Terrorism Act 2000 and subsequent amendments

The *Terrorism Act 2000* superseded the earlier terrorism legislation. It confirmed the maximum period of detention for terrorism suspects as seven days, subject to new arrangements for judicial rather than ministerial authorisation for detention beyond the initial 48 hours, by means of a ‘warrant of further detention’ issued by a judicial authority. The *Criminal Justice Act 2003* amended the 2000 Act to increase the maximum period from seven to 14 days.

Sections 23-25 of the *Terrorism Act 2006*, which came into force on 26 July 2006, amended Schedule 8 of the *Terrorism Act 2000* to increase the maximum period of pre-charge detention of terrorist suspects from 14 to 28 days. The following safeguards were included in the provisions:

- Those arrested can be detained for 48 hours, after which the police or Crown Prosecution Service (CPS) are obliged to apply to a judicial authority for an extension of detention warrant;
- Applications to extend may be made for 7 days at a time, to a maximum of 28 days;
- Between 14 and 28 days all applications to extend are made by the CPS (rather than the police);
- Up to 14 days, the application is made to a designated magistrate; between 14 and 28 days it is made by a High Court judge.

The 28 day period was a compromise, after the Labour Government had been defeated in the House of Commons on its proposals to introduce a 90 day pre-charge detention period.¹

It is also worth noting that the extended 28 day period introduced by the 2006 Act is subject to a further safeguard, insofar as the 2006 Act provides that the maximum period of pre-charge detention reduces to 14 days, after one year, unless renewed by an affirmative order. (see paragraph 2.1 below). Successive twelve month orders were made in 2007, 2008 and 2009. The Government did not face any challenge in renewing the order.

¹ *The Guardian*, “[Blair defeated on terror bill](#)”, 9 November 2005

1.2 The Counter-Terrorism Bill of 2008

On 25 July 2007, the issue of pre-charge detention returned to the fore as the then Prime Minister, Gordon Brown, outlined possible measures for inclusion in a Bill in the autumn and the Home Office published two detailed documents entitled *Options for pre-charge detention in terrorist cases* and *Possible measures for inclusion in a future counter terrorism bill*. In those 2007 papers, the Labour Government argued that the decision to increase pre-charge detention limits to 28 days had been justified by subsequent events saying that they had “been able to bring forward prosecutions that otherwise may not have been possible”. The document stated that the Government believed it was right to increase the limit beyond 28 days but wished if possible to build broad agreement on the way forward.

The Options for Pre-Charge Detention in Terrorist Cases paper argued that that there was fresh evidence for extending the limit, and set out four “serious options that should be considered”: (1) legislation to extend the limit coupled with additional safeguards; (2) the same option but with the powers not coming into force until after a further parliamentary vote; (3) using powers under the Civil Contingencies Act 2004 to authorise a temporary extension of the limit in an emergency; and (4) setting up a system of judge-managed investigations on the continental model.

Subsequently, on 6 December 2007, the then Home Secretary, Jacqui Smith published a paper entitled *Pre-Charge Detention of Terrorist Suspects*, proposing an extension to the limit on the detention of terrorist suspects before they have been charged. The proposals would have increase the pre-charge detention limit beyond 28 days to 42 days for a limited period. They were opposed by the Conservatives and the Liberal Democrats.

The proposals for 42 day pre-charge detention were introduced in the *Counter-Terrorism Bill*, but were defeated in the House of Lords.²

1.3 Recent Commentary

The Joint Committee on Human Rights published a report, [Counter-Terrorism Policy and Human Rights \(Seventeenth Report\): Bringing Human Rights Back In](#), in March 2010. In that report, it queried the need for 28 day pre-charge detention (without making a specific recommendation on the issue itself) and suggested that prior to seeking to renew the power, the Government should conduct an independent review of “the pre-charge detention of all those individuals who were arrested in relation to the Heathrow airline plot and detained without charge for more than 14 days, in order to ensure that Parliament is properly informed about the operation of this power in practice when it debates whether it should be renewed in June this year.”³

In contrast, Lord Carlile, the Government’s Independent Reviewer of Terrorism Legislation has indicated that:

Of the 156 people arrested in 2007-8, 11 were released after 8 days. Only 1 person was released after 14 days, in that case on the 19th day. This provides evidence that the need for extended detention before charge is rare; and that police are not treating the situation as though detention for up to 28 days is the norm. The Crown Prosecution Service is well aware that nobody should be detained for a moment longer than is necessary. That notwithstanding, I expect in the course of time to see cases in which

² BBC Online, “[Peers throw out 42 day detention](#)”, 13 October 2008

³ At para 68

the current maximum of 28 days will be proved inadequate. They will be very rare, but inevitably extremely serious.⁴

2 The Coalition Government's approach

Both the Conservatives and the Liberal Democrats opposed the previous Labour Government's efforts to extend pre-charge detention. Former Shadow Home Secretary, David Davis, went as far as standing down from his front bench post and contesting a by-election on the issue.

