[redacted]

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From: SofS-Special Advisers SA2 (WILD, JAMES Mr)
Sent: 28 November 2014 12:05
To: DJEP-Public Inquiries Hd (Duke-Evans, Jonathan SCS1)
Cc: SofS-DPS ([redacted])
Subject: FW: Policy Exchange seminar

Jonathan

The agenda for Monday week. Let's discuss on Monday – SofS is making introductory remarks at the lunch of 5 mins or so.

He would like to have some form of announcement or statement of intent. He's made a political statement on ECHR but Combat Immunity is something he hasn't specifically addressed, or perhaps we could look towards the impact of inquiries. So can you can give some thought to options on that.

He will likely want some new stats on costs and number of claims/cases he could unveil.

James

From: Dean Godson [mailto[redacted]
Sent: 28 November 2014 11:53
To: SofS-Special Advisers SA2 (WILD, JAMES Mr)
Subject: Policy Exchange seminar

Dear James

As promised, please find the programme for our "Fog of Law" seminar, plus the guest list for lunch with the Secretary of State.

Obviously, we are flexible on the timings to suit SoS's schedule.

As ever

Dean

Dean Godson | Director

{ HYPERLINK "http://www.policyexchange.org.uk/" }

Clutha House | 10 Storey's Gate | London | SW1P 3AY
[redacted]

Clearing the Fog of Law
Private Seminar at Policy Exchange 08.12.2014

1. **Where are we now? The overview of the how the UK forces are affected now by judicial oversight (08 30 – 09 30)**

    - Lieutenant General James Everard CBE, Commander Land Forces
    - Lord Faulks QC, Minister of State for Civil Justice and Legal Policy, Ministry of Justice
    - Lord Hope of Craighead, Justice of the Supreme Court who authored the majority opinion in the landmark *Smith v Ministry of Defence* judgment

2. **Examples of "juridification" of the armed forces (09 45 – 10 45)**

    - Lieutenant General Sir Paul Newton, Chair in Security and Strategy, Director of Strategy and Security Institute, University of Exeter
    - Air Vice-Marshal Edward Stringer CBE, Assistant Chief of the Air Staff
    - Lieutenant Colonel [redacted], Commanding Officer 3 Rifles

    Coffee Break (10 45 – 11 00)

3. **International Aspects: American and French perceptions (11 00 – 12 00)**

    - General Ben Hodges, USA, Commander, EUCOM
    - General Bertrand Ract-Madoux, former Chief of Staff of the French Army
    - Professor Sir Adam Roberts, Professor of International Relations, University of Oxford
    - Professor Kenneth Anderson, Professor of Law, American University Washington College of Law

4. **Lunch discussion with Rt Hon Michael Fallon MP, Secretary of State for Defence (12 30 – 14 00)**

5. **What are the costs? And how can they be assessed? (14 00 – 14 45)**

    - Lewis Neal, Deputy Director, Defence, Diplomacy and Intelligence, HM Treasury
    - Senior defence economist

    Coffee Break (14 45 – 15 00)

6. **Solutions – where now? (15 00 – 16 00)**

    - Lord Carlile of Berriew CBE, QC, former Independent Reviewer of Terrorism Legislation (2001-2011)
    - Tom Tugendhat, author, *The Fog of Law: An introduction to the legal erosion of British fighting power* and former Military Assistant to the Chief of the Defence Staff

Policy Exchange

Clearing the Fog of Law: Private Policy Exchange Seminar

Monday 8 December 2014

Guest List

Professor Kenneth Anderson	Professor of Law, American University Washington College of Law
Conrad Bailey	Senior Policy Advisor at Number 10 Downing Street
Lord Bew of Donegore	Chairman, Committee on Standards in Public Life and Historical Advisor to the Bloody Sunday Inquiry
Rev Professor Nigel Biggar	Professor of Moral Theology, University of Oxford
Rt Hon Lord Brown of Eaton-under-Heywood	Former Justice of the Supreme Court and President of the Security Service Tribunal From 1989 to 2000.
Lord Carlile of Berriew CBE, QC	Former Independent Reviewer of Terrorism Legislation
Lieutenant Colonel Laura Croft (USA, retd)	Author, *The Fog of Law: An introduction to the legal erosion of British fighting power* and previously served as a lawyer in the Judge Advocate General's Corps.
Oliver Dowden	Senior Advisor to Rt Hon David Cameron MP
Hon Alexander Downer	Australian High Commissioner to the United Kingdom
Professor Richard Ekins	Professor of Law, University of Oxford
Lieutenant General James Everard CBE	UK Commander Land Forces
Rt Hon Michael Fallon MP	Secretary of State for Defence
Lord Faulks of Donnington QC	Minister of State for Civil Justice and Legal Policy, Ministry of Justice
Dean Godson	Director, Policy Exchange
Field Marshal Lord Guthrie of Craigiebank GCB, LVO,OBE	Former Chief of Defence Staff
Patrick Hennessy	Soldier, barrister, author
Lieutenant Colonel [redacted]	Military Assistant to the Chief of the General Staff

