PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

INVESTIGATORY POWERS BILL

Thirteenth Sitting

Thursday 28 April 2016

(Morning)

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Monday 2 May 2016

The Committee consisted of the following Members:

Chairs: , † Albert Owen, Nadine Dorries

† Atkins, Victoria *(Louth and Horncastle)* (Con)
† Buckland, Robert *(Solicitor General)*
† Burns, Sir Simon *(Chelmsford)* (Con)
† Cherry, Joanna *(Edinburgh South West)* (SNP)
† Davies, Byron *(Gower)* (Con)
† Fernandes, Suella *(Fareham)* (Con)
† Frazer, Lucy *(South East Cambridgeshire)* (Con)
† Hayes, Mr John *(Minister for Security)*
† Hayman, Sue *(Workington)* (Lab)
Kinnock, Stephen *(Aberavon)* (Lab)
† Kirby, Simon *(Brighton, Kemptown)* (Con)
† Kyle, Peter *(Hove)* (Lab)
† Matheson, Christian *(City of Chester)* (Lab)
† Newlands, Gavin *(Paisley and Renfrewshire North)* (SNP)
† Starmer, Keir *(Holborn and St Pancras)* (Lab)
† Stephenson, Andrew *(Pendle)* (Con)
† Stevens, Jo *(Cardiff Central)* (Lab)
† Warman, Matt *(Boston and Skegness)* (Con)

Glenn McKee, *Committee Clerk*

† attended the Committee

Public Bill Committee

Thursday 28 April 2016

(Morning)

[Albert Owen *in the Chair*]

Investigatory Powers Bill

11.30 am

The Chair: Before we start our line-by-line scrutiny, I want to make a couple of announcements. First, I remind the Committee that for amendments to be eligible for consideration on Tuesday, they must be tabled in the Public Bill Office by the rise of the House today; I am not sure what time the House is rising. People should be aware of that. After the Committee adjourned on Tuesday, it became clear that the Question that clause 187 stand part of the Bill had not been put. I am sorry for that oversight. The appropriate course is for us to rectify the matter and to put the Question now.

Clause 187

Approval of major modifications made in urgent cases

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 10, Noes 2.

Division No. 108]

AYES

Atkins, Victoria	Frazer, Lucy
Buckland, Robert	Hayes, rh Mr John
Burns, rh Sir Simon	Kirby, Simon
Davies, Byron	Stephenson, Andrew
Fernandes, Suella	Warman, Matt

NOES

Cherry, Joanna	Newlands, Gavin

Question accordingly agreed to.

Clause 187 ordered to stand part of the Bill.

Clause 194

Investigatory Powers Commissioner and other Judicial Commissioners

Keir Starmer (Holborn and St Pancras) (Lab): I beg to move amendment 741, in clause 194, page 148, line 36, at beginning insert—

"( ) There shall be a body corporate known as the Investigatory Powers Commission.

( ) The Investigatory Powers Commission shall have such powers and duties as shall be specified in this Act."

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

Amendment 742, in clause 194, page 148, line 40, at end insert—

"(1A) The Investigatory Powers Commissioner must appoint—

(a) the Chief Inspector, and

(b) such number of inspectors as the Investigatory Powers Commissioner considers necessary for the carrying out of the functions of the Investigatory Powers Commission.

(1B) In appointing investigators the Investigatory Powers Commissioner shall—

(a) appoint an individual only if the Investigatory Powers Commissioner thinks that the individual—

(i) has experience or knowledge relating to a relevant matter, and

(ii) is suitable for appointment,

(b) have regard to the desirability of the investigators together having experience and knowledge relating to the relevant matters.

(1C) For the purposes of sub-paragraph (1) of subsection (2B) the relevant matters are those matters in respect of which the Investigatory Powers Commission has functions including, in particular—

(a) national security;

(b) the prevention and detection of serious crime;

(c) the protection of privacy and the integrity of personal data;

(d) the security and integrity of computer systems and networks;

(e) the law, in particular, as it relates to the matters in subsections (2B)(a) and (b);

(f) human rights as defined in section 9(2) of the Equality Act 2006."

Amendment 743, in clause 194, page 149, line 23, at end insert—

"(7A) The Chief Inspector is an Inspector and the Chief Inspector and the other Inspector are to be known, collectively, as the Inspectors."

Amendment 744, in clause 194, page 149, line 31, at end insert—

"(c) to the Investigatory Powers Commission are to be read as appropriate to refer to the body corporate, the Investigatory Powers Commission, and in so far as it will refer to the conduct of powers, duties and functions, those shall be conducted by either the Judicial Commissioners or the Inspectors as determined by this Act or by the Investigatory Powers Commissioner, consistent with the provisions of this Act."

Amendment 753, in clause 196, page 150, line 21, leave out "Commissioner" and insert "Commission".

Amendment 754, in clause 196, page 150, line 38, leave out "Commissioner" and insert "Commission".

Amendment 755, in clause 196, page 151, line 18, leave out "Commissioner" and insert "Commission".

Amendment 756, in clause 196, page 151, line 41, at end insert—

"(4A) The powers and functions specified in this Part will be exercised by the Inspectors under the supervision of the Investigatory Powers Commissioner, except in so far as those powers are powers of the Judicial Commissioners specified in Parts 1 to 8 of this Act."

Amendment 749, in clause 196, page 151, line 43, after "Commissioner", insert "or Inspector".

Amendment 757, in clause 197, page 152, line 28, leave out "Commissioner" and insert "Commission".

Amendment 758, in clause 197, page 152, line 35, leave out "Commissioner" and insert "Commission".

Amendment 789, in clause 199, page 154, line 11, leave out "Judicial Commissioner" and insert "Investigatory Powers Commission".

Amendment 790, in clause 199, page 154, line 18, leave out "Judicial Commissioner" and insert "Investigatory Powers Commission".

Amendment 794, in clause 200, page 154, line 34, leave out "Commissioner" and insert "Commission".

Amendment 795, in clause 200, page 154, line 34, leave out "and the other" and insert ", the".

Amendment 796, in clause 200, page 154, line 35, after "Commissioners", insert "and Inspectors".

Amendment 797, in clause 200, page 154, line 41, leave out "Commissioner" and insert "Commission".

Amendment 798, in clause 201, page 156, line 38, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission".

Amendment 799, in clause 201, page 156, line 41, leave out "Commissioner" and insert "Commission".

Amendment 800, in clause 201, page 156, line 47, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission".

Amendment 802, in clause 201, page 157, line 7, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission".

Amendment 803, in clause 201, page 157, line 11, leave out "Judicial Commissioners" and insert "the Investigatory Powers Commission".

Amendment 816, in clause 202, page 157, line 43, leave out "Judicial Commissioner" and insert "the Investigatory Powers Commission".

Amendment 817, in clause 202, page 157, line 44, leave out "Commissioner" and insert "Commission".

Amendment 818, in clause 202, page 157, line 45, leave out "Commissioner's" and insert "Commission's".