In June 2008, then Shadow Home Secretary, Dominic Grieve QC, indicated that, if elected, the Conservative party would review the 28 day detention period, which he described as "much longer" than it should be.⁵ He was quoted by the Daily Telegraph as having commented that:

28 days is much longer than I would like to see a person detained pre-charge. If there was an opportunity to reduce it because the evidence allowed us to do so, then it is, by my view, something we ought to be considering.

The reason why parliament coalesced around the 28 limit was because there did appear to be evidence that 14 days that might not always be sufficient.⁶

Following the formation of the Coalition Government, Baroness Warsi hinted that the Government might be willing to scale back the pre-charge detention period. She is quoted by the Times as having indicated:

The question I would ask is this: how many times has 28 days been used? [...]Of course you have got to protect your country. But we have also got some very clear principles of natural justice. We have principles that people should know the charge against them, that we don't detain for excessive periods without charge.⁷

The Liberal Democrat 2010 election manifesto committed to "reduce the maximum period of pre-charge detention to 14 days."⁸

2.1 A review of the counter-terrorism legislation

On 24 June 2010, the Home Secretary, Theresa May, made a Written Ministerial Statement on the issue, stating:

I am announcing today our intention to renew the current maximum period for pre-charge detention of terrorist suspects for a period of six months, and I have laid a draft order to that effect.

Section 23 of the Terrorism Act 2006 extended the maximum period of detention of terrorist suspects before charge from 14 days to 28 days. Section 25 of that Act says that the 28-day period of detention must be renewed by order if it is to remain in place.

It is vital that we support the police and other agencies in their work to keep us safe from terrorism. We face a serious threat, and the nature of modern international terrorism means that police investigations can be longer and more complex than they

⁴ Lord Carlisle QC, *Report on the Operation in 2008 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, June 2009, para 128

⁵ *Daily Telegraph*, "[Tories-consider-terror-arrest-limit-below-28-days](#)", 14 June 2008.

⁶ *Ibid*

⁷ *The Sunday Times*, "[Warsi ready to scrap Tories' A list of women and black candidates](#)", 13 June 2010

⁸ [Liberal Democrat Manifesto 2010](#), p 95

have been in the past. At the same time, as a Government we are also committed to safeguarding the rights and liberties of the public.

To ensure this balance is appropriately set, the Government have made clear their commitment to review counter-terrorism legislation, and pre-charge detention will form part of that review. That review is due to report to Parliament in the autumn, but in the meantime the current, and exceptional, 28-day maximum period of pre-charge detention for terrorist suspects will expire on 24 July.

However, while we would not wish to pre-judge the outcome of the review, both parties in the coalition are clear that the 28-day maximum period should be a temporary measure and one that we will be looking to reduce over time.⁹

The Counter-Terrorism Review, which was announced in July 2010, had been expected to conclude in November; however the final report was delayed. In answer to an urgent question on 20 January 2011, the Home Office Minister, Damien Green (pre-empting the publication of the review) confirmed that the Government would not be seeking to extend the order allowing the maximum 28-day limit, and accordingly the maximum limit of pre-charge detention reverted to 14 days as of 25 January 2011.

This process was criticised by the Opposition. In an article in the *Evening Standard*, Shadow Home Secretary Yvette Cooper argued that the Government had taken a "chaotic" approach to national security by allowing the powers to lapse without having been entirely clear what emergency powers could be introduced to reinstate extended pre-charge detention if this became necessary.¹⁰

3 The Counter-Terrorism Review

The Counter-Terrorism Review concluded that the limit on pre-charge detention for terrorist suspects should be set at 14 days, and that limit should be reflected on the face of primary legislation. It made the following recommendations:

26. The review concluded that the limit on pre-charge detention for terrorist suspects should be set at 14 days, and that limit should be reflected on the face of primary legislation. The review accepted that there may be rare cases where a longer period of detention may be required and those cases may have significant repercussions for national security.