Rt Hon Lord Hope of Craighead KT	Justice of the Supreme Court who authored the majority opinion in the landmark *Smith v Ministry of Defence* judgment
Rt Hon Lord Hutton of Furness	Former Secretary of State for Defence; Chairman of RUSI
Rear Admiral John Kingwell	Director, Development, Concepts and Doctrine Centre
Alexis Morel	Former National Security Advisor to President Nicolas Sarkozy
Lewis Neal	Deputy Director, Defence, Diplomacy and Intelligence, HM Treasury
Lieutenant General Sir Paul Newton KBE	Chair in Security and Strategy, Director of Strategy and Security Institute, University of Exeter
[redacted]	[redacted]
Hon Sir Michael Pakenham KBE CMG	Senior Advisor, Access Industries; former Chairman of the Joint Intelligence Committee
General Bertrand Ract-Madoux	Chief of Staff of the French Army from 2011 to 2014
John Raine CMG, OBE	Foreign and Commonwealth Office
Lieutenant Colonel [redacted]	Commanding Officer 3 Rifles
Professor Sir Adam Roberts KCMG	Professor of International Relations, University of Oxford
Air Vice-Marshal Edward Stringer CBE	Assistant Chief of the Air Staff
Laurence Todd	Policy Advisor at Number 10 Downing Street
Lieutenant Colonel Tom Tugendhat MBE	Author, *The Fog of Law: An introduction to the legal erosion of British fighting power* and former Military Assistant to the Chief of the Defence Staff
Rt Hon Lord West of Spithead GCB DSC	Former Minister for Security and Counter-Terrorism; former First Sea Lord; former Chief of the Naval Staff
Marina Wheeler	Barrister, One Crown Office Row, London
James Wild	Special Advisor to Secretary of State for Defence

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From: SofS-Special Advisers SA2 (WILD, JAMES Mr)
Sent: 04 December 2014 13:16
To: DJEP-Public Inquiries Hd (Duke-Evans, Jonathan SCS1); SofS-DPS ([redacted])
Subject: RE: DRAFT FOG OF LAW SPEAKING NOTES

Thanks very much for this. I've made some edits and added a political point. Can you review and check there are no errors of fact etc.? It's a little longer than he needs but useful to set out the arguments and he can draw from it.

One point to clarify – in your draft it say "So far, arising from the conflicts in Iraq and Afghanistan, we have had three public inquiries, over 200 judicial reviews or applications for them, and over 300 personal injury claims from Iraqi or Afghan nationals. The total cost of these legal proceedings has been around £87 million, the majority of which has gone to lawyers." Then in your email it say "£11 million fees paid to solicitors and counsel for Afghan and Iraqi personal injury claims." Is that consistent?

In terms of wider background briefing that we also discussed I think this should cover the below – which is covered in the various submissions you've provided previously:

- Key cases and decisions
- X-government paper on derogation options
- Combat immunity and AG note/meeting briefing
- International perspectives

[redacted] may have other points and can advise on box timings.

James

From: DJEP-Public Inquiries Hd (Duke-Evans, Jonathan SCS1)
Sent: 03 December 2014 15:42

To: SofS-Special Advisers Group (MULTIUSER)
Subject: DRAFT FOG OF LAW SPEAKING NOTES

James

Here's a first shot. It covers (1) ECHR/derogation; (2) combat immunity; (3) costs. some additional cost figures if you want to work them in: £24.9 million for Baha Mousa Inquiry; £9 million for Chilcot Inquiry (MOD pays 25%); £11 million fees paid to solicitors and counsel for Afghan and Iraqi personal injury claims.