Amendment 829, in clause 202, page 158, line 1, leave out "Judicial Commissioner" and insert "Investigatory Powers Commission".

Amendment 819, in clause 202, page 158, line 1, after "Commissioner" insert "or Inspector".

Amendment 820, in clause 202, page 158, line 4, after "Commissioner" insert "or Inspector".

Amendment 821, in clause 202, page 158, line 8, after "Commissioner" insert "or Inspector".

Amendment 822, in clause 202, page 158, line 10, leave out "Commissioner's" and insert "Commission's".

Amendment 823, in clause 202, page 158, line 15, leave out "Commissioner" and insert "Commission".

Amendment 825, in clause 204, page 158, line 39, leave out "Judicial Commissioners" and insert "Investigatory Powers Commission".

Amendment 826, in clause 204, page 158, line 40, after "such", insert "funds".

Amendment 827, in clause 204, page 158, line 40, after "determine", insert—

"necessary for the purposes of fulfilling the functions of the Investigatory Powers Commission under this Part"

Amendment 828, in clause 204, page 158, line 41, leave out subsection (2) and insert—

"(2) In determining the sums to be paid to the Investigatory Powers Commission pursuant to subsection (1), the Treasury shall consult the Investigatory Powers Commissioner."

Amendment 830, in clause 204, page 158, line 42, leave out "Commissioner" and insert "Commission".

Amendment 831, in clause 204, page 158, line 43, leave out "Judicial Commissioners" and insert "Investigatory Powers Commission".

Amendment 832, in clause 204, page 159, line 3, leave out "Commissioners'" and insert "Commission's".

New clause 19—*Funding, staff and facilities of Intelligence and Surveillance Commission*—

"(1) The Treasury must, after consultation with the Intelligence and Surveillance Commission as to number of staff and in light of the extent of the statutory and other functions of the Commission, provide the Commission with funds to cover—

(a) such staff, and

(b) such accommodation, equipment and other facilities, as necessary for the carrying out of the Commissioners' functions.

(2) The staff of the Intelligence and Surveillance Commission must include—

(a) independent technical experts, and

(b) independent legal experts."

This new clause would require the Treasury to provide the ISC with funds to cover its staff, facilities and accommodation. It would also require that the ISC staff include technical and legal experts.

Keir Starmer: We come to part 8, "Oversight arrangements". Clause 194 deals with the appointment of the Investigatory Powers Commissioner. The second set of amendments to the clause deal with appointments; I will deal with them when we come to that group.

There are numerous amendments in the first group, but they all relate to the structure of the oversight mechanism, because the structure set out in the clause is considerably different from that proposed by David Anderson in "A Question of Trust". His recommendation 82 was that there should be a new independent surveillance and intelligence commission. In its scrutiny, the Joint Committee on the draft Bill asked why that had not been done, because, according to its recommendation 51,

"the work of the oversight body will be significantly enhanced by the creation of a Commission with a clear legal mandate."

That was the clear view of David Anderson. The Joint Committee asked why that recommendation was not carried out. The Government response, as I understand it, was that it is too costly. At the moment, that is the only basis suggested for not acting on David Anderson's recommendation, or that of the Joint Committee.

Our view is that such a commission, with a "clear legal mandate", would be far better. Unless there is some significant difference in costs, there seems to be no good reason for not having it. Will the Minister tell us what calculations lie behind the suggestion that one model would be very costly and the other not so?

This issue was raised by the Interception of Communications Commissioner's Office when it gave evidence on the structural divide that it thought there should be between the judicial function and the audit function. In its written and oral evidence, it said it would be more appropriate for those functions to be split, so that the same group of individuals did not look at both aspects. The amendment would create a commission

[Keir Starmer]

with a clear legal mandate. It would split the functions in a way that those who exercise those functions at the moment think is appropriate. It also challenges the suggestion that the only reason not to implement the recommendation is that it is too costly.

I intend to press the matter to a vote. I will press amendment 741, and if I lose that vote, I will take a view on pressing the others, as there are so many of them, but for the record, I stand by all the amendments.

Joanna Cherry (Edinburgh South West) (SNP): I support the amendments.

The Solicitor General (Robert Buckland): I thank the hon. and learned Member for Holborn and St Pancras for setting out his case. He will be glad to know that there is more to this than mere cost. I say "mere", but Ministers and parliamentarians have a duty to ensure we do not burden the Exchequer with unnecessary cost. My primary argument is focused on that. The amendments would only put us in the same position as we will be in under the Bill, but at greater cost.

The Home Office estimates that at least an extra £500,000 would be needed to staff and finance the proposed body. That is not an insignificant sum, which is why the Government are urging restraint when pursuing what might seem an entirely rational, reasonable and logical conclusion. I accept that a number of the bodies and individuals mentioned by the hon. and learned Gentleman would support the thrust of these amendments.

Keir Starmer: Is there a breakdown of the £500,000, given that this is, in broad terms, a structural proposal, rather than a numbers proposal ?

The Solicitor General: The impact assessment published alongside the Bill contains the figure. It is supported by that document, so there has been empirical research. I do not have the full figures, but I imagine that the research is based on estimates of staffing levels. The body would also have to deal with new corporate functions, such as human resources, IT, non-executive directors and procurement, as the hon. and learned Gentleman knows well from his experience as Director of Public Prosecutions. This would be a non-departmental public body similar to, say, the Crown Prosecution Service. As an independent body and a key part of our constitutional arrangements for the prosecution of crime, it would obviously need that structure to maintain its independent role.

The amount of money is not insignificant, and the question I must ask is: what would the measure achieve? I remain unconvinced that it would achieve anything more than the current proposal does, because the powers and duties of the proposed body would remain exactly the same as the commissioner's responsibilities, and the number of inspectors, technical experts and judicial commissioners employed by the organisation would remain exactly the same.

Joanna Cherry: The Interception of Communications Commissioner's Office said that a separate body would promote greater public confidence, because it would be independent, with an appropriate legal mandate, and would be public facing. Does the Solicitor General accept that the amendment would promote public confidence if the oversight function were separate from the judicial function?

The Solicitor General: I am grateful to the hon. and learned Lady for her intervention. I know the spirit in which she supports this amendment, because she genuinely and sincerely believes that more needs to be done to promote public confidence. My simple response to her is that the current proposals do promote public confidence in not only the organisation's operational ability, but, importantly, its ability to deal with the role of inspection.

I respect those who believe that there should be an absolute and complete separation. I suppose it flows from the philosophical view that the desideratum of our constitution should be separation of powers in its pure form. I am afraid that I do not subscribe to that view, and never have done. I think that the British system of checks and balances, which this Bill epitomises, is the better way to achieve the balance between the need for Executive involvement and responsibility for important decisions—on warrantry, for example—on the one hand, and judicial involvement and input into the process on the other. We are achieving that balance in this Bill.

