PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

CRIME (OVERSEAS PRODUCTION ORDERS) BILL [*LORDS*]

First Sitting

Tuesday 18 December 2018

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not later than

Saturday 22 December 2018

The Committee consisted of the following Members:

Chairs: Sir Graham Brady, † Mrs Madeleine Moon

† Antoniazzi, Tonia *(Gower)* (Lab)
† Badenoch, Mrs Kemi *(Saffron Walden)* (Con)
† Bowie, Andrew *(West Aberdeenshire and Kincardine)* (Con)
† Dakin, Nic *(Scunthorpe)* (Lab)
† Jack, Mr Alister *(Dumfries and Galloway)* (Con)
† Johnson, Dr Caroline *(Sleaford and North Hykeham)* (Con)
† Knight, Julian *(Solihull)* (Con)
† Lee, Karen *(Lincoln)* (Lab)
† Maclean, Rachel *(Redditch)* (Con)
† Maynard, Paul *(Lord Commissioner of Her Majesty's Treasury)*
† Merriman, Huw *(Bexhill and Battle)* (Con)
† Newlands, Gavin *(Paisley and Renfrewshire North)* (SNP)
Sherriff, Paula *(Dewsbury)* (Lab)
† Smith, Eleanor *(Wolverhampton South West)* (Lab)
† Thomas-Symonds, Nick *(Torfaen)* (Lab)
† Wallace, Mr Ben *(Minister for Security and Economic Crime)*
† Western, Matt *(Warwick and Leamington)* (Lab)

Joanna Dodd, Kenneth Fox, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 18 December 2018

[Mrs Madeleine Moon *in the Chair*]

Crime (Overseas Production Orders) Bill [*Lords*]

9.25 am

The Chair: Before we begin, I have a few preliminary announcements. I remind Members that no refreshments other than water may be consumed in Committee sittings. Please ensure that mobile phones are turned off or switched to silent. Not everyone is familiar with the procedures of a Public Bill Committee so it might help if I briefly explain how we will proceed.

First, the Committee will be asked to consider the programme motion on the amendment paper, on which debate is limited to half an hour. We will then proceed to a motion to report any written evidence. Then we will begin line-by-line consideration of the Bill.

The selection list, which is available in the room, shows how the amendments selected for debate have been grouped together. The Member who has put their name to the lead amendment in the group is called first. Other Members are then free to catch my eye to speak to the amendments in the group. A Member may speak more than once, depending on how the discussion is going. At the end of the debate on a group, I will call the Member who moved the lead amendment again. Before they sit down, they will need to indicate whether they wish to withdraw the amendment or seek a decision.

If any Member wishes to press any other amendment in the group to a Division, they need to let me know. I am working on the assumption that the Government wish the Committee to reach a decision on all Government amendments. Please note that decisions on amendments take place not in the order they are debated but in the order in which they appear on the amendment paper.

I call the Minister to move the programme motion in the terms agreed by the Programming Sub-Committee. This debate is limited to half an hour.

Ordered,

That—

(1) the Committee shall meet at 2.00 pm on Tuesday 18 December (in addition to its first meeting at 9.25 am on that day);

(2) the proceedings shall (so far as not previously concluded) be brought to a conclusion at 5.00 pm on that day.—(*Mr Wallace.*)

Resolved,

That, subject to the discretion of the Chair, any written evidence received by the Committee shall be reported to the House for publication.—(*Mr Wallace.*)

Clause 1

Making of overseas production order on application

The Minister for Security and Economic Crime (Mr Ben Wallace): I beg to move amendment 1, in clause 1, page 1, line 20, leave out subsections (5) and (6).

This amendment removes subsections (5) and (6) from Clause 1 of the Bill. These subsections concern the designation of international agreements under section 52 of the Investigatory Powers Act 2016.

It is a delight to serve under your chairmanship today, Mrs Moon. I thank hon. Members for having listened in a consensual manner on Second Reading. This should not be a controversial piece of legislation. As people know, the Bill is designed as a docking station to give power to our law enforcement agencies to go to our courts to seek orders for the production of data overseas. It is about removing bureaucratic barriers to our law enforcement and allowing investigations to be concluded in a timely manner—often very quickly, compared with the delays of up to two years that can sometimes be experienced abroad. Fundamentally, it is a piece of legislation about UK law enforcement's request for inward-coming data, so that our law enforcement can seek from the courts data from overseas. I ask hon. Members to bear that in mind.

At the moment, the majority of communications service providers, such as Facebook and Google, hold their data in the United States. It is therefore obvious that one of the countries we will seek to sign a treaty with so that it recognises these court orders is the United States. No doubt there will be one with the European Union at a future date. More than 90% of the data resides in the United States, so when our law enforcement tracks paedophiles, terrorists or organised crime, it is very important that we have timely access to it. At the moment, we go from the United Kingdom to the US Department of Justice to a US court to a CSP, and then it goes back down the line. In some cases, that can take up to two years and, regretfully, some cases have been abandoned as a result of that delay, while all the time offenders are abusing.

I have tabled an amendment today to remove from clause 1 the additional sections added by the House of Lords on international agreements. Subsections (5) and (6) of clause 1, which were added in the Lords, will prevent the Government and all future Governments from designating international agreements under section 52 of the Investigatory Powers Act 2016 with a country that retains capital punishment, unless assurances have been received.

I understand the strength of feeling on this issue and am grateful to Members of both Houses for their contributions. I have listened carefully to their arguments, including those made in the House of Lords. I want us to work together to reach a position that we can all support ahead of Report. However, if the Lords amendments stand, they will put at risk the Bill itself and any future treaty with the United States or, potentially, any other country. Live international negotiations do not work where the host Government—this Government or any future Government—can have their hands tied in this manner. It would prevent our making a negotiation and could effectively disqualify us from getting where we are trying to get to with the United States.

The Bill is about producing the power for a court to make an order in the United Kingdom. Subsequent scrutiny of any international treaty that we seek to make will be done through the normal processes of Parliament. We would table any international treaty for ratification in both Houses, providing 21 working days for scrutiny. Anyone in the House can object to the treaty as formed. If they do not like the terms of the international treaty, that is how they can register their objections or stop it going ahead.

The Bill is agnostic about the countries that we might make a treaty with. That is for the treaty itself. While I understand what is at stake here and what the Lords amendments try to achieve, the principle would be absolutely the same with a Labour Government, as it has been in the past, or any other Government. We should resist attempts in primary legislation to bind our position in negotiations that have not yet concluded and have not come to the House. I believe that would be upheld by any sitting Government.

When it comes to death penalty assurances, it is a fact that under the last three Governments over the past two decades, there have been very rare occasions—two occasions—when a Government have felt that there have been exceptional circumstances and either a death penalty assurance has not been sought when exchanging evidence or one been sought but not been achieved, and the exchange of evidence has nevertheless progressed. That has happened incredibly rarely, but it did happen under the Labour Government in the early 2000s and under the coalition Government when Liberal Democrats Member were in the Department. A legal case is currently outstanding about an occasion when it happened under this Government.

It is not that this or any other Government have wantonly done it with enthusiasm, but there may be occasions when something so egregious has happened to a friend and ally that we make a decision that it is not for us to dictate such stringent terms to that ally in our decision to help keep us all secure or to balance the needs of security with the needs of human rights. I could give an example, but the terms of the confidentiality involved mean that we are unable to do so.

Suffice it to say that a fictional example could be that someone in this country has launched a biological weapon—or, at least, a horrendous weapon—that has caused death and destruction to thousands of people in the United States. That person manages to make it back here and the United States seeks evidence from us about that individual. If there is no evidence in this country to charge him or her with an offence, the Government would have to decide whether evidence about the individual should be shared with the United States authorities. There may be occasions when the US authorities say, "Look, we cannot guarantee that what you do with that evidence will not lead to a death sentence, either indirectly or directly. We cannot do that." This Government or a future Government might realise that the individual poses a real threat—we do not want him residing here any more than anyone else would want him residing anywhere else—and in that position there would be very strong reasons why, if a death penalty assurance was not received, we should share the evidence.

That would be sharing evidence with a country such as the United States or the European Union that has due process, fair trials, independent defence and an independent judiciary, and therefore meets all our values and matches our view of the rule of law, so this is not about making an agreement with a country that does not have the rule of law. It is a very difficult choice, but ultimately the duty of Government is to keep us safe and that is why the Lords amendment puts at risk not only this Bill but the treaties that we could potentially sign and the ability to keep people safe in the United Kingdom.

Let me be very clear that if the Bill was not able to proceed, that would mean that in the 99.9% of cases that are not attached to a death penalty at all—indeed, I have said that there have only been three occasions in 20 years where Governments have been involved in cases where there is a potential death penalty, and interestingly enough in two cases there was not one—offenders such as the people I referred to on Second Reading, who had serially abused children for the most horrendous crimes, will be able to continue to abuse with a longer timetable for being caught. At the heart of my mission is to catch those people as soon as possible.

That is the choice that right hon. and hon. Members are making with this legislation. We can stand on a totally purist principle of absolute opposition, irrespective of strong reasons or exceptional reasons, or we can decide that we have to balance the security needs of our constituents and our national security with the Government's duty towards human rights and to observe the European convention on human rights. It is not an easy balance and it is sometimes tested in the extremes, but I cannot look right hon. and hon. Members in the face and say, "This consideration is so necessary that I would be willing to put at risk the cases that I have seen, as Security Minister, of child abuse, where the data is stored in America." I do not think any hon. Member in this House, of whatever party, would be able to say to their constituents that they would put that at risk.

I am happy to provide the Committee with example after example after example of seriously dangerous people's behaviour towards our children and our friends, and also of terrorists plotting mass-casualty events, where this Bill will help incredibly our law enforcement agencies to get the evidence they need.

The example that I used on Second Reading was of a man—Matthew Falder—so egregious in his abuse that he abused hundreds of people across the world using highly specialised encryption. He was an academic. He persuaded people to commit suicide, or to abuse themselves. He set up chatrooms that people were only qualified to enter by bringing their own images of abuse of children to that chatroom, where they could then share those images among themselves.

When our law enforcement agencies come across these chatrooms or follow the leads, people do not use their real names. Sometimes, one sees things from outside the chatroom and all one sees is a jumble of numbers. We might hear them speaking. We might see, as I have done, some of the footage. Therefore, getting the data from the CSPs, 90% of which is in the United States, is vital for us to do our job and to bring those people to justice. In fact, the first efforts are to stop them abusing, and then to bring them to justice.