Jonathan

"Clearing the Fog of Law"
8 December 2014

Want to start by congratulating Dean and Policy Exchange on initiating the public debate on judicialisation of warfare. *The Fog of Law* came out shortly before I became Defence Secretary and I was briefed on it very early on given the critical bearing this development could have on future defence capability.

For me, there are three issues which are central to this debate. I'll offer comments on each before hearing the different perspectives around the table.

The first is human rights law as against humanitarian law. I take the view that the cumulative effect of some of Strasbourg's decisions on the freedom to conduct military operations raises serious challenges which need to be addressed.

When Britain signed up to the convention no one thought it would apply extra-territorially. There is a perfectly sound body of international law which sets out the rules civilised nations have agreed to apply to the conduct of hostilities, whether war is declared or not. Taking your enemies into captivity rather than killing them is a cornerstone of international humanitarian law and the Geneva Conventions provide a workable and humane framework for detention.

But for some years the European Human Rights Court's decisions have taken us towards a rival structure of legal regulation over military detention which threatens our ability to use this essential operational tool. This has prompted renewed interest in the case for derogating from relevant parts of the Convention.

In fairness there are two developments which had they come earlier could have mitigated this threat to combat effectiveness – and perhaps avoided the need for this event...

The first is Lord Hoffmann's reminder that British courts have discretion in the application of Strasbourg decisions and that they should use it. The second is the recent judgment in the case of *Hassan,* when the Court found that, although Article 5 – the right to liberty – applies to detainees in international armed conflicts, it must be interpreted in line with the Geneva Conventions. This goes some way to reconciling the conflict of laws which was of such concern to us.

Nonetheless, we argued in *Hassan* and continue to take the view that the Convention should not apply in such circumstances. Speaking on behalf of the Conservative Party, we have set out plans for a British Bill of Rights which will *"limit the reach of human rights cases to the UK so our Forces overseas are not subject to persistent human rights claims."* This will remove any doubt and any threat to operational effectiveness.

My second point relates to combat immunity – an issue which has been raised in Parliament by several distinguished former commanders. The Supreme Court ruled last year that claims for compensation based on the alleged defects of the Snatch Land Rover and the recognition equipment

attached to Challenger tanks could go to trial, though they will not be heard before 2016. It was in that case that [Lord Hope, who I know is with us today] coined the phrase "the judicialisation of war".

These are not easy cases to justify defending. They are brought by badly injured soldiers or by the families of soldiers who gave their lives. The MOD pays generous compensation on a no-fault basis whenever such injuries or deaths occur: that is our moral duty. But there are important legal principles at stake which we cannot ignore.

Military operations cannot be run by rules designed for the civilian sphere. They are inherently dangerous. We provide our people with equipment which will reduce the risks they face. But there will always remain a balance of risks and decisions on whether and when to commit military forces and how they will operate must be for Ministers and military commanders, and not the courts, to judge. That is why we continue to contest such cases. We will consider legislation on this subject if that should prove necessary in the light of future court decisions.

My third point relates to the cost to the taxpayer. So far, arising from the conflicts in Iraq and Afghanistan, we have had three public inquiries, over 200 judicial reviews or applications for them, and over 300 personal injury claims from Iraqi or Afghan nationals. The total cost of these legal proceedings has been around £87 million, the majority of which has gone to lawyers. That excludes the £57 million projected cost of service police investigations into reports of incidents in Iraq which may not be complete before 2019.

These include legitimate cases but in the last couple of years we have seen the lodging of claims on a virtually industrial scale - most brought many years after the alleged events. We will be asking the courts to deal robustly with cases where the system is being abused.

We have the same people to thank for the ridiculous application that the International Criminal Court should investigate Britain for an alleged conspiracy to commit war crimes in Iraq.

Finally, later this month I will present the report of the Al-Sweady Inquiry to Parliament. Unusually, we have a good idea what it will say because the advocates for those Iraqi nationals who claimed that British forces had mutilated and murdered their prisoners conceded, after exhaustive examination, that the claims were groundless. This is no criticism of the conduct of the Inquiry - but I am angered that it has taken £30 million of taxpayers' money to expose what appear to have been barefaced lies.

While the courts are rightly independent, I think it unlikely that they had not taken note of the public and political concern expressed over the past year – and Policy Exchange can take some credit for informing and stimulating this.

I look forward to our discussion.