27. The review found that there were challenges with many of the options for a contingency power, particularly if it was intended to extend the period of detention during an investigation. Parliamentary scrutiny of a decision to increase the maximum period of detention in the wake of a particular investigation carried some risks of prejudicing future trials and would need to be handled particularly carefully.

28. The review, therefore, recommends that:

i. The 28 day order should be allowed to lapse so that the maximum period of pre-charge detention reverts to 14 days. The relevant order making provisions in the Terrorism Act 2006 should be repealed.

29. In order to mitigate any increased risk by going down to 14 days, the review recommends:

⁹ <http://www.homeoffice.gov.uk/publications/written-ministerial-statement/pre-charge-detention-wms/>

¹⁰ "Theresa May must put public safety before politics", *Evening Standard*, 25 January 2011

ii. Emergency legislation extending the period of pre-charge detention to 28 days should be drafted and discussed with the Opposition, but not introduced, in order to deal with urgent situations when more than 14 days is considered necessary, for example in response to multiple co-ordinated attacks and/or during multiple large and simultaneous investigations.

Lord Macdonald of River Glaven QC, the former Director of Public Prosecutions, who provided independent oversight of the review, produced a report to coincide with the publication of the Counter-Terrorism Review. On the issue of pre-charge detention, he concluded that:

It is my clear conclusion that the evidence gathered by the Review failed to support a case for 28 day pre-charge detention. No period in excess of 14 days has been sought by police or prosecutors since 2007, and no period in excess of 21 days has been sought since 2006.

Bearing in mind that the power to detain suspects beyond 14 days was always regarded by Parliament as a temporary and quite exceptional measure, this paucity of use in recent years hardly speaks of pressing need.

Furthermore, on the occasions when the power has been used, it has not always demonstrated its fundamental utility. For example, of the two men charged after 21 days in Operation Overt (the airline plot), one case was stopped by the trial judge, and the second resulted in a jury acquittal.

In the circumstances, the Review is plainly right to recommend that the maximum period of pre-charge detention should be reduced to 14 days.

[...]

I agree with the Review's conclusion that the risk of an exceptional event, requiring a temporary return to 28 days, is best catered for by having emergency legislation ready for placing before Parliament in that eventuality. This is the option most strongly supported by the evidence gathered by the Review.

The Order making power contained in the 2006 Act is due to be repealed by provisions in the [Protection of Freedoms Bill](#).

The draft legislation mentioned in the review was published on 11 February 2011 as the *Draft Detention of Terrorist Suspects (Temporary Extension) Bills*.

The Explanatory Notes to the Draft Bills indicate that both would have the effect of extending the maximum period of pre-charge detention to 28 days for a period of three months, should either of them be introduced and approved by Parliament. "One bill could be used immediately while the order-making provisions of the 2006 Act are still in force and the other once those provisions have been repealed."

The draft legislation was subject to pre-legislative scrutiny by a Committee of both Houses. There was also debate at the [Committee stage](#) of the *Protection of Freedoms Bill*. The Government has indicated that it would only be brought forward in "exceptional circumstances."

3.1 Report of the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills

The Committee reported on 23 June.¹¹ It concluded that the draft bills were “not a satisfactory way to proceed.” It highlighted the fact that parliamentary scrutiny of primary legislation would be so circumscribed by the difficulties of explaining the reasons for introducing it without prejudicing the rights of a suspect to a fair trial, as to make the process of justifying the legislation almost impossible for the Secretary of State and totally unsatisfactory and ineffective for members of both Houses of Parliament. The Committee decided this would mean the Government’s aim of ensuring parliamentary scrutiny of any increase in the maximum period of pre-charge detention could not be met. The Committee also stated that there would be an unacceptable degree of risk that it would be impossible to introduce and pass the legislation within a sufficiently short period of time particularly when Parliament was in recess or in a period between the dissolution of one Parliament and the opening of a new Parliament.

The Committee recommended that the Home Secretary should be given an order making power to extend the period of detention from 14 to 28 days in exceptional circumstances for a period of three months (with the agreement of the Attorney General). The Director of Public Prosecutions would then have to apply to a High Court judge to extend detention in each individual case. The Committee also recommended compulsory independent review of any use of the power by the Secretary of State and any application by the DPP.