That is the difficult choice that we have to make in Government. It is the Government's responsibility. The last Labour Government recognised that choice, because their internal advice on such events was that in exceptional circumstances they did not need to seek or require death penalty assurances. The coalition Government went further and, for the first time, published something called OSJA—overseas security and justice assistance—guidance. It is a publicly available document with a very clear guideline about what we need to do to uphold our human rights obligations. However, under paragraph 9(b), where there are strong reasons not to seek assurances, we can proceed without them.

That was a public document—never published by any previous Government—that was published under the coalition Government, via the Foreign Office. It was

[Mr Ben Wallace]

a landmark and it truly opened up the whole process of risk and balance that people go through. I was not the Security Minister at the time, but none of us received any objections. No political party in this House made an issue of it. I did not hear any objections from the Scottish National party, the Labour party or the Liberal Democrats, who were part of the Government at the time, and it stood as a serious piece of work, and still does.

All we seek in the Bill is to reflect that. I therefore hope that hon. Members will support our efforts to get the legislation through the House and to make a treaty with the United States, and other countries as required, in a way that allows us to uphold our values, but recognises that the Government have to balance that with their duty, which is often not easy but is necessary, to keep us safe. That is why we will remove the amendment made in the Lords and progress the Bill, which I do not believe is controversial. I also do not believe that the amendment tabled in the Lords has anything to do with the legislation, which is about empowering a court order. If the Lords want to object to the treaty that we make with the United States, they can do that through the ratification process that takes place in this House and in the House of Lords when, hopefully, it arrives at a later date.

I am afraid that there are high stakes. I wish that I could tell the United States what to do and bind its hands, but I simply cannot. The reality of international negotiations is that none of us holds all the cards. We all have to negotiate, just as I negotiate with Her Majesty's official Opposition, and just as I negotiate with the Scottish National party. That is what we do. I cannot speak for the Scottish National party any more than the Scottish National party can speak for me. *[Interruption.]* The tartan Tories! Similarly, I cannot speak for international communities.

I therefore commend our amendment to remove the additions that were made in the House of Lords, so that we can get on with the important job of protecting our constituents, while having the highest regard for our obligations under the European convention on human rights.

Nick Thomas-Symonds (Torfaen) (Lab): It is a pleasure to serve with you as Chair this morning, Mrs Moon. The Opposition oppose the attempt to remove the amendment that was inserted into the Bill in the other place. Indeed, I am grateful to my Labour colleagues in the other place, where the Bill started, for their persistence and success in securing the amendment. On Report in the other place, Lord Rosser outlined the Opposition's concerns and, indeed, Labour's position on the death penalty. However, I point out that the amendment in the House of Lords proceeded on a multi-party basis, with support from other political parties.

9.45 am

Prior to its amendment, the Bill allowed for electronic data to be shared with another country when requested. I totally accept that the existing MLAT—mutual legal assistance treaty—system is slower than that which would be allowed under the Bill. The Minister is quite right to set out the efforts that are being made to deal with the despicable crime of child sexual abuse. He referred to the case of Dr Matthew Falder, to which he previously referred on Second Reading. He can have no doubt that the Opposition fully support an efficient, quick method of sharing data to ensure that such people are brought to justice.

The issue that we are talking about arises in a small number of cases—the Minister mentioned the statistic of three in the past 20 years. Unfortunately, it is the case that several countries around the world still operate the death penalty. The view of the Opposition in the other place was that the Bill did not include the safeguards required to ensure that the data handed over by UK communications service providers would not be used in death penalty cases. My Labour colleagues pressed that issue and secured the amendment, as seen in the Bill.

To be clear, that amendment would allow the Home Secretary of the day—of whatever political party—to seek assurances that the information would not be used directly as evidence in a death penalty case or to obtain evidence to be used in a death penalty case. The amendment makes it clear that if those assurances were not forthcoming, the information could not be handed over—that is the effect of the amendment. It passed through the other place by 208 votes to 185.

The Minister referred to the United States. I appreciate that the United States is in sharp focus for two reasons: first, because of the ongoing negotiations with regard to a treaty to plug in, as it were, to the Bill, and secondly, because, as the Minister has pointed out, the majority, perhaps as much as 90%, of communications service provider data is in the United States. The issue is that 30 states in America still operate the death penalty.

It is a live issue. In July, the shadow Home Secretary, my right hon. Friend the Member for Hackney North and Stoke Newington (Ms Abbott), asked an urgent question in the House about the case of Mr Elsheikh and Mr Kotey. The letter from the Home Secretary that was referred to in that debate said:

> "I am of the view that there are strong reasons for not requiring a death penalty assurance in this specific case, so no such assurances will be sought".

In that case, the assurances had not even been sought in the first place.

In his response in July, the Minister said:

> "The UK has a long-standing policy of opposing the death penalty as a matter of principle regardless of nationality and we act compatibly with the European convention on human rights."—[*Official Report*, 23 July 2018; Vol. 645, c. 725.]

I am not for a moment suggesting that he is somehow in favour of the death penalty, or anything like that, because I know he is not. The issue is a matter of judgment that he has made on the Bill.

The reality of the situation is that the Minister's argument appears to be that, for the sake of two or three cases, the United States would be willing to put the entire Bill at risk. It has to be said—I agree with the him—that they are despicable crimes, particularly when they relate to illegal images or other online exploitation, but none of those crimes in and of themselves carry the death penalty in the United States in any event.

We are talking about a tiny number of cases, so why is the principle important? If we are genuinely opposed to the death penalty, that should include the fact not only that we do not use it here in the United Kingdom, but

that we will never be complicit in its use abroad either. It is about us as a country acting up to different moral standards. If we wish to go around the world using our soft power and our commitment to human rights to say to other countries that their human rights records should improve—and we should—we as a country need to set the highest standards to have the moral authority to do that.

The Opposition will oppose the attempt to remove the amendment from the Bill. It is important as a matter of principle. This issue affects a tiny number of cases. We would urge the United States to think again about putting at risk the enormous amount of work that can be done to speed up the process of information exchange for a very small number of cases.

Huw Merriman (Bexhill and Battle) (Con): I agree with many of the hon. Gentleman's arguments, but change that he is seeking will drive a coach and horses through this Bill, which will protect the vulnerable. Is he not using the wrong vehicle for that?

Nick Thomas-Symonds: No, I am not using the wrong vehicle. This plug-in mechanism will have an impact on many other treaties. My answer to the hon. Gentleman is a rhetorical one: if we do not make a stand here, where will we make a stand? The idea that this huge amount of data and information relating to cases that do not carry the death penalty will be put at risk for a small number of cases—three in 20 years, as the Minister said—is, to my mind, not the most credible position.

Mr Wallace: The hon. Gentleman fails to recognise that there is no equality of arms here. Because of the creation and development of the internet, 90%-plus of the data we need is held in the United States. If it were 50:50 or 60:40, it would be different. The United States has been absolutely categorical with us that, should we adopt the principle of effectively telling it how to conduct its justice system, it will not proceed with the treaty. That is the choice in the real world that I, as the Minister with responsibility for this, have to make. Do I like it? No. Do I have to make the decision? Yes—that is a fact. There is no conjecture about whether the United States will or will not: it will not. In addition, it holds 90% of the data. If the hon. Gentleman would like to like to come here so we can change the law together on how we store data, I would be delighted to do that, but that is a fact. That is the reality that I have to live with. Therefore, if he knows that the United States will not do that, does he recognise that the implication of supporting the amendment made in the Lords is that the Bill will fall over?

Nick Thomas-Symonds: I do not for a minute question the Minister's perspective, but let me just say this. We are talking about the United States which, as he rightly points out, at this moment in time holds the substantial majority of CSP data. That is the treaty that is being negotiated. This Bill could be used for treaty plug-ins for many other countries. What if in eight, nine or 10 years down the line, it is not the United States that still holds the majority of CSP data? What if it is another country that does not have a particularly attractive human rights record? Will the Minister say the same thing—that it does not matter?

Mr Wallace: We can debate that when we make the country-by-country treaty. That is the difference between this Bill and the treaty. The hon. Gentleman and his colleagues will have plenty of time to scrutinise the international treaties as they come before this House and the Lords under the process that has been well established. That is the time to scrutinise the decisions we have come to, and whether we agree or disagree to make the case at that time. It is perfectly possible to refuse to ratify the treaty.

Nick Thomas-Symonds: It seems to me that the Minister is saying that there are circumstances in which he would make a different judgment. His judgment to me is that now is not the time to make a stand. Respectfully, I have to disagree with him. I believe that now is the moment to make a stand. The Opposition oppose the removal of the amendment.

Gavin Newlands (Paisley and Renfrewshire North) (SNP): It is a pleasure to serve under your chairmanship, Mrs Moon. The hon. Gentleman has set out the opposition to the Government amendment with commendable detail and clarity. I do not seek to repeat too much of that, but I will make a brief statement setting out the Scottish National party position.

The Minister spoke of principles and of tying the hands of Governments. I have a different set of principles: the SNP has not been a member of a Government who have passed on information without seeking or receiving assurances about the death penalty. The Minister also spoke about a compromise potentially before Report. That is largely a matter for the Government and the Labour party, although we would be more than happy to engage in that process.

To be crystal clear, the SNP will only support a compromise where the default position of Parliament would be not to provide data where assurances on the death penalty have not been received or sought and where it would be for the Government to argue otherwise in exceptional circumstances. At the end of the day, article 2 and protocol 139 obligations should be met and our shared principles across the United Kingdom on capital punishment should be protected.

Mr Wallace: The hon. Gentleman says it is for the Government to argue about exceptional circumstances. Is he saying that a Government should always seek death penalty assurances and if they do not get them, there could be exceptional circumstances, or is he saying that there are no circumstances or no exceptional circumstances—no nothing—where they would be allowed to seek that?

Gavin Newlands: I am saying that it is our position, and it should be Parliament's position, that we should not give information to any country seeking the death penalty or seeking information from the United Kingdom in pursuit of the death penalty.

We are trying to listen to the principle that the Minister has set out, and we are trying not to bind completely the hands of future Governments. If we are looking to achieve compromise and there is a small glimmer whereby the Government can argue in exceptional circumstances for that duty to be removed—we will be arguing against that at every turn, I am sure—it should be set out in the Bill, so that we are not handing over

[Gavin Newlands]

information, but Governments can argue for doing that in exceptional circumstances. What the Minister has been arguing should be flipped on its head. We will vote against the Government amendment.