While I respect the philosophical intention behind this other approach, my worry is that we are pursuing too much of a rationalist, purist approach to separation of powers, rather than keeping to the spirit of what the Bill is all about. I am supported—perhaps not quite to the fullest philosophical extent, but certainly practically—by the comments we have heard from people with a strong interest in and knowledge of this area.

There is a value in having a relationship, even a distant one, between the two functions that I have talked about. Indeed, Lord Judge made that point in his evidence to this Committee, when he described how the Office of Surveillance Commissioners works. He said that he "strongly recommended" a model in which the inspectors act as a check on how an authorisation was implemented and then feed back, if necessary, that information to the authoriser, so that there is a full awareness of how warrants are to be put into practice.

There is a strong argument that there is stronger oversight from having one indivisible body that can scrutinise the full lifespan of a warrant, from initial request for authorisation through to implementation. David Anderson himself believes that:

> "I have considered whether it would be difficult to combine the judicial authorisation function and the inspectorate in a single organisation, and concluded that it would not…Whilst the judicial function is obviously a distinct one, there is considerable benefit in dialogue: the Judicial Commissioners could advise the inspectorate on matters to look out for on their inspections, and the inspectors could in turn suggest that a warrant be referred back to the Judicial Commissioners if they formed the impression that it was not being implemented as it should be, and that the Judicial Commissioners might wish to consider modifying or cancelling it."

I accept that the Bill does not prescribe the precise approach in practical terms, but the point is that we want the Investigatory Powers Commissioner to decide what the working relationship should be between the two functions of his or her office. The fact that the Bill is silent on that emphasises the point that we want the degree of operational independence and robustness that I believe the current framework provides.

Of course, there is nothing new about this, because the current oversight bodies—the offices of the Intelligence Services Commissioner, the Interception of Communications Commissioner and the Chief Surveillance Commissioner—are provided for in statute in exactly the same way that it is proposed that this body be provided for in this Bill. I am sure that if the current commissioners—we heard them give evidence—felt that their independence was in any way being constrained, we would have heard about it by now. What we get is oversight, and the bodies responsible for oversight focusing on the core tasks of carrying out inspections and investigations, and avoiding the sort of administration, human resources and IT functions that I have mentioned.

Joanna Cherry: I hear what the Solicitor General says about the essential philosophical difference between those who believe in separating powers properly and those who do not, but does he accept that if the one body has judicial audit and inspection responsibilities, the judicial commissioners will effectively be checking their own homework? Does he really think that that will promote public confidence?

11.45 am

The Solicitor General: I respect the hon. and learned Lady's point. I answer it by making the important point that we have stronger oversight if the body is able to look at everything from initial authorisation right through to implementation. The dialogue that can occur will therefore be much more immediate and focused, because the body will have a fuller and deeper understanding of the process. We end up with a body that is independent and flexible and will gain the public confidence that she and I want it to.

The worry is that if we pursue the attractive—seductive, almost—course proposed by the hon. and learned Lady and others and separate the powers, we will end up breaking the important links between the executive and judicial functions epitomised by the Bill. I say "links" in a neutral sense, and not in the sense that one can unduly influence the other—far from it. Rather, the Bill allows for the check-and-balance approach that epitomises the British constitution and its organic development over the centuries in a modern and relevant way. As a Tory, I am proud to stand here and argue for those values.

I want to deal with the Investigatory Powers Commissioner's functions and the amendments seeking direct negotiation with the Treasury, rather than the Secretary of State, on the resources necessary for the commissioner to fulfil their functions. I think I am on safe ground in saying that my right hon. Friend the Home Secretary would warmly welcome not having to be involved in negotiations with the Treasury wherever possible, but I believe that removing his or her function from this negotiation would be an error.

There will be much more familiarity with the work of the IPC at the Home Office than at the Treasury, so the Home Office can make a far more accurate assessment of the resources that the IPC will need. That is important in ensuring that the IPC is properly resourced. Importantly, there can be meaningful challenge by the Home Secretary if they believe that the IPC is asking for too big a budget and is not providing proper value for money.

I do not think it is right or fair to say that the independence of the new IPC will be somehow compromised if it receives funding through a Secretary of State, because plenty of other non-departmental public bodies receive funding via that route, such as the Independent Police Complaints Commission and Her Majesty's inspectorate of prisons. It is not an unusual or uncommon position, and we would have heard about it if there was an issue with the compromising of those bodies' ability to act.

The Treasury has made clear in its guidance, "Managing public money", that

"Functional independence is compatible with financial oversight".

I am glad to say that the current oversight commissioners have repeatedly made clear in their annual reports that they have always been provided with enough money to undertake their functions. The same route of complaint will be available to the IPC, and I know that Parliament would take a keen interest if there was any suggestion by the new commissioner that the IPC was under-resourced. For those reasons, I respectfully ask Members to withdraw their amendments.

Keir Starmer: I intend to deal with funding under clause 208. I appreciate that new clause 19 is in this group, but that is probably only because it contains the word "commission", so I will deal with it at a later stage. However, I have listened to what the Solicitor General said.

The amendments are supported by the Interception of Communications Commissioner, who was most concerned about the structural division of the two functions. The Solicitor General says that there are advantages in being able to do an end-to-end review, and that it brings focus; I can see that. If it were an end-to-end review of someone else's work, that would be a good thing. The structural problem is that, within that end-to-end process, the same team takes the steps and does the overseeing. That is more than just a philosophical issue. It is a practical issue with how oversight works. I am therefore unpersuaded.

Joanna Cherry: The hon. and learned Gentleman will recall that Jo Cavan, the head of the Interception of Communications Commissioner's Office, not only covered that in her written evidence, but was asked about it by me in her oral evidence to the Committee. She reiterated the position that we set out very strongly.

Keir Starmer: I know that the Interception of Communications Commissioner feels very strongly on this point. I think that he raised it in evidence, and he has certainly raised it with me. For that reason, I will press amendment 741 to a vote. I will review my position on the remaining amendments, depending on how that vote goes.

The Chair: For clarity, we will divide on amendment 741 now. We will then go on to amendments 735, 736, 740, 737, 738 and 739, which the hon. and learned Gentleman may wish to discuss. If he feels like moving the others, he may do so at that time.

Keir Starmer: I am happy to do it in whichever way suits the Committee and the Chair.

The Solicitor General: We have prayed in aid Jo Cavan's comments quite a lot, and I think it is interesting that she said:

"It is really important for the commissioners to work very closely with the inspectors and technical engineers and so on who will carry out the post facto audits."

I am arguing that this is supervision of the agencies' work, and that the hon. and learned Gentleman's point would be stronger if it were purely about the commission itself.

Keir Starmer: I am grateful to have been reminded of Jo Cavan's evidence. The Solicitor General is right: there is a mixture of functions, and the oversight has to operate in quite a flexible way in relation to the different functions. However, this is a structural issue, and I therefore press amendment 741 to a vote.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 10.

Division No. 109]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	
Matheson, Christian	Stevens, Jo

NOES

Atkins, Victoria	Frazer, Lucy
Buckland, Robert	Hayes, rh Mr John
Burns, rh Sir Simon	Kirby, Simon
Davies, Byron	Stephenson, Andrew
Fernandes, Suella	Warman, Matt

Question accordingly negatived.