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[redacted]

From: DJEP-Public Inquiries Hd (Duke-Evans, Jonathan SCS1)
Sent: 05 December 2014 10:54
To: SofS-DPS ([redacted])
Cc: SofS-Special Advisers SA2 (WILD, JAMES Mr); DJEP-D (Ryan, Peter SCS); CLS-OIHL Hd Div (DD)(Swords, John SCS); DJEP-JRs Asst Hd Casework ([redacted])
Subject: BACKGROUND BRIEFING FOR S OF S AT POLICY EXCHANGE SEMINAR

[redacted]

Please see requested background briefing.

NB I haven't covered international perspectives as suggested: I thought in the time available it would be best to do something on the ICC.

Also note that this hasn't been cleared by legal advisers because of shortage of time. I'm confident it's fit for purpose as a background brief but it shouldn't be stored for future use before CLS have had a chance to go over it. If they spot any serious issues with it I imagine they can be fed in on Monday morning.

Jonathan

COMBAT IMMUNITY

- Combat immunity is the common law rule that the Crown owes no duty of care to its employees so far as prevention of injury or death on the battlefield is concerned
- This prevents soldiers or their families suing for damages on the basis that the MoD should have protected them from injuries or death in battle
- Instead the MOD provides compensation to all personnel who suffer physical harm as a result of their service in the Armed Forces under the Armed Forces Compensation Scheme (AFCS). AFCS payments can however be smaller than those which would be ordered by the courts in cases where the MOD is legally at fault, thus creating an incentive to sue where possible.
- The scope of combat immunity is currently contested. Some litigants argue that it does not apply where the injury, though sustained in combat, is attributable to an earlier decision to supply equipment which offered inadequate protection.
- The Supreme Court in 2013 refused an MOD application to strike out two groups of cases of this kind: Snatch Land Rover, alleged to have offered insufficient protection against IED blast, and Challenger, where equipment designed to distinguish friendly from opposing forces is alleged to have failed to prevent a "friendly fire" accident.
- These cases will be heard at the High Court in 2016. Ministers have confirmed that they must be defended vigorously.
- Another group of cases raising combat immunity is the very large group of claims for Noise Induced Hearing Loss. If the hearing loss complained of appears to have occurred as a result of exposure to noise during conflict, the MOD contends that combat immunity applies. This is however difficult to prove.
- Ministers have said that they will consider legislation to define combat immunity if the lead cases on Snatch and Challenger are lost.
- Some have argued that the legal uncertainty over combat immunity raises the prospect of individual commanders being subjected to legal action over decisions made on the battlefield. There is at present no sign of this happening.
- Despite the MOD's stance in the combat immunity cases it of course recognises a moral obligation to provide its forces with adequate protective equipment before sending them into combat.

DEROGATION FROM THE ECHR

- A party to the ECHR may under certain circumstances derogate from certain of its articles, i.e. declare that it will not be bound by them in certain situations.
- There has been discussion as to whether the UK should derogate from, in particular, articles 2 (right to life) and 5 (right to liberty) when contemplating military action overseas.

- There can be no derogation from Article 3 (prohibition of torture) under any circumstances.
- FCO are preparing a paper setting out key considerations.
- The UK made no derogation from the ECHR ahead of its interventions in Iraq or Afghanistan. The view was taken that ECHR did not in any case apply extra-territorially in such situations and that the relevant Security Council Resolutions provided the necessary authority for UK operations.
- The ECHR decisions in cases such as *Al-Skeini* and *Al-Jedda* established that it was capable of applying, opening the way for extensive compensation claims by Iraqi detainees in particular on the grounds that their rights to liberty had been infringed.
- Enactment of a British Bill of rights of the kind mentioned at the Conservative Party conference would of course render the debate on derogation for military operations irrelevant.

INTERNATIONAL CRIMINAL COURT

- The International Criminal Court, based in The Hague, is conducting a preliminary examination of a dossier presented by Public Interest Lawyers alleging the commission of systematic war crimes by British forces in Iraq for which senior military officers, officials, and politicians must be held responsible.
- The UK is preparing a submission arguing that a full ICC investigation should not go ahead because the crimes alleged do not meet the gravity threshold and because they are being adequately investigated already by IHAT (the Iraq Historic Allegations Team).
- This work is being led at Ministerial level by the Attorney-General, but IHAT is part of the service justice system and funded by the MOD.
- We believe that ICC will not decide to proceed to a full investigation of the UK, which would be widely regarded as totally unacceptable.