Mr Wallace: I have listened to the SNP, and I am happy to look at further scrutiny of those decisions when we consider exceptional circumstances. The SNP, having been in government in Scotland for a long time, will know that Governments very occasionally encounter circumstances where they have to make difficult decisions. If the hon. Gentleman is looking for more scrutiny, we are absolutely happy to provide that. We are also happy to provide in the Bill a primary obligation to seek death penalty assurances in a way that has never been done before. We are happy to look at that.

What we cannot do is seek and acquire those assurances, because we are not in charge of the other country. We can certainly bind our hands to seek it in primary legislation and to explain why we have made an exceptional circumstance. I have no objection to trying to reach that position. My challenge is in the absolute. My challenge is in the bit where there is absolutely no position for a Government to make a choice or decision that is so exceptional that something has to be done. It was never any different with the previous Labour Government. In fact, a Secretary of State of that Government did exactly that when push came to shove, and the details around that are even more extreme.

Never did I hear an objection about the overseas security and justice assistance document, which is a public document that has been in circulation since 2014. It is not from the shadow Attorney General or the Liberal Democrat shadow Attorney General. It says absolutely clearly in part 9:

"Where no assurances are forthcoming or where there are strong reasons not to seek assurances, the case should automatically be deemed 'High Risk'"—

I think we recognise that and agree on it—

"and FCO Ministers should be consulted to determine whether, given the specific circumstances of the case, we should nevertheless provide assistance."

That is the reality.

If this is about making a stand, what has been the Labour party's stand been since 2014, or since 2000, when it was carrying out these things? I venture that it has not taken that stand because it knows that in government—it aspires to be a Government sooner rather than later—it might have to make those decisions. That is why members of the Committee are seeking not to agree that amendment. We can offer more assurances and scrutiny of that decision, but as the Minister of State for Security, I make the decision to try to help our law enforcement agencies catch these people time and again, and I cannot bind their hands 100%. The United States has made it clear that we will not be able to progress with the treaty if the amendment falls in the legislation in the way it does.

10 am

On top of that, the Lords amendment is deficient for technical reasons that I will not bore the Committee with—I cannot remember off the top of my head, but there are some technical drafting deficiencies. Nevertheless, the amendment is absolutely important and reflects the reality of where we find ourselves in today's world of the internet. When there was no internet or encrypted chat rooms, it was different. We have those things today; people use our servers here, but the vast majority reside in the United States—that is the point about the equality of arms. There may come a day when it is not that way. I hope we have a British Google and away we go!

The hon. Member for Torfaen asked what would be the position if another country had the majority of servers. My starting point for any treaty on another country about this issue is whether it has the rule of law, an independent judiciary, oversight, the right to defend and a similar legal system to us. The United States and Europe absolutely do. This is not a treaty between us and countries with no rule of law, elections, democracy or accountability—I would not sit here and talk about a treaty with North Korea or any other country such as that. The starting point is a country with an English legal system, let us not forget. It is difficult but necessary to remove the Lords amendment and to make the case that, on balance, I am keen to protect my children and my citizens in the constituency I represent, as my colleagues are. That is the difficult but real choice before us when it comes to this Bill.

Question put, That the amendment be made.

The Committee divided: Ayes 9, Noes 6.

Division No. 1]

AYES

Badenoch, Mrs Kemi	Maclean, Rachel
Bowie, Andrew	Maynard, Paul
Jack, Mr Alister	Merriman, Huw
Johnson, Dr Caroline	Wallace, rh Mr Ben
Knight, Julian	

NOES

Antoniazzi, Tonia	Smith, Eleanor
Dakin, Nic	Thomas-Symonds, Nick
Newlands, Gavin	Western, Matt

Question accordingly agreed to.

Amendment 1 agreed to.

Nick Thomas-Symonds: I beg to move amendment 7, in clause 1, page 2, line 10, leave out "or prosecution".

This amendment would refine the definition of international agreement which could serve as the basis for an order.

The Chair: With this it will be convenient to discuss the following:

Amendment 8, in clause 4, page 5, line 24, leave out "proceedings or".

This amendment would mean that a judge would need to be satisfied that the data sought is likely to be of substantial value during the period of the investigation: an application could not be granted solely because the data might be of value during any proceedings in relation to the alleged offence.

Amendment 9, in clause 4, page 5, line 30, leave out "proceedings or".

This amendment would mean that a judge would need to be satisfied that, before granting an order, there is likely to be a benefit in the public interest during the period of the investigation: an application could not be granted solely because the data might be of value during any proceedings in relation to the alleged offence.

Nick Thomas-Symonds: I will deal with these three amendments quite quickly because, in essence, they would all do the same thing: bring the provisions in line with the Police and Criminal Evidence Act 1984. Specifically, they would limit the use of the information to an investigation, rather than investigation and proceedings. That is the position set out in the 1984 Act.

To be clear, the Police and Criminal Evidence Act outlines that material may be used when it is likely to be of substantial value to an investigation. It does not use the term "prosecution". Paragraphs 2 and 14 of schedule 1 to the Act detail that applications can be made of material if they benefit the investigation. For overseas production orders, however, the clause also details the term "prosecution". Our simple position is that, in so far as is possible, the provisions should be in line with those of the Police and Criminal Evidence Act, rather than those of the Terrorism Act 2000 and the Proceeds of Crime Act 2002, given the nature of the cases that the Bill will deal with.

Mr Wallace: I understand that the Bill is not the most exciting piece of legislation, but after the first vote the Labour party lost three of its Committee members, who have gone off to do something else. The hon. Member for Wolverhampton South West, for example, has done a bunk—I shall go through the others as we proceed. *[Interruption.]* The Scottish National party is present in all its yellow glory. The Bill might not be exciting, but I do not think that Members should turn up for the controversial vote and then do a bunk. We should recognise that this legislation is incredibly important to our law enforcement community and our constituents.

I understand that the hon. Member for Torfaen is concerned about the additional proceedings in relation to serving an overseas production order while PACE refers only to the investigation. However, I believe that PACE has been misread in this regard. Nothing in law says that an investigation ceases once proceedings have been brought to court. Indeed, PACE does not state anywhere—I do not believe it infers this either—that orders may be used only up until someone is charged.

The operational partners we work closely with have made it clear that, in the context of applying for production orders under PACE, they do not consider an investigation to have come to an end until convictions have been secured. It is common for new evidence to come to light and to be obtained throughout the criminal process after charge. Evidence gathering is not limited to the investigation. I believe that it is highly unlikely that a court would construe PACE so narrowly that the police could lose access to investigative tools once the person has been charged.

Nick Thomas-Symonds: The Minister seems to be making the case that there is little practical difference between the two, but my point is that PACE does not include the word "prosecution." Where has the wording for the Bill come from, because it does not mirror PACE?

Mr Wallace: I understand. I suspect that the wording just comes from the parliamentary draftsmen. Given no significant difference, as I am explaining, the wording was simply put in that way.

As I was saying, that interpretation would be perverse, and it would have an impact not only on the prosecution but on the defence, given the duty on the police to exhaust avenues of inquiry even if they point away from the defendant's guilt. The COPO Bill therefore deliberately references "proceedings" to make it clear that orders are available for all stages of the investigation. That was influenced by language used in section 7 of the Crime (International Co-operation) Act 2003, which deals with a request for assistance when obtaining evidence from abroad.

I reiterate that, despite the difference in the language used, the Government do not intend any difference in effect between the Bill and PACE in that regard. We do not consider that the use of the word "proceedings" in the Bill increases the likelihood of "criminal proceedings" in PACE being interpreted unduly narrowly. PACE will continue to be available to law enforcement agencies once proceedings have begun for use up to charge and beyond.

The hon. Member for Torfaen has suggested that once a trial begins the investigation is often handed over from law enforcement agencies to the Crown Prosecution Service, but it is still possible that—this happens a lot—the law enforcement agencies that were investigating the crime will then come across new evidence, which of course they would share with the prosecuting authorities. I therefore ask him to withdraw the amendment.

Nick Thomas-Symonds: I do not disagree with anything the Minister has said in that interpretation. The point I was trying to probe was the difference in the wording. On the basis of the Minister's assurances that the wording comes from somewhere else but that he does not expect there to be a substantial difference, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Nick Thomas-Symonds: I beg to move amendment 15, in clause 1, page 2, line 11, at end insert—

"(7A) The Secretary of State may only make regulations designating an international agreement under subsection (7) where that agreement—

(a) provides for safeguards and special procedures in respect of applications by competent authorities of a country or territory other than the United Kingdom for orders in respect of journalistic data and confidential journalistic data that are equivalent to those in this Act, and

(b) provides for at least as much protection for freedom of expression and the protection of journalists' sources as Article 10 of the European Convention on Human Rights and section 10 of the Contempt of Court Act 1981."

This amendment would seek to ensure that the terms on which other states may access electronic data held in the UK mirror the UK's own safeguards for press freedom.

The Chair: With this it will be convenient to discuss amendment 18, in clause 1, page 2, line 11, at end insert—

"(7A) The Secretary of State may only make regulations designating a treaty for the purposes of this section if that treaty provides as least as much protection for freedom of expression and the protection of journalist's sources as guaranteed by Article 10 of the European Convention on Human Rights and Section 10 of the Contempt of Court Act 1981."

This amendment would mean that a treaty could be designated an international co-operation arrangement for the purposes of this Act only if it provided as much protection for freedom of expression and the protection of journalistic sources as that provided in the European Convention on Human Rights and the Contempt of Court Act 1981.

Nick Thomas-Symonds: The amendment deals with the concern over what has been described as a free pass for overseas authorities to access data in the UK. Again, the issue is a fairly discrete one, on which I hope the Minster will be able to comment and give some reassurance. In its current form, the Bill allows the Government to enter into agreements with foreign Governments to enable reciprocal access to data stored in the United Kingdom. The concern is that there are no appropriate safeguards to compel the position in other countries with regard to freedom of the press, mirroring those that we have in the United Kingdom. From comments that the Minister made in a different context in a previous discussion, it may be that that is something we take into account before a particular country is considered for negotiation for such a treaty, but I would appreciate it if that was set out.

The concern is that we create a back door for overseas Governments to bypass procedures and protections laid out in the United Kingdom. Put simply, we could have a situation whereby a country that does not have our standards of press freedom is able to access something that has been obtained by journalists in this country. What assurances can the Minister give on the considerations that would be taken into account on that issue before any treaty was entered into with another country?