4 Government reaction

In a letter to Lord Armstrong (the Chair of the abovementioned Joint Committee) Theresa May set out “three broad scenarios” in which an extension of the pre-charge detention period might become necessary:

- In response to a fundamental change in the threat environment which means that the police and CPS anticipated that multiple complex and simultaneous investigations would necessitate 28 days.
- During an investigation or series of investigations, but before arrests, which was so complex or significant that 14 days was not considered sufficient.
- During an investigation but after arrests had taken place.¹²

In response to the Committee’s report, the Government introduced an amendment on Report Stage in the House of Commons. James Brokenshire moved new clause 13, which set out an emergency power for the Secretary of State to make a temporary order extending the pre-charge detention period from 14 to 28 days for a period of three months, but only in “very limited circumstances”, namely if Parliament had been dissolved, or in the period following a dissolution of Parliament but before the Queen’s Speech had taken place (HC Hansard, 11 October 2011, col 260).

He said that this clause was being introduced to address the Committee’s concern about what would happen if Parliament were dissolved when the Government wanted to extend the

¹¹ [Report of the Joint Committee on the Draft Detention of Terrorist Suspects \(Temporary Extension\) Bills, Session 2010-12, 23 June 2011, HL Paper 161/HC Paper 893](#)

¹² [Letter from Theresa May to Lord Armstrong, Chair of the Joint Committee on the Draft Detention of Terrorist Suspects \(Temporary Extensions\) Bills, 3 October 2011](#)

maximum pre-charge detention period (col 262). Mr Brokenshire explained that the Government had also acted upon other concerns raised by the Joint Committee:

... we welcome two of the Committee's further recommendations for increased safeguards, and we have included them in new clause 13. First, applications for any warrant of further detention that would see an individual detained for longer than 14 days may be made only with the personal consent of the Director of Public Prosecutions or the equivalent post holder in Scotland or Northern Ireland. Secondly, whenever an individual is detained for longer than 14 days, their case will be reviewed by the independent reviewer of terrorism legislation, or someone on their behalf, and a report of that review will be sent to the Secretary of State as soon as possible.

Both those changes will also be incorporated in the draft fast-track legislation to increase the maximum length of pre-charge detention to 28 days. (col 265)

New clause 14, tabled by Paul Goggins (Labour), who had been a member of the Joint Committee, was debated at the same time. Mr Goggins explained that it reflected the Committee's conclusions and recommendations (col 270). It would have introduced an order-making power for the Secretary of State to extend the maximum pre-charge detention period to 28 days, as recommended in the Committee's report. This power could be used at any time that exceptional circumstances made an extension of the pre-charge detention period necessary (whereas new clause 13 would only give the Secretary of State an order-making power when Parliament was dissolved and therefore could not pass emergency primary legislation). Mr Goggins acknowledged that "The objective of the Committee and the Government is the same, but the question is how to extend beyond 14 days" (col 271). He said the Committee had "concluded that the route of primary legislation was simply too risky and uncertain to be relied upon in what, in any event, would be extremely challenging circumstances" (col 271).

In response to new clause 14, James Brokenshire said that the Government believed that "the exceptional nature of these powers to extend the maximum period beyond 14 days means that, where feasible, the principle of 28-day detention should be debated and approved by Parliament" (col 262). He quoted the [Home Secretary's response](#) to the Joint Committee's report, arguing that an order-making power of the type recommended by the Committee would "not be a clear expression that the 'normal' maximum period of pre-charge detention should be no longer than 14 days" (col 262).

During the Report stage debate, several members of the Joint Committee re-stated their concerns about the Government's legislative approach. Alun Michael (Labour/Cooperative) pressed Mr Brokenshire on the precise circumstances under which the maximum detention period could be extended. He focused on "the fact that an extension of detention can be made only if more time is required for investigation and in order to bring cases before the court, and [it] is not intended to be some form of preventive detention" (col 259). He reminded the Minister that "multiple attacks in themselves would not justify the use of the power... it is the weight of investigation and preparation of cases that would be the trigger" (col 260). Given this, Mr Michael argued that:

... the problem with a debate by the House of Commons is that the evidence of the need for a longer period will be based only on a specific case or number of cases. If we have a massive number of cases, we will get away from the individual case, but that is an unlikely circumstance, and if the need for detention beyond 14 days relates just to one case, or to two or three, it is almost impossible to envisage a debate that would not refer to them. (col 263)