Keir Starmer: I beg to move amendment 735, in clause 194, page 148, line 36, leave out "Prime Minister" and insert "Lord Chancellor".

Amendments 735 to 739 would require that Judicial Commissioners are appointed by the Lord Chancellor on the recommendation of the Judicial Appointments Commission under the Constitutional Reform Act 2003.

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

Amendment 736, in clause 194, page 148, line 36, after "appoint", insert

"in accordance with the procedure set out in the Constitutional Reform Act 2003".

See the explanatory statement for amendment 735.

Amendment 740, in clause 194, page 149, line 4, at end insert—

"(2A) The Prime Minister may make an appointment under subsection (1) only following a recommendation by—

(a) the Judicial Appointments Commission;

(b) the Judicial Appointments Board of Scotland; or

(c) the Northern Ireland Judicial Appointments Commission."

Amendment 737, in clause 194, page 149, line 5, leave out subsection (3).

See the explanatory statement for amendment 735.

Amendment 738, in clause 194, page 149, line 12, leave out subsection (4).

See the explanatory statement for amendment 735.

Amendment 739, in clause 194, page 149, line 14, leave out subsection (5).

See the explanatory statement for amendment 735.

Keir Starmer: The amendments are fundamental and important, because one of the main features of the Bill is the role of the judicial commissioners and the role, therefore, of judges in the double lock. The Home Secretary made a great deal of introducing that judicial element when the Bill was published in draft form, and again when it came back before the House in its current form. The Government have repeatedly and understandably emphasised that point throughout the scrutiny process. The amendments are focused on the appointment of the judicial commissioners. The way in which senior judges are appointed in this country has evolved over time, but we now have a clear and agreed way that has gone through numerous processes and consultations, with numerous recommendations on how it should properly be done.

We welcome the fact that, following the pre-legislative scrutiny, the provisions in clause 194 have been amended, but it remains the case that the Prime Minister will appoint the judicial commissioners, which is most unusual. The change from the draft Bill is that the Prime Minister must now consult the Lord Chief Justice. That is a step in the right direction, but it is fundamental, under our unwritten constitution, that judges are appointed independently of the Executive and those in political positions, and are not appointed by the Prime Minister.

The step of requiring the Lord Chief Justice to be consulted does not go as far as the Joint Committee on the draft Bill wanted. It recommended that the Lord Chief Justice be responsible for appointing the commissioners, to "ensure public confidence". It was clear about how the separation of powers should operate in this important field. The Joint Committee also recommended:

"The Judicial Appointments Commission must also be consulted to ensure that the appointments procedure is fair and transparent."

It wanted a move away from the Prime Minister making the appointments to the Lord Chief Justice doing so, drawing on the Judicial Appointments Commission, which was set up to ensure the transparency and independence of the appointments regime.

In short, the Prime Minister should not be involved. The Interception of Communications Commissioner's Office agrees, stating in its evidence to the Joint Committee:

"It is inappropriate for the Judicial Commissioners to be appointed by the Prime Minister".

It, too, said there should be a role for the Judicial Appointments Commission. As I said, the Judicial Appointments Commission has evolved over time. It was set up to ensure the independence of the judiciary, by requiring vacancies to be advertised and published, with the criteria for appointment and so on.

The changes proposed in the amendments are ones of principle that are rooted in the separation of powers and in line with the view of Lords Constitution Committee on judicial appointments. That Committee has affirmed that judicial independence is a basic constitutional principle, and it found wide agreement among those that gave

evidence to it that the appointments process must be designed in such a way as to reinforce judicial independence and that judges should not be appointed through a political process.

The amendments are fundamental to the how the judicial commissioners are to be appointed. If there is to be public confidence in the double lock, judicial commissioners should be appointed independently, in accordance with the understanding and arrangements under our unwritten constitution.

Joanna Cherry: I support the amendments.

The Minister for Security (Mr John Hayes): It is a pleasure to serve under your chairmanship as ever, Mr Owen. It is important, as we consider this part of the Bill, that we test some of its provisions in the way the hon. and learned Gentleman has.

The Government take this part of the Bill very seriously. Along with the safeguards added earlier in the Bill, oversight plays an important part in making sure that we have the checks and balances that we all seek. In that respect, there is space for an informed debate about the balance that we are seeking to achieve, as the hon. and learned Gentleman suggests. The roles of the Executive and of the judiciary, which we have already begun to explore in the brief debate to which my hon. and learned Friend the Solicitor General contributed, are central to those considerations.

12 noon

The amendments would remove the Prime Minister's involvement in the appointment process and substitute it with a process by which the Lord Chancellor makes the appointments, following recommendations by the Judicial Appointments Commission. There are several problems with that. First, It would involve a different member of the Executive, and to involve the Lord Chancellor and not the Prime Minister raises questions of hierarchy—I put it no more strongly than that, but that is certainly of questionable merit. More importantly, I remind the Committee that in order for an individual to qualify as a judicial commissioner, they will have to be, or have been, a High Court judge, so they will have gone through the Judicial Appointments Commission process. I am not sure that they need to be put through it again. Hon. Members will remember that during the evidence session on 24 March I asked Lord Judge about that point specifically, because I was mindful that it was a matter of debate and mindful of what the Joint Committee had said about it. Lord Judge was very clear about.

Keir Starmer: I take the point that there is no point in people who have gone through the Judicial Appointments Commission process once going through it again. In fairness, we have put forward several options for the appointment process and, to be clear, I prefer the one in which, having consulted the Judicial Appointments Commission, the Lord Chief Justice, rather than the Lord Chancellor, makes appointments.

Mr Hayes: That is helpful, because the hon. and learned Gentleman has qualified the point that I was going to come on to make. The amendments could take the Lord Chief Justice out of the process altogether, and I am sure that the hon. and learned Gentleman would not want that—indeed, he has confirmed as much. However, there is also a point to be made about the practicalities and effectiveness of the system, which Lord Judge commented on when I questioned him on 24 March. I asked,

"in terms of the appointment of the judicial commissioners, would the Judicial Appointments Commission be a better place to appoint them, or do you rather like the model we have come up with?"

He said that

"I much prefer the model you have come up with",

and finished by saying:

"There is no point whatever in involving the Judicial Appointments Commission, ignoring the fact that it has got far too much to do anyway and not enough people to do the work."—[*Official Report, Investigatory Powers Public Bill Committee*, 24 March 2016; c. 73, Q237.]

I will not comment on the arrangements or resources of that body, but on a different occasion, when speaking in particular about the Prime Minister's role in the proposals, Lord Judge described that as a "perfectly sensible system."