Mr Wallace: The hon. Gentleman makes a valid point, and I recognise the slight difference between this amendment and amendments 13 and 14, in which he deals with confidentiality. First, as I pointed out earlier, hon. Members are talking about incoming requests for UK-held data, but the Bill relates only to the UK's outgoing requests for electronic data held overseas. I completely accept the point that the Bill cannot work without a reciprocal international agreement in place, but amendments 15 and 18 are directly related to the international agreement, as opposed to what our Bill provides for.

The Bill is simply not the right place to mandate what is, I agree, a right and laudable protection for journalists and their data. We cannot impose these conditions in advance of negotiations on an international agreement. In my view, this goes back to the principle of allowing the Government of the day to have those negotiations without necessarily having their hands tied. Of course, the UK would never agree to share data with a country that had insufficient safeguards—not as long as I am the Minister and this is our Government. I do not think that it is necessary or helpful to mandate this in the Bill.

The amendments, which seek to control the Government's negotiating position before they have begun considering future international agreements, would not prove desirable to any Government. However, I remind hon. Members that they will get ample opportunity to scrutinise any international agreement, both when the agreement is designated and again, ahead of ratification, under the Constitutional Reform and Governance Act 2010. The Government already amended the Bill in the other place to provide that extra level of scrutiny of all international agreements.

The first, most immediate and most important international agreement will be, I hope, with the United States. As hon. Members know, the US has an even higher regard for protecting freedom of speech and freedom of the press than the UK has, as set out in the first amendment to its constitution. In addition, the US-UK agreement has been drafted to be fully compliant with EU law. If hon. Members want to know how strong the US holds the first amendment to be, I tell them that when they lobby me about neo-Nazi websites hosted in the United States—as they often do—and we seek to have them taken down because of the vile extremism that they spout, our challenge is that under the first amendment it is extremely hard, even domestically, for the US to do that.

To some extent, we would not have the same problem—well, let us hope not—but the US definitely has that problem. That is an example of how these international agreements will be between like-minded countries with similar values and rights, the rule of law and so on. In this case, on the journalistic issue, the US has a stronger protection than we currently have in the European Union. That is why we have done this in the way we have.

10.15 am

I understand what the hon. Gentleman is rightly trying to get at. Of course, I have been open throughout to anything that protects and better qualifies journalistic data. However, we should remember that under the Bill, which is about our requests out, law enforcement agencies will have to make their case not to me but to a judge, who will have to decide whether the application is proportionate, necessary and in the national interest. It cannot be a fishing exercise. Only if the judge is satisfied that it is obviously relevant to the investigation and protects the rights of the journalist will the application be granted. The journalist will be notified, so it is not as if they will be unaware. We will be able to protect their material where that is appropriate, but if there is material that is important to an investigation—and remember that no journalist, no Member of Parliament and no one else is above the law.

Nick Thomas-Symonds: I do not disagree with much of what the Minister says, and I take his point about the scope of the Bill. The point I was driving at is that if we had a treaty with a country that did not have the same laws about freedom of the press, that would obviously create a concern. I think the Minister is saying, in effect, that that would be taken into account before a treaty was finalised in any event. Is that correct?

Mr Wallace: The hon. Gentleman is right on that. I cannot speak for the next Government, but the Bill is about our requests to our courts, and this Government would not enter into an agreement with a Government that went around oppressing the press and the media. Despite the fake news, this Government believe that journalism and the press are vital to exposing the truth, corruption and everything else, and we absolutely would do all we could to protect that, both in domestic proceedings and with any international treaties. That is why the Bill is drafted so it is both compliant with European law and has high regard to the first amendment.

Gavin Newlands: I was going to speak to amendment 18, but the hon. Member for Torfaen made points broadly similar to those I was going to make. The Minister has addressed some of them, but I have one question. He said he would never countenance handing over information to a country with fewer journalistic safeguards than we have here. If that is the case, why can we not have that

safeguard in the Bill, which all these international treaties and agreements will plug into? What is the danger of building that safeguard into the Bill?

Mr Wallace: First of all, the Bill is simply the docking station from here to there. It is not about international treaties—when we sign our treaties, we can dock them into the Bill. The principle of allowing a Government to negotiate without their hands narrowly tied about what they can discuss is important.

Secondly, remember that—this probably comes down to how we would draft such a provision—for the purposes of security and so on we sometimes share information with countries that do not have the same high standards as us. If we had a credible threat against aeroplanes with British tourists taking off from third countries, we would not say, "We're not going to tell you," and let British tourists get blown out of the sky. Of course we share information with countries, but this is about journalistic information as it applies to investigations, criminal proceedings and so on.

We can do more to provide assurances about journalistic material, notification and journalists in court here, and I can give the Committee the assurance that we would enter into international agreements only where we felt there was high regard for the protection of journalists, but I do not think that safeguard needs to be in the Bill. There would be a challenge about how exactly to draft it. It would also go against the principle of letting the Government of the day be free to hold a negotiation in a way that would achieve the same things, but could address all the different issues. Every country will have things that we have issues with, and I bet that not one country will tick all our boxes across the board. What is my highest priority? Protection of the ECHR, the right to life, journalistic protections—those things will be right up there at the very top, which I think is the best way to do it.

Nick Thomas-Symonds: On the basis of the Minister's reassurances, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Question proposed, That the clause, as amended, stand part of the Bill.

Mr Wallace: Clause 1 is the meaty part of the Bill, and the Government have removed the amendment made in the Lords. I do not need to reiterate the importance of the Bill progressing in the way that we have tried to take it through. I have offered concessions throughout, as I have done elsewhere, and concessions are still on offer to Opposition Members, and indeed to Conservative Back Benchers. However, I cannot say that I will put the Bill in jeopardy, because I believe that fundamentally that would make our constituents less safe. That is why we have removed the amendment, and why I believe clause 1 should stand part of the Bill.

Nick Thomas-Symonds: The Minister knows that I am always willing to speak to him about concessions, and that remains the case. However, I hope that he understands the real strength of feeling about death penalty assurances, which was reflected in my speech and the vote this morning. Of course we will consider the issue in further discussions, and we will revisit it on Report.

Question put and agreed to.

Clause 1, as amended, accordingly ordered to stand part of the Bill.

Clause 2 ordered to stand part of the Bill.

Clause 3

MEANING OF "ELECTRONIC DATA" AND "EXCEPTED ELECTRONIC DATA"

Nick Thomas-Symonds: I beg to move amendment 11, in clause 3, page 3, line 46, at end insert:

"but shall not include bulk data".

This amendment would prevent applications for bulk data under the Bill.

The Chair: With this it will be convenient to discuss amendment 21, in clause 3, page 3, line 46, at end insert:

"but does not include bulk data".

This amendment would exclude bulk data from the electronic material which can be made subject to an overseas production order.

Nick Thomas-Symonds: Amendment 11 is about safeguards on bulk data. Baroness Williams of Trafford spoke on this issue in Grand Committee on 5 September and explained why she felt that an amendment excluding bulk data was unnecessary:

"The Bill has been drafted to require appropriate officers to consider carefully what data they are targeting—which, of course, is not the case with bulk data—and where the information is stored, in order to help with the investigation and prosecution of serious crime, in addition to demonstrating that the data will be of substantial value to the investigation and in the public interest. It feels to me that there are sufficient safeguards in place,".—[*Official Report, House of Lords,* 5 September 2018; Vol. 792, c. GC150.]

Put simply, there is a worry that under current safeguards it could be argued that bulk data was of substantial value to any criminal investigation and was in the public interest. This is a simple but discrete point regarding reassurances that bulk data will not be accessed by the powers in the Bill. The Government's position, as set out in the other place, is that the safeguards there are sufficient to ensure that as the Bill stands, but I am hoping that the Minister will be able to set out and expand in greater detail on the reassurance given in the other place.

Gavin Newlands: The amendment tabled by the hon. Member for Torfaen is probably more grammatically correct than mine—my high school English teacher would not be surprised by that—but the principle is exactly the same. Rigorous safeguards are required to ensure that overseas production orders are not open to abuse in terms of requesting access to bulk data.

As someone who suffered—served—on the Investigatory Powers Bill Committee, I used to read the excerpts on the levels of oversight on the various elements of bulk data collection and interception to help to put me to sleep at night; if this is a dry Bill, then the Investigatory Powers Bill, although incredibly important, was even drier. The Scottish National party held out strong opposition to bulk data collection, and it is important to explain why we tabled this amendment: to remind the Minister that we believe that surveillance should be targeted by means of warrants that are focused, specific and based on reasonable suspicion.

Although the Government produced an operational case for bulk powers in between the draft Bill and the Bill as scrutinised in Committee, it was inadequate because it was largely anecdotal. We still firmly believe that such powers do not pass the legal tests of necessity

[Gavin Newlands]

and proportionality, and the additional test that the same results could not be achieved using more proportionate and less intrusive means. Two American Committees that asked to look at these Bills concluded that the same information could be obtained using more proportionate and less intrusive means.

Amendment 21 in my name is straightforward; the hon. Gentleman has already outlined many of the arguments and quoted Baroness Williams, but we agree that applications for bulk data lack a careful consideration of specifically which data is to be targeted. However, the Bill does not contain any express provision requiring orders to be targeted in the manner the Government describe. It is perfectly possible for officers to argue to the Government's satisfaction that bulk data will be of substantial value to criminal investigations and in the public interest, given that the Government already regularly make arguments about why bulk powers are required in a wide variety of circumstances.

That assumption on the Government's part does not amount to an adequate safeguard against the potential for bulk data to be requested under an OPO. Any access to routine daily surveillance of communications en masse should be expressly prohibited, and that is what the SNP amendment and the hon. Gentleman's amendment are both intended to do. I urge the Minister to accept our amendment.

Mr Wallace: I hope I can put colleagues' concerns to rest. The Bill does not provide for the acquisition of bulk data. The only means of acquiring bulk data is provided for in the Investigatory Powers Act 2016.

The test in clause 4 of this Bill clearly sets out that the power to obtain an overseas production order is to make a targeted request for specific data. When applying for an overseas production order, an officer must specify or describe what electronic data is sought, and applications must therefore be precise and specific. Moreover, the Bill provisions have been drafted to require officers to consider carefully what data they are targeting, and to be able to demonstrate that the data would help with the investigation and prosecution of a serious crime.

There are safeguards, also in clause 4, that require the judge to thoroughly test the need for the data sought and to be confident that

"there are reasonable grounds for believing that the person against whom the order is sought has possession or control of all or part of the electronic data specified or described in the application",

and, in clause 4(5), that the data will be of "substantial value" to an investigation or proceedings and, in subsection (6), that producing the data is "in the public interest". Those tests make clear that the quest for electronic data using overseas production orders will be targeted, specific and not about large volumes of data relating to a number of unknown persons.