Responding for the Opposition, Chris Bryant, a Shadow Home Office Minister, said that “everybody agrees that the norm should be 14 days” but that also, “it is universally accepted that there may be exceptional circumstances in which we would need to go beyond 14 days” (col 266). However, his view was that “the Government are going down the wrong route” in their proposal for dealing with this (col 268). He agreed with the Joint Committee’s concerns about the sensitivities of holding a parliamentary debate without prejudicing an individual case. Furthermore, he felt that “on the whole, emergency legislation is a bad idea”. With emergency legislation on this issue in particular, he said:

I can imagine a point where we are nine days into somebody’s detention and then the Government realise that they need their emergency legislation. They would not be able to start that process until the eleventh day, and then they would suddenly be saying, “Right, we’ve got to put it all through this House and the other House in one day”. That leads to very dangerous decision-making and it is a bad route to go down. (col 268)

Therefore, he said that he preferred the approach set out in new clause 14 tabled by members of the Joint Committee, although “we still need to resolve some of the issues about the level of corraling needed to ensure that the power is not used gratuitously, that the Secretary of State is not able to proceed unhindered, and so on”. Chris Bryant said he suspected that “this will not be the end of the matter in this House and that their lordships will want to look very closely at whether there is a better route to achieve the same end” (col 268). Concluding the debate, James Brokenshire said:

We believe that the structure being created is reliable and available, and that the House is able to make the distinction and understand its role, as contrasted with that of the judiciary; hence the reason why I commend new clause 13 to the House and urge Members to reject new clause 14, although I recognise the important points that the Joint Committee made. (col 277)

New clause 13 was added to the Bill, becoming clause 58 in the Bill as introduced in the House of Lords.

At Third Reading, Yvette Cooper, the Shadow Home Secretary revisited the issue, describing the Home Secretary as “unwise” for not having made changes to the Bill as advocated by members of the cross party Joint Committee.¹³

Lords Amendments

The issue of the Joint Committee report was again revisited by the House of Lords. Lord Armstrong of Ilminster sought to move an amendment which would have implemented the Committee’s recommendation.¹⁴ This was again resisted by the Government. Lord Henley set out the Government’s reasoning and also proposed a further (minor) Government amendment:

Lord Henley: My Lords, I am grateful to the noble Lord for his detailed consideration of this clause, and I thank him for his letter of 16 November in which he provided a detailed explanation of the reasons behind his amendment.

The amendment would extend the circumstances in which an order could be made under Clause 58 to increase the maximum period of pre-charge detention in relation to terrorist suspects from 14 to 28 days. We have made it clear that we believe that the maximum period for pre-charge detention for terrorist suspects should in the majority of

¹³ HC Deb 11 October 2011, c285

¹⁴ HL Deb 15 Dec 2011 cGC385

circumstances be 14 days. Given that no suspects have been held for longer than 14 days since 2007, it is evident that such a long period is not routinely required.

However, there may be exceptional circumstances in which it is necessary to extend temporarily the maximum period. A mechanism should therefore be in place to provide for such circumstances. We are clear that any extension of that maximum period would be a very serious matter and, as such, the question of whether to increase the maximum period available should be put to Parliament by way of fast-track, primary legislation.

I am grateful for the consideration of this issue by the noble Lord, Lord Armstrong. He has invested considerable effort during, and since, his chairmanship of the Joint Committee which undertook the pre-legislative scrutiny of the Government's draft fast-track legislation. The Joint Committee agreed with the Government that the creation of a contingency mechanism to increase the maximum period of pre-charge detention is a sensible precaution. However, the committee advised against the use of primary legislation suggesting that the circumstances in which it might be needed would make its passage through Parliament impossible, a point stressed by the noble Baroness, Lady Royall.

The Government also agreed with the committee's conclusion that primary legislation would not be a workable solution during the period when Parliament is dissolved because obviously there would be no Parliament to take it through. As a result of a Government amendment agreed on Report in the House of Commons, Clause 58 now provides for the Secretary of State to make an urgent order to extend the maximum period of pre-charge detention, but only during a dissolution or in the period before the first Queen's Speech of a new Parliament.

The noble Lord's amendment seeks to allow an urgent order to be made by the Secretary of State at any point if she felt that the use of primary legislation would be inexpedient for any of three reasons: namely, that there is not enough time; that there is a risk of prejudicing future trials; or that there is a risk to public safety or security. I appreciate the arguments put forward by the noble Lord that the Government may proceed by way of primary legislation but that they should also retain the option of using an urgent order-making power if primary legislation is too difficult. However, the Government remain of the view that when Parliament is sitting or is in recess, such a power is not appropriate.