It is therefore clear that there is a view that the arrangements being put in place are a reasonable balance between the Executive and the judiciary, and that changing them would not necessarily lead to greater effectiveness or practicality. The people being appointed will already been through Judicial Appointments Commission process, as the hon. and learned Gentleman generously said. It is also important that we are clear about lines of accountability and the character of independence. To an extent, that reflects the broader debate that my hon. and learned Friend the Solicitor General stimulated. It is important that there is separation between the roles of the people involved to avoid any sense of patronage, and that the Prime Minister continues to play a role, to affirm the significance of the Executive's engagement in everything that we are discussing in the Bill.

That is a much broader point. Although I do not want to go back into all of this, Committee members will be aware that the double lock that we have created is itself a compromise. On one hand, there is the position adopted by those who are sceptical about judicial involvement in the business of issuing warrants—the former Home Secretary Lord Reid, for example, and a number of Members of this House, including some from my own party. On the other, there are the recommendations of David Anderson, who is clear that in order to add more validation to the process and insulate it from challenge, it is important to create a role for the judiciary. Given that balance, which is a pretty finely tuned one, I am reluctant to take the Prime Minister out of the business of appointments.

Joanna Cherry: I hear what the Minister is saying about the Government's keenness to retain the involvement of the Prime Minister. Could his concerns be met and a compromise reached via amendment 740, which the Scottish National party support? It would retain the Prime Minister's involvement and provide that he or she would make an appointment only following a recommendation by either the Judicial Appointments Commission, the Judicial Appointments Board for Scotland or the Northern Ireland Judicial Appointments Commission. Of course, as the Minister has reminded

[Joanna Cherry]

us, those bodies would be appointing from an existing pool of appointed judges, so it would not take up too much of their time; they would be considering people with whom they were already familiar. Is that the way forward? It is important to ensure that the Judicial Appointments Board for Scotland is involved, if not the Scottish Ministers, given the Scottish Ministers' current responsibility for appointments to the Office of Surveillance Commissioners.

Mr Hayes: The hon. and learned Lady is right to interpellate in that way. There is certainly a good argument to be made for what she has just described, and I am not insensitive to it. However, I challenge more fundamentally the suggestion that the Prime Minister's engagement—and, further, the Prime Minister's engagement in the way that we have set out, rather than in the way that she has just described—would in some way be injurious to the independence that is critical for those involved in the oversight process.

Joanna Cherry: It will not be, provided that he or she appoints on the recommendation of the independent bodies. That is what we do at the moment for judges, both north and south of the border. In Scotland, the First Minister appoints judges to the supreme courts of Scotland on the recommendation of the Judicial Appointments Board for Scotland. In England and Wales, as I understand it—I am willing to be corrected—the Prime Minister makes his appointments on the recommendation of the Judicial Appointments Commission and the Lord Chancellor, but presumably they have gone through an independent judicial scrutiny process. Amendment 740 would simply replicate those procedures for the judicial commissioners. I do not understand what possible objection there could be.

Mr Hayes: The hon. and learned Lady ascribes to me a lack of willingness to hear the argument, which I have made clear is not a feature of my approach to the provisions, and a certain stubbornness. Far be it from anyone to accuse me of that. I am not insensitive to that argument, as I have emphasised.

Keir Starmer *rose—*

Mr Hayes: I will give way to the hon. and learned Gentleman in a second, but I draw attention again to the Joint Committee's view on the matter, because he quoted it. I think that we are reaching a common view on this; we are certainly journeying towards accord. The Joint Committee said:

> "We do not think that appointment by the Prime Minister would in reality have any impact on the independence of the Investigatory Powers Commissioner and Judicial Commissioners. In modern times, our senior judges have had an unimpeachable record of independence from the executive and we believe any senior judge appointed to these roles would make his or her decisions unaffected by the manner of appointment."

In the witness sessions, former Home Secretaries made it clear that in their direct experience of similar matters, they had seen no sign of the judiciary being intimidated to the point of subservience when faced with the views of the Executive.

There is an argument for fine-tuning, and that is almost where the hon. and learned Member for Edinburgh South West is heading. There are a range of amendments in this group, and in a sense some are more radical than others, as the hon. and learned Member for Holborn and St Pancras has acknowledged. He and the hon. and learned Lady have placed some emphasis on, if I may put it this way, one or two of the more modest changes that have been suggested, and that is not falling on deaf ears on the Government Benches. However, I resist the fundamentalist view—not represented in this case, I think—that somehow the Prime Minister's involvement is undesirable because it compromises judicial independence.

Christian Matheson (City of Chester) (Lab): Will the Minister give way?

The Solicitor General: Will my right hon. Friend give way?

Mr Hayes: I shall give way to the hon. Member for City of Chester and then, purely in a bipartisan way—perhaps I should say tripartisan—I will give way to the Solicitor General.

Christian Matheson: I will respond in a bipartisan way with an initial confession that I know little about judicial appointments. I wonder whether there are any others that have to go through the Prime Minister's office. Perhaps the Minister can confirm that.

The appearance of things is perhaps a problem. If the Prime Minister is appointing the Secretary of State—let us say, for example, the Home Secretary—and the judges who comprise the second part of that double lock, it may appear that there is an apex, or apogee, leading to one place, rather than the two locks. It might be better for the process if there were an appearance of independence from those two sides.

Mr Hayes: Again, that is an argument about fine tuning. I do not say that with any pejorative implication. It is reasonable to say that the Prime Minister's engagement has to be of a kind that does not either mean, or arguably, perhaps, give the appearance of, a lack of independence—I think that is what the hon. Gentleman is suggesting. Thus we end with the idea of the hon. and learned Member for Edinburgh South West about changing the chronology, or perhaps rather more than that, actually altering the process by which the Prime Minister is involved.

On the factual point that the hon. Gentleman raised about the Prime Minister's engagement, of course the current commissioners are appointed on that basis, and there is no suggestion that their independence has been compromised.

Then we come to the issue of deployment, and I want to talk about the difference between deployment, in the way that the hon. and learned Lady is no doubt about to prompt me to.

Joanna Cherry: Does the Minister agree that, although there may be no suggestion that the current commissioners' independence has been compromised, the appearance of independence is important for public confidence?

Mr Hayes: Imitation is the best form of flattery and I have already said that, so I take that contribution not as mere flattery but as a compliment. As the hon. and learned Lady will know, there is a big difference between being flattered and being complimented.

I do think that appearance matters. I do not want to go too far here, because the Solicitor General will have his views, and he is a man of fiercely independent mind on all these matters and speaks with great authority, which is why I am about to give way to him. However, I am not minded to be dogmatic, notwithstanding some of the fundamentals, which I think are important.

The Solicitor General: Having had experience of the JAC process myself, albeit for a junior judicial office, I think that the point is well made about the lack of necessity for renewal of approval by the JAC. However, this is not about that; it is about deployment of a judge to a particular office overseeing an Executive function. That is different from the appointment stage. This is deployment, which is why the Prime Minister should be involved.