I accept that hon. Members may be referring to bulk personal datasets, but those cannot be required using overseas production orders either. The Investigatory Powers Act fact sheet on bulk personal data, which the hon. Member for Paisley and Renfrewshire North must have remembered from his reading, defines them as

"sets of personal information about a large number of individuals, the majority of whom will not be of any interest to the security and intelligence agencies. The datasets are held on electronic systems for the purpose of analysis by the security and intelligence agencies. Examples of these datasets include the electoral roll, telephone directories and travel-related data."

The request for a large volume of data on a specific individual, or even a group of individuals such as a criminal gang if every individual is of investigatory concern, does not constitute a bulk personal dataset, as the request is still targeted and specific. For requested data to constitute a bulk personal dataset, it has to include the full bulk dataset, which would include the personal information of large numbers of unknown individuals of no interest to the investigation. Again, under the Bill, officers cannot just request bulk personal data that would not be of substantial value to their investigation.

10.30 am

Gavin Newlands: To clarify, on the specific information request that the Minister speaks of, can that information be taken from data that is harvested in bulk?

Mr Wallace: Certainly not through this process. Any use or acquisition of bulk data is guided by the Investigatory Powers Act 2016, and those conditions are set out. Someone could not use the Bill to go along to court and say, "Google, can I have data on everyone in Scunthorpe who uses the internet?" That would be a bulk dataset. However, they could go along to the court and say, "I'm investigating somebody called Gavin Newlands, and I would like to see the comms data record and some of his content." They would make the request to the judge, possibly for more than one set of data—browsing history and mobile phone text history, perhaps. That would be two sets, but they would be specifically targeted at an individual, and would therefore not be a bulk dataset. That is the difference.

Bulk datasets are required under the 2016 Act by our intelligence service and so on, and they are overseen by the Investigatory Powers Commissioner's Office and the warrantry system, which now has the double lock in many cases. They can also be overseen by Ministers, and to some extent by the Intelligence and Security Committee when investigating operations and how that data was used. I do not know when it will be published—it might be about to be published, or have been published—but the latest annual report by the Investigatory Powers Commissioner is out. Lord Justice Fulford's report is a detailed analysis, and highlights where mistakes have been made or the law has not been applied.

That is how bulk data is regulated and acquired. The Bill does not apply to that, and none of those requests could involve bulk data applications.

Nick Thomas-Symonds: I have some other issues to press later about journalistic material; however, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Nick Thomas-Symonds: I beg to move amendment 13, in clause 3, page 4, line 3, at end insert

", or

(c) confidential journalistic data (within the meaning of section 12(4))."

This amendment would bring confidential journalistic data within the definition of "excepted electronic data".

The Chair: With this it will be convenient to discuss amendment 14, in clause 12, page 10, line 27, leave out subsection (4) and insert—

"(4) 'Confidential journalistic data' means data—

(a) that a journalist holds that is subject to such an undertaking, restriction or obligation; and

(b) that has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism."

This amendment would redefine confidential journalistic data for the purposes of the Bill.

Nick Thomas-Symonds: Again, the amendment relates to a theme of my amendments, regarding provisions of the overseas production orders being in line with the Police and Criminal Evidence Act 1984. I will refer to the excluded material under the Bill, because there is a set of conditions different from those that need to be met under the 1984 Act.

Under the 1984 Act, the definition of excluded material means that in most cases confidential journalistic material is simply out of the police's reach. That protection helps to ensure the anonymity of those who approach journalists with information that is in the public interest. If journalists cannot ensure that their sources' identities will be protected, people will not come forward with information exposing crime, corruption and other wrongdoings in society.

Clause 3 does outline that excepted electronic data cannot be targeted by applications by orders. That includes data subject to legal privilege, and any personal record that is confidential. However, there is a further concern with regard to protection for excluded material or journalistic material that is held subject to a duty of confidence. Under the 1984 Act, excluded material has a different set of conditions that need to be met. My question to the Minister is why that should be different in the Bill.

I appreciate that on Second Reading the Minister set out that the Bill had been worded in such a way that it is in line with the Terrorism Act 2000 and the Proceeds of Crime Act 2002. However, particularly in relation to POCA, one would usually have an application—a POCA application—at the conclusion of a trial. Obviously, in that situation the crime would already have been proven and the authorities would go after any ill-gotten gains as a consequence. It is not necessarily the best place to mirror provisions from in this context.

The concern is that, as the Bill stands and as excluded material is defined, we are running the risk of potentially sensitive material contained in confidential records being applied for and that there is not that explicit protection with regard to confidential journalistic sources. Journalists play a fundamental role in our society in holding those in power to account; I am sure that the Minister shares my concern that we do not want this legislation to suppress in any way investigative journalism and the exposure of matters in the public interest. I hope that he will be able to set out his position on that issue and provide reassurances to the members of the Committee.

Mr Wallace: The amendment would make confidential journalistic data an excepted category for material for an overseas production order, meaning it cannot be sought using the powers in the Bill. The amendment goes further than what is currently in place under PACE. While confidential journalistic material is excluded material in PACE, it is accessible if certain access conditions are met.

Under PACE, a constable may obtain access to excluded material for the purposes of a criminal investigation by making an application under schedule 1. Excluded material can be applied for only if there is a statute that would have authorised obtaining material in question under warrant before PACE was introduced.

Nick Thomas-Symonds: I accept that the conditions are different. The point is this: why is it not in the same place?

Mr Wallace: While the Bill was based on some of the provisions in PACE, its powers extend to further offences, such as terrorism investigations. In the Terrorism Act 2000—the legislation that law enforcement agencies currently use for terrorism investigations—confidential journalistic material is not excepted data. The Bill creates a new power to obtain an overseas production order, drawing on existing powers available to law enforcement domestically for the acquisition of content data overseas, to help to prevent unnecessary delays in tackling serious crime.

It is sensible to ensure that we do not have significantly different legal tests in the Bill. The existence of different court procedures for different sorts of court orders leads to unnecessary confusion, avoidable litigation and further delays in investigations.

Huw Merriman: My right hon. Friend touches on a point that has struck me, in relation not only to this clause but to measures further on in the Bill. The Bill applies a test that relates, on a domestic basis, to where our terrorism laws relate, but it could actually be a lot broader. I know that he has just touched on the fact that it would actually make things more complex, but would it not be possible to have a two-tier test, depending on whether the application is terrorist-related or non-terrorist-related?

Mr Wallace: I hear my hon. Friend's point. The whole point of the Bill is to increase the speed of the process and smooth it. What we will come on to later is obviously that in this process there is notification for journalists; other people do not get notification. Journalists are brought into the process early on, so that they are able to make representations to a judge in a way that does not apply to the rest of the public. Indeed, it does not apply to Members of Parliament; if MPs are under investigation, they will not get a chance to make representations to the judge. But a journalist will get that chance.

Our view is that the terrorism law is domestic law, and that judgment has been in existence since the last Labour Government. What is important is that the judge uses his or her discretion, guided by the fact that any judgment needs to be proportionate, necessary, in the public interest, targeted at an individual and in line with the range of domestic laws. So, yes, there is POCA, PACE and the Terrorism Act 2000. However, all of those laws are established UK pieces of legislation.

If we add the notification to the judge's discretion—the point of it has to be proportionate and necessary—and to the fact that the laws are already established, I believe that journalists will have the protection that they need. I am happy to look at the issue, which we will come to in later amendments, about effectively improving the definition of journalistic material to make sure that it is not broad and spread wide.

[Mr Wallace]

In this case, we must remember that the appropriate officer will need to provide evidence against each of the access conditions, and the judge will scrutinise them carefully. It is almost inevitable that in any situation where the police attempt to obtain journalistic material, there will be understandable resistance from the journalist or media organisation that holds it. Both are well versed in the process of making representations to court, and it is rare that access to confidential material is granted through PACE.

It is the Government's intention that journalists' interactions with their sources should be protected, but that does not mean that journalists should receive blanket protection from legitimate investigation, simply because of their chosen profession. The Bill takes a reasoned balanced approach, so I ask the hon. Gentleman to withdraw amendment 13.

Amendment 14 seeks to redefine "confidential journalistic data". The definition in the Bill is taken from the Investigatory Powers Act 2016, which the Government feel is sufficient protection for source material.

Nick Thomas-Symonds: I have already referred to the Police and Criminal Evidence Act 1984. I am not saying that there is a blanket protection, but there is a stringent set of tests. Before the Minister concludes, will he say how satisfied he is about how stringent the tests are in the Bill?

Mr Wallace: I am satisfied, and the court rules will also expand on that. I am satisfied that judges, who regularly come down not on the Government's side, will take the Bill and scrutinise the requests properly. We have to go to a judge, so our law enforcement agencies cannot examine the information without going via the judiciary; it goes via the judiciary in this case. I have every faith that they will be able to uphold those important principles.

On amendment 14, the term "confidential journalistic data" reflects the reality whereby journalistic material can be hosted on servers where the data would technically belong to the communications service provider, rather than the journalist. To ensure that source material has proportionate protections, the term "confidential journalistic data" has been borrowed from the 2016 Act. I am happy to discuss that further with hon. Members before Report. I therefore ask the hon. Gentleman to withdraw the amendment.

Nick Thomas-Symonds: On that basis, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 3 ordered to stand part of the Bill.

Clause 4

Requirements for making of order

Nick Thomas-Symonds: I beg to move amendment 5, in clause 4, page 5, line 1, leave out "(6)" and insert "(6A)".

This amendment is consequential on Amendment 4.

The Chair: With this it will be convenient to discuss the following:

Amendment 4, in clause 4, page 5, line 34, at end insert—

"(6A) Where an application for an order includes or consists of journalistic data, the judge must also be satisfied—

(a) that there are reasonable grounds to believe that the specified data is likely to be relevant evidence;

(b) that accessing the data is in the public interest, having regard—

(i) to the benefit likely to accrue to the investigation if the data is obtained; and

(ii) to the circumstances under which the person is possession of the data holds it,

(c) that other methods of obtaining the data have been tried without success or have not been tried because it appeared that they were bound to fail."

This amendment would require a judge to be satisfied that journalistic data which is the subject of an application for an order constitutes relevant evidence.

Amendment 6, in clause 4, page 6, line 16, after "section" insert—

""relevant evidence", in relation to an offence, means anything that would be admissible in evidence at a trial for the offence."

This amendment is consequential on Amendment 4.