A 28-day limit on pre-charge detention for terrorist suspects is such a significant extension-it doubles the time-of the current limit, which is itself longer than the period permitted for non-terrorist investigations, that we believe Parliament should have the opportunity to debate and approve such a move. Yes, it will be difficult to manage primary legislation in those circumstances but it has been done before and the noble Lord, Lord Armstrong, has pinpointed some of those difficulties in his amendment, as has the noble Baroness, Lady Royall. However, we believe that it will be possible.

Parliament has shown itself capable of debating emergency legislation in one or two days in the past-I have taken part in some of the debates-when the issues have been of real importance and urgency. Furthermore, Parliament would be required to debate the principle of 28-day detention rather than the circumstances of any individual cases, which will properly remain the responsibility of the courts. Therefore I do not think the danger to which the noble Baroness alluded would occur.

While that means that Parliament must tread a very careful line in discussing the details of any individual investigations, it would be afforded the opportunity to consider the general nature of the threat and the need for any extended period of pre-charge

detention in the context of that threat. Again, I think Parliament has a track record of discussing sensitive ongoing legal issues, as we have seen this year with the intensive debate around phone hacking.

The Government believe that the introduction of an order-making power along the lines proposed would detract from the principle that in the main 14 days should be the maximum period of detention in all normal circumstances and this should be reflected in the legislation. The temptation to use such a power instead of primary legislation would be greater and this Government do not believe that it properly reflects the exceptional nature of 28-day pre-charge detention.

In this group, we were also due to consider government Amendments 144 and 145. It might be of some use if I briefly say a word or two about them. They are in response to a recommendation and an observation made by the Delegated Powers and Regulatory Reform Committee in its report on the Bill. The committee reported that any order made by the Secretary of State under Clause 58 should be laid in draft before Parliament as soon as practicable. The committee noted that a similar provision in the Terrorism Prevention and Investigation Measures Bill requires an order to be laid before Parliament.

The Government accept the committee's recommendation and Amendment 144 will give it effect. An order made by the Secretary of State under Clause 58 will be made only when Parliament is dissolved. That effectively means that a draft would be laid as soon as possible once a new Parliament has assembled. The order would then be subject to parliamentary approval within 20 days, as per the requirement in the clause.

The Delegated Powers Committee also noted that the drafting of the Bill means that the revocation of any temporary extension order made under this power would also be subject to the affirmative procedure, and questioned whether this was appropriate. After further consideration, we are of the view that the revocation of a temporary extension order need not be subject to parliamentary approval. A revocation order would simply return the maximum period of pre-charge detention for terrorist suspects to 14 days.

Should Parliament agree to Clause 57, it will already have signalled its agreement that the default maximum period should be 14 days. I do not believe that it is necessary for Parliament subsequently to approve an order that restores the 14-day limit, given that the effect will simply be to revert to the status quo. As an order could be both made and revoked while Parliament is dissolved, it is possible that Parliament could be asked to approve an order and then approve its revocation immediately afterwards. Given that Parliament's concern has been around the increase of the maximum period rather than any reversion to 14 days afterwards, I believe that it is sensible to allow for a process of parliamentary approval in respect only of the making of an order, rather than the revocation. That will allow Parliament to debate the principle of an extension of pre-charge detention, but will not result in the unnecessary use of parliamentary time if that increase, for whatever reason, is no longer required.

That is the explanation behind government Amendments 144 and 145. I hope that what I have said about the amendment in the name of the noble Lord, Lord Armstrong, will satisfy him and that he will therefore feel able to withdraw his amendment.

Lord Armstrong of Imlinster: My Lords, of course I entirely respect the Government's preference for introducing primary legislation if time and other constraints permit. I am afraid that, having sat through the proceedings of the Joint Committee and having heard a great deal of evidence on the subject, it remains my belief that the Government's view that emergency primary legislation when Parliament is sitting will

always be able to provide what is needed is optimistic. Their determination to rely on emergency primary legislation is admirable. If this amendment were to be passed, they would still be able to exercise that power and resist the temptation to introduce an executive order. I am glad that the Secretary of State and the Minister are of the view that they would always be able to do so.

It is at that point that my view still, with respect, differs from that of the Minister. The risk of great difficulty in introducing emergency primary legislation for the reasons set out in the amendment remains. The consequences of not being able to extend the period of detention over terrorist suspect or suspects without charge could have literally fatal consequences. While I beg leave to withdraw the amendment at this stage, I wish to reserve the right to return to the matter on report.