Mr Hayes: Yes, and that is the point I was about to come on to: my hon. and learned Friend, with all his usual sharpness of mind, has anticipated what I was going to say about deployment being an organisational issue too, it being about the allocation of resource, and gauging such things as manpower and skills. Those are, in the terms he described, pretty important to the existing arrangements. One would hesitate to drive a coach and horses through that. I am not sure that that is intended, but there are risks associated with excessive radicalism as there are always risks associated with radicalism—I am just as Tory as my hon. and learned Friend.

12.15 pm

Keir Starmer: The Solicitor General actually made a powerful case in favour of the amendments with his intervention, and I am reflecting on that. This is about choosing from a pool of judges who have all the necessary characteristics and competencies and deciding which of them will oversee the Secretary of State. That is a very powerful argument for saying that it should not be the Prime Minister for that deployment. I suppose what I am saying is this: what, over and above the other qualities that they have already proven, is needed in this case? There is the expertise; there is the knowledge of the area. Those are all matters that the Judicial Appointments Commission or the Lord Chief Justice would have strong views on, and probably better views than the Prime Minister, because they are closer to the judges on a day-to-day basis. What is special about this? It is a decision about which of these high-quality judges, with all the competencies, will oversee the Secretary of State. That is why the decision should not be with the Prime Minister.

Mr Hayes: I understand the point. The hon. and learned Gentleman will know that the Lord Chief Justice cannot appoint, because of creating what I described as patronage, but the Solicitor General's point is that it is important that he can be involved, looking at deployment, for the reasons that we have both given.

In truth—I think it is fair to say this—the exact details of the appointment process, which the hon. and learned Gentleman seeks to explore further, are still under consideration. It is very important that all stakeholders are involved in designing an appropriate process. I am not sure that we would want to detail that in a Bill, as the hon. and learned Gentleman will understand, because this is a matter of judicial operational decisions as much as anything else.

I think we are getting to the place—perhaps in a slightly meandering way, but it is fairly late in our consideration of the Bill and a little opportunity to meander is always welcome, or perhaps not, as I can tell from your stern glance, Mr Owen—where we all agree that a balance needs to be struck between Executive involvement and judicial involvement. I think we are now getting to a place, notwithstanding that the amendments do not actually say this in the way they are grouped, where we agree that the Prime Minister needs to be involved to cement or secure that relationship between the Executive and the judiciary, and we are coming to a synthesis about the respective roles of some of the players.

At this juncture, having meandered, I can tell that you want me to draw my remarks to a swift conclusion, Mr Owen.

Lucy Frazer (South East Cambridgeshire) (Con) Will my right hon. Friend the Minister give way?

Mr Hayes: It will not be as swift as I imagined.

Lucy Frazer: I have a residual concern, having been through a process, albeit not a judicial one, that was extremely lengthy and costly—appointment as a silk. I am aware of colleagues who are sometimes put off the judicial process for those two reasons, and I am slightly concerned, not necessarily about the appointer but about the process. Will members of the judiciary be willing to put themselves through a lengthy and costly process when they are already in that position?

Mr Hayes: My hon. and learned Friend makes a very good point and, at an earlier stage of consideration of the Bill, that issue was raised. Will there be enough of these people? Will they want to do the job? This is an important new responsibility. It can hardly be argued, as some outside this place and perhaps even some in this place have tried to do, that the Home Secretary cannot cope with the numbers of warrants, and then simultaneously say that these people will rush forward to consider these matters in the heat of the moment and the dead of night. My hon. and learned Friend is right to say that there is an issue about people being willing to play this part in the double lock, and I would not want in any way to be complacent about that. It is important that the system is sufficiently streamlined, but rigorous, to ensure that people can practically do what we ask of them—she is right to make that point.

The difference between us now seems to be probably a slightly more refined version of what the amendments suggest. The difference now boils down to when and how the Prime Minister is involved, and on what basis he is involved in respect to the advice that he is given. We have already amended the Bill to make it clear that

[Mr John Hayes]

the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland will be consulted, as the hon. and learned Member for Edinburgh South West said. Therefore, there has been some movement in the direction of those who felt that the measure needed to be more balanced; but, the hon. and learned Lady and, I think, the hon. and learned Member for Holborn and St Pancras are now saying that we need to recalibrate it one more time. We will not accept the amendments at this juncture, but I hope that both the content and the tone of what I have said will have suggested to all concerned that we are not unresponsive to these matters of detail and no doubt there will be further opportunity to discuss them.

Keir Starmer: I think this has been an occasion on which there has been a willingness on both sides to adapt, or look again at, their positions. Having listened to the debate, I think there is a powerful argument for saying that the Judicial Appointments Commission and its full process should not apply. One reason is that a judge has been through it and there is no need to retest their competencies. These are going to be very senior members of the judiciary and, almost certainly, from the smaller group within that who have experience handling the sort of material they need to handle to carry out the function of the judicial commissioner. That is going to be a small group of judges, and probably those who have sat on the Special Immigration Appeals Commission and dealt with other similar types of procedures. This is a question about which of those judges, who have all those competencies and experience, should oversee some of the functions of the Secretary of State. It is troubling, from an appearance point of view if nothing else, if the Prime Minister acts by consulting only the Lord Chief Justice.

Mr Hayes: Will the hon. and learned Gentleman give way?

Keir Starmer: In a moment I will, but I shall just finish my point. I know the Lord Chief Justice and I can imagine how that consultation would go. He would make a very powerful case and would not easily be dissuaded from his candidate.

I was going to press the amendment, but I am now not going to because of our discussion. On reflection, I wonder whether a possible approach would be for the Prime Minister to make an appointment only following a recommendation by those listed under subsection (3)(a) to (e). That would mean that the Lord Chief Justice would recommend the judge that they consider to have the skills and experience to do the particular job. The Lord Chief Justice would know about that and, with respect, the Prime Minister would not know about it in the same detail. The Prime Minister would, therefore, not be able to make an appointment that had not been recommended by the Lord Chief Justice and step outside that, but on the other hand, the Prime Minister would not be forced to make an appointment. That is because it is a recommendation, not a requirement, and so in a particularly contentious case the Prime Minister may say no.

There is an issue of appearance. These judges will have made decisions at the highest level, both for and against the Government. I can see how there would then be the temptation for some to look at the track record of a particular judge and say, "I can see why it is them." Doing things in this way—I readily accept that this suggestion is not one of the amendments—would mean that the Lord Chief Justice had a more powerful role. In the end, it would be a recommendation role and there would be no appointment without a recommendation from the Lord Chief Justice, but they would not mandate the decision maker, which would remain the Prime Minister.

I simply put that idea forward. It is not one of the amendments. I will not press the amendments because at this stage further consideration probably needs to be given to exactly how the process will operate, if it is to be changed at all. I will now give way and I am sorry for not having done so sooner.

Mr Hayes: The difference between us is becoming even narrower. It seems that we are speaking about what the hon. and learned Gentleman has described as appearance. In saying that, I do not want to minimise the importance of this issue, but he will know that Lord Judge, when challenged on the issue of compromising independence, was clear. He said:

"There is no danger whatever."—[Official Report, Investigatory Powers Public Bill Committee, 24 March 2016; c. 74, Q236.]