Nick Thomas-Symonds: This group of amendments consists of amendment 4 and two consequential amendments. Again, the amendments refer to the read-over to the Police and Criminal Evidence Act 1984. Under that Act, the warrant can be made for journalistic material only if the judge is satisfied that a series of conditions have been met, including that there are reasonable grounds to believe that an indictable offence has been committed, that the materials sought would be of substantial value to the investigation, that all other avenues of procuring the evidence have been exhausted or would be bound to fail, and that the evidence sought is relevant to the investigation. The amendments probe that relevance test.

10.45 am

Although the Bill offers a public interest test and a substantial value test, it does not include a relevant evidence test. Nor does it speak about a requirement that all other means of obtaining the information have been exhausted. I am pushing the Minister on the relevance test. Adopting a threshold for what data are relevant to an investigation is necessary and proportionate. It enables clarity and constituency in all cases, and is in line with our human rights obligations. As the Minister pointed out, the judges who will be considering these applications will be familiar with the application of a relevance test. It is a recognised legal standard, and it would be a simple, sensible safeguard that would bring these provisions in line with those under the Police and Criminal Evidence Act 1984. I ask the Minister to consider carefully the inclusion of a relevance test.

Huw Merriman: It is a pleasure to serve under your chairmanship, Mrs Moon. I wish to speak to amendment 4. I declare an interest: I chair the all-party parliamentary BBC group, but my concerns relate to all organisations. As the hon. Member for Torfaen said, under schedule 1 to the Police and Criminal Evidence Act, there are three

conditions that must be met. One is that there are reasonable grounds for believing that the material is likely to be of substantial value. That is replicated in this Bill. Another is that it is in the public interest to have regard to certain matters. That is also included. What is not included is the requirement that there are reasonable grounds for believing that the material is likely to be relevant evidence. I support the move to add that third limb to the Bill.

Let me use as an example a typical application that I have received for all material relating to a matter. It relates to all journalistic material including but not limited to audio, visual recordings and documentation related to and arising from interactions with X and Y in respect of allegations linked to certain addresses. That can be incredibly wide, so the relevant evidence test is very important.

Journalists and media organisations rely on individuals to come forward, and their investigations can be incredibly broad. There could be a large onus on them to supply a lot of information, which could include legal advice and editorial content back and forth. Without this amendment, I believe that there would be difficulties. The amendment would make the Bill entirely consistent with the Police and Criminal Evidence Act, which should be its benchmark.

The Bill states:

"The judge must be satisfied that there are reasonable grounds for believing that…the electronic data…is likely to be of substantial value".

I recognise that there are additional bulwarks in the Bill to give us assurance, but I gently suggest to the Minister and his excellent Committee team that, if we extend the Bill to include the third limb, that would make me comfortable.

Mr Wallace: Amendments 4, 5 and 6 seek to include in the Bill an additional test of relevant evidence, which the judge must be satisfied has been met before granting an overseas production order for journalistic data, and the additional requirement that all other avenues for obtaining the data have been exhausted before applying for an overseas production order. On the relevant evidence test, under schedule 1 to PACE, there are certain conditions that must be satisfied before the judge can order the production of special procedure material. Under these conditions, first, there must be reasonable grounds for believing that the material is likely to be of substantial value to the investigation in connection with which the application is made. Secondly, there must be reasonable grounds for believing that the material is likely to be relevant evidence, which means, in relation to an offence, anything that is admissible in trial for that offence. Thirdly, it must be in the public interest, having regard to certain matters, for the material to be produced.

Only the public interest and substantial value conditions are included in the Bill. That was deliberate drafting to ensure that our law enforcement agencies have the powers they need to gain access to material that could help further investigation, even if that material is not necessarily admissible as evidence in court. Although the intent of the powers is to allow for data gathered to be used as evidence in court, we do not intend admissibility as evidence to be a barrier to obtaining material that has been identified as being of substantial value to an investigation. My officials have worked closely with operational partners to understand the need for this. Investigators from law enforcement agencies advise that there are often cases in which access to data is fundamental in discovering certain leads in an investigation, although they will not necessarily be used as evidence in court. For example, if someone is being investigated for storing inappropriate images of young children, an overseas production order could reveal further references to other platforms where inappropriate content was being stored. While the images themselves would be used as evidence in court, the lead to the platforms on which they were stored might not be.

Nick Thomas-Symonds: The Minister is talking about admissibility, not relevance. Why on earth would anyone want to investigate something that is irrelevant?

Mr Wallace: I do not think that is what I am saying. I am saying that some material would be used as evidence and some would be used as a lead through which to access or potentially find evidence. This is not about anyone going to the court and asking for irrelevant material. It is about asking for material that is substantial and meets the test of the judges.

Nick Thomas-Symonds: I do not see how a relevance test would prevent that from taking place.

Mr Wallace: I will give another reason. Unlike PACE, the Bill allows for the investigation of terrorist offences. It has been drafted to mirror the relevant parts of the Terrorism Act and POCA, neither of which has a requirement for relevant evidence tests to be met.

The concept of relevant evidence works only if an application is made in relation to a particular offence. That is why it does not exist in the Terrorism Act, under which an application does not have to be made in respect of one particular offence, but only for a terrorist investigation. Given that an overseas production order made under the Bill could be served in support of a terrorist investigation, we cannot simply import a relevant evidence test into the Bill, as in PACE. I do not believe that introducing a markedly different legal test depending on the investigation is helpful.

I reiterate that the Bill deliberately brings different police powers under one piece of legislation. The intention is to create a single set of test criteria, which the Government believe provides appropriate safeguards to accessing content data.

Huw Merriman: In a way, the Minister has answered my point, but I will still prod him in this direction. If we will not have the same three limbs as in PACE, is there no justification—notwithstanding what he just said, which makes it more complex—to have two separate related texts? One could have terrorism-related activity under the Bill, and one could not and could follow the three limbs of PACE.

Mr Wallace: We are in the process of trying to balance the safeguards. Let us remember that the Bill effectively covers a relationship between the law enforcement agencies, the courts and the CSPs—not the journalists or the person under investigation or anybody else. Journalists will be notified effectively to make a representation to a court about why, for example, half

[Mr Wallace]

of their address book is irrelevant. They have an opportunity to make that point to the judge. Nobody else does. That provides a different type of safeguard from what my hon. Friend is looking for.

The point is well made about an investigation. Many of these investigations are about discovery and are very fast moving; starting with one mobile telephone number or one individual, it very quickly becomes a plot in a terrorist case. It is therefore about giving our law enforcement agencies the ability to pursue an investigation. However, when the investigation comes across journalistic material, the journalist will be given a notification that they are allowed to make a case for why it is irrelevant and effectively influence the parameters of that request. I venture that a judge would take that very seriously.

Some 99.9% of journalists do not have anything to fear from this process. The ones who do have something to fear are those who call themselves journalists at the *Dabiq* or *Inspire* magazines from Al-Qaeda and IS and so on, who pump out propaganda and journalism, as they see it, around the world. They have something to fear because this Bill will help us catch those people much quicker. I do not call them journalists, however; I call them first-class terrorists. Ultimately, they are the ones who would love to see bureaucracy slow down the investigation. I do not think our journalists—mainstream journalists, law-abiding journalists, and not even mainstream journalists—have anything to fear from this.

Another point was made about exhausting all avenues of accessing journalists' data before an overseas production order is granted. First, if the amendment were incorporated in the Bill, that could have the adverse effect of compelling a judge to ensure law enforcement agencies have tried the mutual legal assistance route, which is the route we are currently trying to fix because that can take up to two years before an overseas production order can be granted. That would defeat the point of our creating this new process to prevent up to two years of delays via MLA. The caveat the hon. Member for Torfaen has added to his amendment with the phrase,

"tried without success or have not been tried because it appeared that they were bound to fail",

would not mitigate this risk either. We are not worried about MLA failing, but about the length of time it takes to gain access to vital evidence.

It is worth noting that, in practice, law enforcement agencies would have exhausted less coercive methods of obtaining data, if they exist. Agencies will only go through the process of applying to court for potential evidence as a last resort in the investigation, for example, should suspects refuse to release or unlock access to their phones and so on. I therefore urge the hon. Gentleman to withdraw his amendment.

Nick Thomas-Symonds: I am not minded to divide the Committee on this, and I am willing to withdraw the amendment. I just say to the Minister that I am not sure the relevance test has quite the impact he thinks it does. I urge him to look again, because its inclusion would provide greater safeguards and reassurance without doing the damage he thinks. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Gavin Newlands: I beg to move amendment 16, in clause 4, page 5, line 16, at end insert—

"(3A) In any case which —

(a) falls within subsection (3)(a), and

(b) relates to data which comprises or includes excluded material (as defined by section 11 of the Police and Criminal Evidence Act 1984) or special procedure material (as defined by section 14 of the Police and Criminal Evidence Act 1984)

the judge may only make an order if satisfied that the relevant set of access conditions in Paragraphs 2 or 3 of Schedule 1 to the Police and Criminal Evidence Act 1984 would be fulfilled if the application had been brought under that Schedule."

This amendment would that, in the case of excluded or special procedure material, a judge could only make an order if the relevant provisions on access conditions in the Police and Criminal Evidence Act 1984 were complied with.

The Chair: With this it will be convenient to discuss amendment 17, in clause 4, page 5, line 17, leave out subsections (4) to (6) and insert—

"(1) In any other case, the judge must be satisfied that there are reasonable grounds for believing that —

(a) the person against whom the order is sought has possession or control of all or part of the electronic data specified or described in the application for the order.

(b) all or part of the electronic data specified or described in the application for the order is likely to be of substantial value (whether or not by itself) to the proceedings or investigation mentioned in subsection (3)(a) or, as the case may be, to a terrorist investigation.

(c) is in the public interest for all or part of the electronic data specified or described in the application for the order to be produced or, as the case may be, accessed having regard to—

(i) the benefit likely to accrue, if the data is obtained, to the proceedings or investigation mentioned in subsection (3)(a) or, as the case may be, to a terrorist investigation, and

(ii) the circumstances under which the person against whom the order is sought has possession or control of any of the data."

This follows on from Amendment 16 and brings the current subsections (4), (5) and (6) together in one subsection.