Amendment 143 was withdrawn and amendments 144 and 145 were agreed.

Commons consideration of Lords amendments is set for 19 March 2012.

5 Terrorism Bail

In a report addressing 'Operation Pathway', Lord Carlile noted that once a person has been arrested under s 41 of the *Terrorism Act 2000* "they cannot be granted bail during that detention whilst further enquiries continue. This is to be compared with the situation in Northern Ireland, where bail was always available from a High Court judge even when the arrest was in respect of generic terrorism; and with immigration law, under which SIAC has the power to grant bail."

He went on to recommend that:

Consideration be given to the amending TA2000 to allow the granting of bail by a judge for a period up to the 28th day following arrest, subject to the full range of conditions available in general crime. This change would not affect any matters of arrest law discussed above. However, in suitable cases it would enable restrictions short of custody to be imposed whilst the inquiry continued.¹⁵

The Parliamentary Joint Committee on Human Rights also recommended the use of terrorism bail. The Counter-Terrorism Review rejected the introduction of a pre-charge conditional bail. It concluded that:

[T]here would be risks for public safety [releasing terrorist suspects when the nature and extent of their involvement in terrorism was still being investigated. Police bail was unlikely, therefore, to be a substitute for extended pre charge detention.

Lord Macdonald took a different approach to terrorism bail, considering it an unnecessary restriction. He said:

The Review is also right to reject the option of a further 14 days of strict bail being made available to the police. This new restriction would not have been justified by any evidence gathered by the Review, and it would have been widely regarded as an unwarranted form of control order. It is unnecessary.

6 Statistics

Statistics relating to terrorism arrests and outcomes in Great Britain are routinely published by the Home Office. Links to the latest publications are provided below:

¹⁵ Lord Carlile, *Operation Pathway, Report following Review*, October 2009, paras 93-94

Operation of police powers under the Terrorism Act 2000 and subsequent legislation:
Arrests, outcomes and stops & searches Great Britain

The latest published information shows that between 11 September 2001 and 30 September 2010 there were a total of 1,897 terrorism arrests in Great Britain, of which 1,504 (79%) were under section 41 of the Terrorism Act 2000.

Of the 1,504 individuals arrested under section 41 of the Terrorism Act 2000 34% were charged while 59% were released without charge.

Most suspects spend a short time in custody. Of those arrested since 11 September 2001 57% of those released without charge were released within one day, and 79% were released within two days.

Of those arrested and subsequently charged, in 27% of cases the decision to charge was made on the first day of detention and within two days in 40% of these cases.

Since the maximum period of pre-charge detention was extended from 14 to 28 days in July 2006, 11 individuals have been held for over 14 days pre-charge detention. The last individual to be held for over 14 days was arrested in 2007.

As the table shows, of these 11 individuals, eight people were charged and three released without charge.

Number of individuals held for over 14 days pre-charge detention

Period of detention	Number of persons held	Charged	Released without charge
14-15 days	1	1	
18-19 days	1	1	
19-20 days	3	3	
27-28 days	6	3	3

Source: Table 1.3, Home Office Statistical Bulletin 10/10

Information on the charges faced by those eight people was provided in answer to a Parliamentary Question which is reproduced below:¹⁶

Six were charged following in Operation Overt, the disruption of an alleged plot to blow up an aircraft; one individual was charged following a counter terrorist operation led by Greater Manchester police and one individual was charged following his arrest in relation to the London and Glasgow incidents.

The length of pre-charge detention and resultant charges is as follows:

14-15 days

One individual charged with having information about an act of terrorism (section 38B, Terrorism Act 2000). This case was subsequently dismissed by a judge due to insufficient evidence.

18-19 days

¹⁶ HC Deb 16 June 2008 c685-6W

One individual charged with conspiracy to cause explosions (section 3 (1a), the Explosives Substances Act 1883).

19-20 days

Three individuals charged with conspiracy to murder (section 1 (1), Criminal Law Act 1977) and Preparation of Terrorist Acts (section 5, Terrorism Act 2006). The latter charge has subsequently been amended by the Crown Prosecution Service for two of the individuals to a charge of conspiracy to commit an act of violence likely to endanger the safety of an aircraft (section 1(1), Criminal Law Act 1977).