The reality is that independence would not be compromised, but I understand the hon. and learned Gentleman's point on how these things look, and I will consider that in the spirit he suggested it.

Keir Starmer: I am grateful to the Minister. In the circumstances, I will not press the amendments. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 194 ordered to stand part of the Bill.

Clause 195

Terms and conditions of appointment

Joanna Cherry: I beg to move amendment 745, in clause 195, page 149, line 34, leave out "three" and insert "six".

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

Amendment 746, in clause 195, page 149, line 36, after "may", insert "not".

Amendment 860, in clause 195, page 150, line 18, at end insert—

"(e) the Commissioner is unfit to hold out office by reason of inability, neglect of duty or misbehaviour."

Amendment 861, in clause 195, page 150, line 18, at end insert—

"(6) Before removing a Judicial Commissioner the Prime Minister must consult—

(a) the Lord Chief Justice of England and Wales,

(b) the Lord President of the Court of Session,

(c) the Lord Chief Justice of Northern Ireland,

(d) the Scottish Ministers, and

(e) the First Minister and Deputy First Minister in Northern Ireland."

Joanna Cherry: It is a pleasure to serve under your chairmanship, Mr Owen. Clause 195 deals with the terms and conditions of appointment for judicial commissioners, and amendments 745 and 746 address the term of the appointment. The Bill provides for the judicial commissioners to be appointed for short terms of three years, subject to a potential rolling renewal. The amendments would extend the length of term served to six years and remove the prospect of renewal. The thinking behind that is that secure judicial tenure is designed and recognised as one of the key safeguards of judicial independence.

The provision for the judicial commissioners to be appointed by the Prime Minister and for their terms to be short and subject to renewal only at the discretion of the Prime Minister could pose a significant barrier to the commissioners' functional or apparent independence. Three years is a very short term, and a judicial commissioner wishing to extend his or her term may be influenced in their behaviour by a desire to please the current Administration. In saying that, I take fully on board the fact that an extremely distinguished English judge, Lord Judge, has said that that is unlikely to happen, but he cannot speak for other judges or the future, just as this Government cannot speak for future Governments. That is why judicial independence is so important.

We may feel complacent about judicial independence at present. I do not mean to be pejorative about the English system, but I like to think we have proper judicial independence in Scotland—as I said earlier, judges are appointed by Her Majesty the Queen on the recommendation of the First Minister after they have consulted the Lord President and after the Judicial Appointments Board for Scotland has made a recommendation. We have judicial independence under the current system in Scotland, but those judges are of course appointed for an indefinite term, until such time as they have to retire. Under the Bill, the plan is to have judges appointed by the Prime Minister. I have heard what the Government say, but without the further safeguards we have just been discussing, judges will be appointed for very short periods of three years, at which time their renewal will come up. If the amendments are made, the term of appointment will be six years, which is probably quite long enough to be doing this sort of important and taxing work, and there will be no renewal thereafter.

The six-year terms would allow the commissioners to develop their expertise and avoid any concerns about stagnation. Importantly, six-year terms would ensure that the judicial commissioners' tenure does not undermine their crucial independence from the Government, and the perception of their independence from the Government and from the officers, agencies and public bodies they are monitoring.

Victoria Atkins (Louth and Horncastle) (Con): It is a pleasure to serve under your chairmanship, Mr Owen.

The point of the three-year term is surely that the Government are hoping to recruit High Court judges at the very top of their game—High Court judges who have a long career behind them and ahead of them. The idea of the three years is to give them the choice to pop out of the High Court or the Court of Appeal and do their three years, and then if they wish to return to service in the courts, they have been out for only three years. It is an attempt to encourage judges to apply, rather than to count against it.

12.30 pm

Joanna Cherry: I hear what the hon. Lady is saying. Initially, I thought she was going to suggest that it would be for judges who were at the end of their judicial careers and would be coming up against retirement anyway. Her point gives me a difficulty with the six-year amendment, but not with the non-renewal amendment. If judicial commissioners are appointed only for three years with a renewal at the end, my fear pertains in so far as they would be there for a very short period of time. They would probably be anxious to stay on for longer, and could well tailor their decision making to guarantee a longer stay. That may not be a concern at present, as I have taken trouble to say, but that does not mean that it could not be a concern for the future.

The oversight of some of the most intrusive and far-reaching powers of the state is important work. Therefore, in tailoring the provisions for the appointment of the judges, we should look not so much to what might be convenient for judges, but to what is necessary to secure proper independence in the eyes of the public. That is about as much as I can say about amendments 745 and 746.

I am pleased to say that amendments 860 and 861 were suggested to the Scottish National party by the Law Society of Scotland, and we have decided to table them because we think they would improve the Bill. They deal with the circumstances in which a judicial commissioner may be removed from office. At present, clause 195 allows for the removal of a judicial commissioner who is bankrupt, disqualified as a company director or convicted of an offence. The clause does not permit the removal of the commissioner for being unfit by reason of inability, neglect of duty or misbehaviour. It is important, in the eyes of the Law Society of Scotland—I endorse its views—that the possibilities of unfitness for office by reason of inability, neglect of duty or misbehaviour are provided for in the Bill.

Very regrettably, it sometimes happens in Scotland—this has happened in my lifetime—that a judge, albeit of the lower courts, has to be removed for reasons of inability, neglect of duty or misbehaviour. I realise that we are dealing with judges at the very senior end of the spectrum, and I very much hope that such steps would never be necessary, but there is no harm in providing for such steps to be taken. Would it not be a very serious matter if a judicial commissioner dealing with the oversight of such far-reaching and intrusive laws were unfit for office by reason of his or her inability, neglect of duty or misbehaviour? We would want to be rid of them, in the best interests of everybody. I commend that aspect of the Law Society of Scotland's amendments.

If amendment 861 were made, before removing a judicial commissioner the Prime Minister would be required to consult the Lord Chief Justice in England and Wales, the Lord President of the Court of Session in Scotland, the Lord Chief Justice of Northern Ireland, the Scottish Ministers and the First Minister and Deputy

[Joanna Cherry]

First Minister in Northern Ireland. That additional safeguard of consultation with the heads of the UK jurisdictional judiciaries and the devolved Administrations would provide a check on unjustified attempts to remove the judicial commissioner.

The purpose of the amendments is to prevent unjustified attempts to remove the judicial commissioners and to add grounds for their removal if they were unfit for office by reason of inability, neglect of duty or misbehaviour. I am interested to hear what the Solicitor General has to say about the amendments.

The Solicitor General: Once again, the hon and learned Lady puts her argument succinctly and clearly. I am sure she will forgive me for characterising her as a guardian of independence of the judiciary. Although that is an admirable position to take, I do not think it is necessary in this instance.