Gavin Newlands: Many of the arguments relating to these amendments have largely been made in the previous set of amendments about PACE. To clarify, from our point of view, journalists are currently given notice under PACE, which allows them to negotiate changes to their application in most cases. These amendments simply replicates what already exists and works well under PACE for the measures in the Bill. They would ensure that the evidential value test mirrors the current law on both terrorism and non-terrorism cases, in reference to the point made by the hon. Member for Bexhill and Battle. They would also ensure that confidential journalistic material is protected as under the current law for domestic applications. As has been said already, the Bill strips out the requirement that the information sought is likely to be relevant evidence and that other means of obtaining it have at least been considered. In a free, democratic society, seizing journalistic material should be a last resort.

Although there is a public interest test in clause 4, it sets a lower threshold than in PACE. Instead of the judge being required to determine whether granting access to information would be in the public interest, as

in PACE, the judge must merely be satisfied that there are reasonable grounds to believe that it would be in the public interest. Separately, the police and security services have covert powers, primarily under the Investigatory Powers Act 2016. These powers are exercised through the issuing of a warrant by the Secretary of State and the Investigatory Powers Commissioner. Exceptionally, these powers have been used by the police to identify a source. Most infamously, the police used a journalist's phone number to identify the police source who had leaked the "plebgate" story to *The Sun*. As a result of concern from the press about this, some safeguards have been added. However, neither the journalists nor the CSP is given notice of an application for an IPA warrant.

Nick Thomas-Symonds: I support what the hon. Gentleman is saying, and there is a later amendment for a notice. Is not the essential issue here that, as the Bill stands, the notice provision is not there for material that might not be confidential but is none the less extremely sensitive? It would be sensible to have the notice provision for that journalistic material as well.

Gavin Newlands: I could not agree more. The Investigatory Powers Act—I thought I left it behind a couple of years ago but I am on it again—provides for communications to be intercepted in the course of transmission; for communications data, but not content, to be produced to the police; and for the bulk surveillance of communications, with access to the content of specific communications that are highlighted in this process. Other than that, there is not a general right under the Act to apply for the content of stored communications, so there is no general ability under domestic law to obtain the content of journalistic communications other than through applying for a domestic production order.

11 am

In simple terms, under domestic law the police can apply to search premises and require electronic information to be copied and provided, but that is not really of use to obtain abuse images stored in the cloud. Instead, the police would have to use surveillance and interception powers, and their powers to make communications providers supply communications data, in order to identify suspects. They do not generally have the power to require the communications provider to provide electronically stored content. The police are therefore likely to use information gleaned from interception and communications data to apply under PACE for a search warrant of individuals' premises, and to seize computers and phones.

Could the Minister explain the key differences between the powers he seeks in the Bill and the provisions in the Investigatory Powers Act for relevant international agreements designated by the Secretary of State to serve warrants overseas? It could be argued that, for the use of such covert surveillance and interception powers, the Investigatory Powers Act already has the international capacity that the Bill strives to provide. The hon. Member for Bexhill and Battle said that the protections outlined in PACE should be copied over to the Bill. I urge the Minister to accept the amendment.

Mr Wallace: I appreciate the intention behind the amendments, but I hope that I can explain why they are not in line with the policy intention behind the general tests set out in the clause. To summarise, amendment 16 would incorporate the tests under PACE for special procedure and excluded material. Amendment 17 would ensure that our existing tests in the Bill apply to all other data in scope, including any electronic data obtained from terrorist investigations. The amendments would introduce a separate set of access conditions for special procedure and excluded material, but the Bill has been carefully drafted with serious consideration. The rational policy intention reached was that it is not desirable to introduce a separate set of access conditions, as the Bill seeks to reduce bureaucracy and streamline process, not complicate it.

More crucially, the Bill was designed not to imitate PACE but to take relevant parts of PACE, the Terrorism Act and POCA and merge them into something appropriate for an entirely new tool: a streamlined version of mutual legal assistance called overseas production orders—a new tool that confers a new or revised set of conditions. I accept that the greatest number of production orders are issued under PACE, but the power under PACE is limited to just one type of production order, for special procedure material and excluded material. If material that is not special procedure or excluded material is not voluntarily given to the police, an ordinary search warrant would be used.

The purpose of the overseas production orders will be to request evidence held overseas where we could not use search warrants. In addition to PACE, production orders can be issued under the Terrorism Act and POCA for different types of evidence. Indeed, overseas production orders will seek electronic content data for a range of offences related to serious crime, which may include terrorism.

Therefore, the overarching policy intention is to provide a careful, considered and blended set of tests that reflect the current legislation in PACE, the Terrorism Act and POCA, which would work for all types of evidence sought through overseas production orders. We do not want to introduce two different legal tests; we want to keep this simple for police and judges, in order to offer a streamlined alternative to an existing bureaucratic process. That policy intention was the goal firmly in mind, but certainly not at the expense of any necessary safeguards.

None the less, the Bill incorporates the robust tests required to request electronic content data for all types of serious crime, including terrorism. The Bill and the general tests set out in clause 4 are what we deem reasonable for all the types of evidence that overseas production orders can access. It is important to reiterate that an issued overseas production order has been deemed proportionate by an independent judge, having concluded that the tests in clause 4 have been satisfied—tests that we believe are sufficient safeguards to prohibit officers from just requesting any data they wish.

On the point about the difference between the powers under the Bill and powers under the Investigatory Powers Act, miraculously—as if in a Christmas pantomime—the answer has appeared in my hand. The Investigatory Powers Act provides for lawful intercept of communications, but US companies have been prevented from complying with requests by domestic US legislation. The agreement will hopefully fix those problems and remove those barriers.

I hope that I have convinced the hon. Member for Paisley and Renfrewshire North that his amendments are not in line with the policy intention, and I hope that he will be content not to press them to a vote.

Gavin Newlands: The Minister will be surprised to hear that I am not content. He said that the Bill is not designed to replicate PACE. We and others argue that it should. I look behind me, however, and realise that attempting to divide the Committee would be a futile gesture this morning, so I shall not press the amendments. However, if the Government do not bring forward protections that we feel appropriate—

Mr Wallace: Given that the hon. Gentleman wants to put the provision in line with POCA, is he saying that he would want to amend the Terrorism Act to put many of the Terrorism Act orders and requests on exactly the same line as the Proceeds of Crime Act 2002? That is a consequence of his view.

Gavin Newlands: We are talking about PACE, not POCA—I think that the Minister meant that, so I will answer accordingly. What he outlined is not before us today. If he introduces another Bill to make such changes to legislation, then perhaps on considering it we would argue the same points. That is for another day, but I take his point.

If the Government do not table appropriate amendments to provide protections, I suspect that we shall revisit the matter on Report, but for now I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 4 ordered to stand part of the Bill.

Clauses 5 to 7 ordered to stand part of the Bill.

Clause 8

Inclusion of non-disclosure requirement in order

Nick Thomas-Symonds: I beg to move amendment 12, in clause 8, page 8, line 42, at end insert—

"(3A) A judge shall only include a non-disclosure requirement for a period which, in the judge's opinion, is necessary and proportionate in all the circumstances."

This amendment would require a judge to include a non-disclosure requirement to cover a period which was only as long as he or she deemed necessary and proportionate.

This is another quite discrete point. Clause 8 empowers a judge making an overseas production order to include a non-disclosure requirement. Subsection (3) provides:

"An overseas production order that includes a non-disclosure requirement must specify or describe when the requirement is to expire."

However, the clause does not include a necessity and proportionality test. Of course, it is essential that a non-disclosure requirement should not run for longer than reasonably necessary. Whereas under subsection (3) an order with a non-disclosure requirement would certainly have to specify or describe when it would expire, the judge would not be asked to consider the necessity for and proportionality of the order and its duration.

The purpose of the amendment is simply to probe the Minister for an indication of why there is no necessity and proportionality test, and whether he thinks any reassurance can be provided that those factors would be borne in mind in any non-disclosure order, which he will appreciate is a powerful order to make. It has quite profound consequences in these circumstances.

Mr Wallace: As the hon. Gentleman outlined, the clause allows for a judge making an overseas production order to include a non-disclosure requirement. Such a requirement would be imposed on the person against whom the order is made. It would prevent that person disclosing the making of the order or its contents to any person, unless with the leave of the judge or the written permission of the appropriate officer who applied for the order.

In deciding whether to include a non-disclosure requirement, judges are under a general obligation to make a reasonable decision and to take into account all relevant factors when making that decision. Furthermore, as a public authority, the court is under an obligation to act compatibly with convention rights. I hope that hon. Members are reassured that a decision to include a non-disclosure requirement will not be taken arbitrarily.

There might be circumstances in which it is appropriate for non-disclosure requirements to remain in place once the order has been complied with, or on revocation of it, for example when it could prejudice an ongoing investigation. In such instances we would expect a judge to include such a requirement as he or she would consider reasonable in the circumstances.

If the person subject to the non-disclosure requirement wants to disclose either the contents or the making of the order, the Bill already contains provisions under which the non-disclosure requirements may be challenged, including that of duration. First, when the person against whom the order is made wishes to oppose that requirement, the duration of the non-disclosure can be amended on application. In an individual case, the person against whom the order is made could seek leave of the judge, under subsection (2)(a), or written permission of the appropriate officer, under subsection (2)(b),

"to disclose the making of the order or its contents to any person".

A mechanism therefore exists by which a person against whom the order is made can seek permission to disclose information relating to the order.

Secondly, the non-disclosure requirement will form part of the overseas production order itself. Clause 7 confers a right to apply for the variation of an order. An application for a variation can be made by the appropriate officer, any person affected by the order, the Secretary of State, or the Lord Advocate in Scotland. That could include varying the order to remove the non-disclosure requirement entirely, or to alter its duration to a period that the applicant feels is reasonable.

As hon. Members know and respect, our judges and courts are under an obligation to act reasonably. There is therefore no need to amend the Bill as is proposed. When a person subject to a non-disclosure requirement believes that it is not reasonable to remain subject to the requirement, provision already exists in the Bill for an application to the court to amend the order accordingly. The amendment is therefore unnecessary and the Government cannot support it.

Nick Thomas-Symonds: I think that there is still a case for having the necessary and proportionate test in the Bill, and that would not necessarily undermine the Minister's argument. In the circumstances, however, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 8 ordered to stand part of the Bill.

Clauses 9 to 11 ordered to stand part of the Bill.

Clause 12

NOTICE OF APPLICATION FOR ORDER: CONFIDENTIAL JOURNALISTIC DATA

11.15 am

Nick Thomas-Symonds: I beg to move amendment 3, in clause 12, page 10, line 18, leave out "that is confidential journalistic data".

This amendment would require notice to be given of an application for an overseas production order for electronic data which is believed to contain any journalistic data, not just confidential journalistic data.