27-28 days

One individual charged with preparation of terrorist Acts (section 5, Terrorism Act 2006).

One individual charged with preparation of terrorist Acts (section 5, Terrorism Act 2006), possession of a prohibited weapon (section 5(1), Firearms Act 1968), possession of ammunition (section 1 (1b), Firearms Act 1968), possession of a silencer without a firearms licence (section 1 (1b), Firearms Act 1968). The charge of preparation of terrorist Acts for the second individual was subsequently amended by the Crown Prosecution Service to a charge of conspiracy to commit an act of violence likely to endanger the safety of an aircraft (section 1(1), Criminal Law Act 1977).

One individual charged with attending a place for instruction or training in terrorism (section 8, Terrorism Act 2006) and collection of information (section 58 (1) (a), Terrorism Act 2000).

Of the three people held for 27/28 days and then charged, it appears that two were accused of involvement with the Overt (airline) plot¹⁷ and were charged, but acquitted¹⁸ while another individual was arrested by Greater Manchester Police¹⁹ and convicted.²⁰

It is worth noting that in answer to a recent parliamentary question by Dominic Raab, the Coalition Government indicated that:

Two individuals who were arrested under section 41 TACT 2000 and subsequently charged and convicted of terrorism related offences were charged on the 27-28 day of detention following their arrest in a counter terrorist operation led by Greater Manchester Police.²¹

On previous occasions the Government had only ever identified one person who had been arrested by Greater Manchester Police and held for 27/28 days.²²

7 Further reading

Lord Carlile QC, [Report on the Operation in 2008 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006](#), June 2009

¹⁷ See for example: BBC Online, "[Profile: Operation Overt](#)", 8 July 2010

¹⁸ See for example: JUSTICE, *Draft Terrorism Act 2006 (Disapplication of Section 25) Order 2010*, July 2010, p 6

¹⁹ BBC Online, "[Q&A Terrorism Legislation](#)", 23 January 2008

²⁰ Daily Telegraph, "[British-al-Qaeda chief found guilty of directing operations](#)" 18 December 2008, however it was recently reported that he is appealing against his conviction, see: Daily Mail "[Convicted British-Al-Qaeda member Rangzieb Ahmed allowed appeal](#)" July 2010

²¹ HC Deb, 5 July 2010, c81W

²² See for example: HC Deb, 16 June 2008, c688W

Clarke, M and Soria, V. *Terrorism in the United Kingdom – Confirming its Modus Operandi*, RUSI Journal, June 2009, Vol. 154, pp 44-53

The Guardian, [Reports on Pre-Charge Detention](#)

Home Affairs Select Committee, [The Government's Counter-Terrorism Proposals](#), 13 December 2007, HC 43-I

Home Office, [Options for Pre-Charge Detention in Terrorism Cases](#), 25 July 2007

Home Office, [Draft Terrorism Act 2006 \(Disapplication Of Section 25\) Order 2010 Explanatory Memorandum](#),

House of Commons Library, [Counter-Terrorism Bill, \(Bill 63 of 2007-08\)](#), 26 February 2008

House of Commons Library, [Counter-Terrorism Bill - Committee Stage Report](#), 5 June 2008

House of Commons Library, [Counter-Terrorism Bill, Lords Stages](#), 18 November 2008

[Report of the Joint Committee on the Draft Detention of Terrorist Suspects \(Temporary Extension\) Bills, Session 2010-12, 23 June 2011, HL Paper 161/HC Paper 893](#)

Joint Committee on Human Rights, [Counter-Terrorism Policy and Human Rights \(Seventeenth Report\): Bringing Human Rights Back In](#), 25 March 2010, HC 111

Joint Committee on Human Rights, [Counter-Terrorism Policy and Human Rights \(15th Report\) Annual Renewal of 28 Days](#), 23 June 2009, HC 726

Joint Committee on Human Rights, [Counter-Terrorism Policy and Human Rights \(Eleventh Report\): 42 Days and Public Emergencies](#), 5 June 2008, HC 635

JUSTICE, *From Arrest to Charge in 48 Hours: Complex terrorism cases in the US post-9/11*, November 2007, available at

<http://www.justice.org.uk/parliamentpress/parliamentarybriefings/index.html>

JUSTICE, *Draft Terrorism Act 2006 (Disapplication of Section 25) Order 2010*, July 2010, available at: www.justice.org.uk

Liberty, [Terrorism pre-charge detention - comparative law study](#), July 2010