KEY DECISIONS AND DATES OF ECHR JURISDICTION JUDGMENTS

<u>Al Saadoon and Mufdhi</u>
On 2 March 2010, the European Court of Human Rights (ECtHR) ruled the UK had breached the Article 3 rights of Al Saadoon and Mufdhi because of the risk of the death penalty being imposed if convicted in Iraq in connection with the murder of two British soldiers. They had been captured by the UK and transferred to Iraqi custody on 31 December 2008 once the UN Security Council Resolution (UNSCR) mandate for Multi National Forces in Iraq expired.

<u>Maya Evans</u>
On 25 June 2010, the High Court found that, despite some concerns about the real risk of mistreatment to UK detainees once transferred to the Afghan authorities, the Government's governance and practices were sufficient to minimise the risks. The court dismissed a claim for Judicial Review by Maya Evans, a peace campaigner.

Al Skeini
On 7 July 2011, the ECtHR held that, in SE Iraq between May 2003 and June 2004, the UK exercised authority and control over five individuals killed - the Al Skeini cases. This established a jurisdictional link between them and the UK. The UK's obligations under the ECHR therefore applied to all five when they died. This includes the obligation under Article 2 to ensure an effective and independent investigation into their deaths. The investigations had not met the required standard.

So ECHR jurisdiction applied to security operations during the period 1 May 2003 to 28 June 2004 as the UK had assumed authority and responsibility, as an occupying power, for the exercise of maintenance and security in SE Iraq.

In the case of Baha Mousa (who had been tortured and killed in detention by UK Armed Forces in 2003) the MOD had conceded he had come within the jurisdiction of the UK on the basis that a British detention facility in Iraq was analogous to an embassy.

Al Jedda
On 7 July 2011, the ECtHR held that Al Jedda's detention was attributable to the UK rather than the UN. It also held that the UK's obligations under Article 5 applied were not superseded by UNSCR 1546. Al Jedda's detention (between October 2004 and December 2007) breached ECHR Article 5 because it amounted to internment on security grounds. We therefore had to settle claims from other former detainees in Iraq.

Ali Zaki Mousa/Demand for single public inquiry
The High Court has twice rejected the demand for a single public inquiry into all the Iraq abuse allegations. The MOD established the Iraq Historic Allegations Team (IHAT) under the superintendence of Provost Marshal Navy to carry out ECHR compliant investigations. On 24 May 2013, the Court ruled that a process other than an IHAT investigation would be required for around 12 deaths in Iraq where there had been no prosecution. A retired High Court judge, Sir George Newman, has been appointed to chair quasi inquests into the first two such cases.

Serdar Mohammed
On 2 May 2014 the High Court ruled that

Government can rely on 'Crown act of state' to preclude enforcement of Serdar Mohammed's claim under Afghan law but not to preclude enforcement of his Human Rights Act claim.

His detention up to 96 hours was in accordance with ECHR and HRA.

His detention after 96 hours was contrary to Article 5 ECHR and HRA, and in particular;

- His detention was attributable to the UK ,
- Article 5 was not displaced/qualified by the UNSCRs,

- The jurisdiction of the UN under ECHR extends to the military premises on which SM was detained, and
- Article 5 was not displaced/qualified by IHL.

His detention after 72 hours was unlawful under Afghan law.

Permission to appeal has been granted and the Court of Appeal hearing begins on 9 February 2015.

If, once all routes of appeal have been exhausted, the determination that Serdar Mohammed's detention beyond 96 hours was unlawful is upheld, we will need to consider settling with all former detainee claimants who have been detained beyond 96 hours.

Hassan
On 16 September 2014, the ECtHR ruled that Hassan who had been captured by the UK during the warfighting phase in Iraq came within the jurisdiction of the UK but that his Article 5 rights had not been breached.

This has implications for other cases where individuals pose a threat and are captured on the battlefield and has led to us having to recognise that ECHR jurisdiction exists where claimants were in UK custody, power and control, whether during the pre-Occupation, Occupation, or post-Occupation phase in Iraq.

Rahmatullah
On 19 November 2014, the High Court refused the MOD/FCO's application to strike out the damages claim by Yunus Rahmatullah and one other by reason of the doctrine of state immunity or foreign act of state. The judge held that claims could be barred in future by the doctrine of crown act of state if Government were able to demonstrate the arrest and detention was in accordance with the UK's detention policy. The two claimants had been arrested by UK Armed Forces in June 2004 before immediate transfer to US forces.

DJEP
5 December 2014