The Chair: With this it will be convenient to discuss the following:

Amendment 10, in clause 12, page 10, line 19, at end insert—

"(1A) Where an application is for journalistic data, the court must not determine such an application in the absence of the journalist affected, unless—

(a) the journalist has had at least two business days in which to make representations; or

(b) the court is satisfied that—

(i) the applicant cannot identify or contact the journalist,

(ii) it would prejudice the investigation if the journalist were present,

(iii) it would prejudice the investigation to adjourn or postpone the application so as to allow the journalist to attend, or

(iv) the journalist has waived the opportunity to attend."

This amendment would give a journalist opportunities to make representations in relation to any application for data which he or she may hold.

Amendment 20, in clause 12, page 10, line 27, leave out subsection (4).

Nick Thomas-Symonds: Clause 12 states:

"An application for an overseas production order must be made on notice if there are reasonable grounds for believing that the electronic data specified or described in the application consists of or includes journalistic data that is confidential journalistic data."

Amendment 3 is designed to broaden that notice requirement to include material that might not be counted as strictly confidential but is nevertheless sensitive. When there is an application for journalistic data, amendment 10 would mean that the court must not determine that application in the absence of the journalist affected, unless the journalist has had at least two business days to make representations, or the court is satisfied that that would not be appropriate on a number of other counts. These two matters are important, and I urge the Minister to consider them carefully.

The notice requirement often enables a negotiation to take place between the media organisation to which the journalist belongs, or the journalist themselves, regarding what data it is appropriate to provide. It would also enable the media organisation or journalist formally to oppose the application if necessary. We believe that those are important safeguards. The notice requirement is helpful for the overall protection of journalistic material that we have discussed during our deliberations on a number of different clauses, and it is a fundamental aspect of fairness in such situations. It is not that there is a blanket exception to material becoming available in appropriate circumstances, but the amendment would introduce an appropriate balance that allows the journalist or media organisation to put forward their concerns and try to ensure that we protect our free press and investigative journalism—something I am sure all members of the Committee wish to do.

Huw Merriman: I will be brief because the hon. Gentleman said much of what I wish to say, but I wish to endorse it. The amendment would make the clause consistent with the Police and Criminal Evidence Act 1984 and apply it to all journalistic information, rather than just confidential information. I would be pleased if the Minister considered such a provision.

The point has been made—perhaps I can extend it—that such a measure would also save a lot of time and administration. If journalists are given an opportunity to negotiate with more notice, we will not find that matters reach the stage where it is too late. I am led to believe that the procedure works very much on a negotiation basis. On that basis, I think this measure is fair and consistent with domestic matters, and that it will also make for more administrative justice through our court process. I therefore support the sentiments behind the amendment, and I hope that the Minister will consider it.

I say gently to Opposition Members that, to a certain extent, and judging by what the Minister said earlier, we could perhaps have flexibility in this area and make the Bill work better if they do not seek to drive a coach and horses through the Bill with an amendment that is completely outside its scope and could potentially take it to pieces. I make those gentle points to those on both Front Benches.

Gavin Newlands: The hon. Member for Torfaen made his points with force and alacrity, and I shall not seek to detain the Committee by repeating them. However, in supporting the hon. Gentleman, I urge the Minister to listen not only to those on the Opposition Benches, but to those on his own Back Benches, to concede the principles of the amendment, and to table Government amendments on Report. If he does not do so, we will.

Mr Wallace: The Minister shook himself. Amendments 3, 10 and 20 would provide that when journalistic data is sought as part of an overseas production order, the journalist is put on notice of application. Clause 12(1) of the Bill requires that when confidential journalistic data is sought as part of an overseas production order, the respondent is put on notice. The respondent in this context would be the communication service provider from which law enforcement agencies or prosecutors are seeking content data.

The Government intended to ensure that where an application for an overseas production order was made there was a presumption that any person affected by the order, which would include the journalist themselves, was also put on notice. That was to be included in the relevant court rules, as is the case with domestic production orders, including those made under PACE, the Terrorism Act and POCA.

I am pleased to see that the amendments tabled by the hon. Member for Torfaen recognise that, should all journalists be put on notice when an overseas production order is served in respect of an application that relates

[Mr Wallace]

to their data, certain exemptions must be in place. It is important that the requirement to provide notice for an overseas production order is not absolute. The difference between the Bill and PACE is that PACE production orders are served directly on the respondent themselves—that is, the journalist. Where PACE requires notice to be given to the respondent, notice has been given to someone who will of course be made aware of the order when it is served, as they are the person who will be required to comply with it. In practice, that will be the person handing over the data to law enforcement agencies.

However, in the Bill the orders are served directly on the CSP that owns and controls the data. Giving notice to a third party—the journalist, who is not required to act on the order—should not stand in the way of issuing an overseas production order where there are good reasons for notice not to be given. I believe that the judge is well placed to determine whether the journalist should be notified, and the circumstances in which it will not be appropriate for that to be the case.

The exemptions set out in amendment 10 are that

"the applicant cannot identify or contact the journalist…it would prejudice the investigation if the journalist were present…it would prejudice the investigation to adjourn or postpone the application so as to allow the journalist to attend, or…the journalist has waived the opportunity to attend."

Those exemptions mirror what is currently in place in court rules for domestic production orders through PACE, and they seem a sensible approach. For example, we do not want to oblige law enforcement agencies into notifying an ISIS blogger or journalist when clearly that could prejudice the investigation. Those exemptions are fundamental to retaining a robust and sensible approach to evidence.

I thank Members for their detailed arguments, and for the time that they have taken to consider the protection of journalists. I reiterate that both the notice requirements and the important exceptions that underpin them will be provided for, as they are currently, in court rules. However, I am happy to consider whether they can be provided for in the Bill. I am happy to discuss that with hon. Members as we proceed to Report, if they will withdraw the amendment.

Nick Thomas-Symonds: On the basis of that continuing discussion, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Mr Wallace: I beg to move amendment 2, in clause 12, page 10, line 39, at end insert—

"(6) In determining for the purposes of subsection (5) whether or not a purpose is a criminal purpose, crime is to be taken to mean conduct which—

(a) constitutes one or more criminal offences under the law of a part of the United Kingdom, or

(b) is, or corresponds to, conduct which, if it all took place in a particular part of the United Kingdom, would constitute one or more criminal offences under the law of that part of the United Kingdom."

This amendment clarifies what is meant in Clause 12(5)(a) of the Bill by the reference to creating or acquiring electronic data with the intention of furthering a criminal purpose. What is criminal is to be judged by reference to what is, or would be, a criminal offence under the law of a part of the United Kingdom.

Clause 12(5) provides that electronic data is not to be regarded as having been created or acquired for the purpose of journalism if it was created or acquired with the intention of furthering a criminal purpose, and that electronic data that a person intends to use to further such a purpose is not to be regarded as intended to be used for the purpose of journalism. As drafted, the Bill does not explicitly define what is meant by a criminal purpose in that context. Without a definition of criminal purpose or a crime in the Bill, there is a risk that the provision could be interpreted inconsistently within UK law. Our intention is that a criminal purpose is criminal only if the conduct constituting a related crime is an offence under UK law, regardless of whether it is a crime in the place where the relevant data was created or acquired, or where it was intended to be used.

For example, if a person located in another country was creating an extremist blog that encouraged others to join a terrorist organisation that is proscribed in the UK, such as ISIS, that person should not benefit from any protections afforded to journalistic data under the Bill. That could be the case even when that country does not criminalise the same conduct. That reflects the principle that the criminal purpose must be recognised as criminal under UK law.

To flip the example the other way, if a legitimate British journalist based abroad is writing an article about political corruption, which the country that they are in deems illegal, we should absolutely ensure that they are given the right protection under the Bill, given that their conduct is perfectly acceptable under British law. Without something that links criminal purpose to conduct that is criminal in the UK, or to conduct that would be criminal had it occurred here, there is a risk that the term will be interpreted by reference to the criminal law of the place where the person who created or acquired the data is located. I therefore propose amending the Bill to include a definition of what is meant by "criminal purpose". I hope that hon. Members will support the need for this clarifying amendment.

The Chair: Colleagues, we usually have to finish at 11.25 am, but I have discretion to extend the sitting by 15 minutes, if I think we can finish our consideration of the Bill in that time.

11.25 am

The Chair deferred adjourning the Committee (Standing Order No. 88).

Nick Thomas-Symonds: I support the sensible amendment. As subsection (5) is drafted, it is clearly the case that we should not regard electronic data

"as having been created or acquired for the purposes of journalism if it was created or acquired with the intention of furthering a criminal purpose".

The difficulty comes when we have investigative journalistic work in another country that would not be regarded as a criminal act under UK law but could be illegal in that country, if it had particularly stringent or harsh laws. The sensible way to deal with that problem is the Government's amendment, which defines criminal purpose in relation to UK law. That achieves the purpose of subsection (5) without endangering investigative journalistic activity abroad, which we all want to see.

Amendment 2 agreed to.

Clause 12, as amended, ordered to stand part of the Bill.

Clauses 13 to 20 ordered to stand part of the Bill.

Question proposed, That the Chair do report the Bill, as amended, to the House.

Mr Wallace: Thank you, Mrs Moon, for your swift and efficient chairmanship. I am glad that something is functioning in Parliament and Government, and it is this small corner of the United Kingdom. I thank hon. Members for their contributions. I thank the hon. Member for Torfaen, who has contributed throughout, and the hon. Member for Paisley and Renfrewshire North, who has also contributed in as consensual a way as possible. It is regretful that we disagree on one important part.

The Bill will allow our citizens to be kept safer than they are now. As unexciting as its title is—I designed it that way—the Bill is an incredibly important piece of legislation. I hope that it progresses to Report soon and then returns to the House of Lords. I thank hon. Members for their attendance. The speed of our consideration does not reflect the seriousness of the Bill.

Nick Thomas-Symonds: Thank you, Mrs Moon, for the way you have chaired proceedings. I also thank all the officials, the hon. Member for Paisley and Renfrewshire North, the Minister and all hon. Members who have contributed. As the Minister said, the speed of our proceedings is due to the fact that the vast bulk of the Bill is uncontroversial; it does not detract from the serious nature of the matters we are considering. I look forward to hearing further from the Minister on Report about the concerns I have expressed.

Question put and agreed to.

Bill, as amended, accordingly to be reported.

11.30 am

Committee rose.

Written evidence reported to the House

COPO01 News Media Association

COPO02 Society of Editors

COPO03 BBC

COPO04 Media Lawyers Association

COPO05 Rachel Mawhood