I will deal first with the length of appointment. My hon. Friend the Member for Louth and Horncastle put it very well and I do not need to improve upon the argument. We need a relatively significant term—three years—to attract serving High Court judges, but not a term of such length that it would be difficult for them to return to High Court work in the normal course of events. That is why we think three years is an appropriate period. For retired High Court judges, we have to remember the constraints that we are under. A three-year period, with that renewal term, strikes the correct balance. The renewal term is there because this will be technical role, and knowledge and expertise will be developed by the commissioners. Allowing a reappointment will retain that expertise in a balanced and fair way. A six-year period would just be too long, bearing in mind the quality that we want to attract to fill these important and sensitive posts.

I will deal with the question of unfitness. I am sympathetic to the intention behind the amendments, but it might be argued that the proposed wording gave too much discretion to the Prime Minister to remove a commissioner. The conditions listed in clause 195 for removal from office are precisely the same as those for which a High Court judge can be removed from post. Since having held the position of a High Court judge is the qualification for office as a judicial commissioner, the reasons for removal from the two posts should be precisely the same. If a commissioner is demonstrably unfit to perform the role, he or she can still be removed from post if the Prime Minister and, importantly, both Houses of Parliament agree to the removal. That is an admirable check and balance, which deals with the point of competence and fitness to which the hon. and learned Lady quite properly points us.

On the need to consult the judiciary and others concerned in the appointment of commissioners before removing them, I do not think that is necessary because there are only two ways in which a commissioner could be removed from office: first, because the individual had failed to meet the standards expected of a High Court judge; and secondly, via the mechanism of Prime Minister and Parliament agreeing that that person is no longer fit. Those are adequate safeguards that stop the mischief of a commissioner being removed from post on the whim of the Prime Minister alone. I strongly reassure the hon. and learned Lady that there is absolutely no power for the Government—any Government—to remove a judicial commissioner just because they disagree with that commissioner's views. I can say a Government would not do that, but I am able to go further and say that, on the basis of this framework, the Government simply cannot do that. That is absolutely right and fulfils the objectives that the hon. and learned Lady wishes to achieve through her amendment. On that basis, I urge her to withdraw it.

Joanna Cherry: I have listed carefully to the Solicitor General and the hon. Member for Louth and Horncastle and I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 195 ordered to stand part of the Bill.

Clause 196

Main oversight functions

Joanna Cherry: I beg to move amendment 752, in clause 196, page 150, line 43, at end insert

"and under section 217 (technical capability notices)"

The Chair: With this it will be convenient to discuss amendment 747, in clause 196, page 151, line 19, leave out subsection (4)(a)

Joanna Cherry: The clause provides for oversight functions. The purpose of the amendments—amendment 752 in particular—is to provide for consistent oversight functions.

Under clause 218, obligations to remove electronic protections, which we will come to under part 9, or encryption can be issued either as a national security notice or, more likely, as a technical capability notice by the Secretary of State. As drafted, the Bill does not require judicial authorisation or a test of necessity or proportionality for either a national security notice or a technical capability notice. I argue that the powers are so far-ranging that they should be subject to oversight by the proposed new oversight body. Amendment 752 would make it clear that the commissioners have responsibility for oversight of national security notices and technical capability notices.

Amendment 747 would remove clause 196(4)(a). The Bill provides for the Secretary of State to modify the functions of the Investigatory Powers Commissioner and the judicial commissioners by secondary legislation subject to the affirmative procedure. The amendment would remove that power. I acknowledge that the Joint Committee had every confidence that such a power would only be exercised responsibly by the Secretary of State, but in the light of the commissioner's important function holding Ministers and public agencies to account, I consider that granting Ministers a delegated power to alter the commissioner's powers is inappropriate. One way of removing that power would be to leave out subsection (4)(a); another would be to take out clause 205 completely, but we will come to that later.

Suella Fernandes (Fareham) (Con): I rise to speak in favour of clause 196 as drafted and against the amendments. It is an honour to serve under your chairmanship, Mr Owen.

Part 8 and clause 196 cover the oversight functions for the Investigatory Powers Commissioner and the judicial commissioners. Clause 196 sets out the functions of and legal basis for oversight relating to the interception of communications, the acquisition or retention of communications data and secondary data, and equipment interference. That review power includes audit, inspection and investigation of the exercise of the powers; it also relates to the use of data acquired, and taken with subsections (2) and (3) it extends to cover bulk personal datasets, section 216 notices and functions under section 80 of the Serious Crime Act 2015. That constitutes not only wide-ranging powers of oversight, but duties, which means there will be constant watch on how the powers are implemented on the ground, which is vital to ensuring public trust.

12.45 pm

As a member of the Joint Committee, with other members of this Committee, I heard evidence from the commissioners. We heard evidence from Sir Mark Waller, who is the Intelligence Services Commissioner. He set out how the powers and functions are carried out. He said:

"I see the agencies taking lawfulness very seriously and by taking authorisations very seriously, and I see the same among Ministers and in departments."

That powerful and independent view of how these functions are carried out should not be dismissed.

Lord Judge, the chief surveillance commissioner, Clare Ringshaw-Dowle, the chief surveillance inspector, and Sir Stanley Burnton, the Interception of Communications Commissioner, all gave very powerful evidence. Lord Judge set out in detail the authorisation inherent in the role, as well as the detail behind the review. He described to the Joint Committee the audit function in the following way:

"Speaking only for my own team, every authorisation is made before any…intrusion takes place. The papers come to us… A judge commissioner looks at them. He decides whether necessity is established and whether it is proportionate, which involves looking at the nature of the offence. You would not authorise intrusive surveillance for somebody who was stealing a tin of salmon from a supermarket. You are looking at sentences starting in the three to four-year range and upwards. He checks for proportionality: is this a reasonable way to go about sorting this problem out? He authorises or does not, or says, 'I want more information'. Then the process goes through.

"At the other end of the process, every year my inspectors go in and conduct an inspection of every single police force in the country, Her Majesty's Revenue & Customs and so on—all the law enforcement bodies. They conduct random analyses inspections of all the things for which the body is responsible, such as encryption. There are all sorts of different things that come under the…surveillance. They then write a report. The report is written to me. It goes to the chief constable. I write my own report to the chief constable. Sometimes I say, 'This is being…well handled. Your authorising officers are well trained. The paperwork is very good. The explanations are excellent', and so on and so forth. I have just written a very rude letter saying, 'This is not good enough. You are not complying. There are too many breaches. There is too much inefficiency in this part or that part', or whatever it is."

Sir Stanley Burnton said:

"We carry out an audit function…you cannot carry out an audit function properly unless you have some understanding of the business you are auditing."

I believe that we have clear evidence of the challenge, the independence, the high level of scrutiny that our judiciary currently applies and that is indeed protected and expanded in the Bill. We have been given an insight into how the professionals grapple with the conflicts and issues, which is all welcome. The judgment made in looking at the tension between privacy and security was set out by Lord Judge.

"This is what, if you are a former judge, you have been doing for however many years you have been doing it. You have been making decisions like this day in, day out. The questions are very simple: is this necessary? Where is the evidence? Yes, on this evidence, it is necessary. Is this proportionate? I must bear this in mind and that in mind, and that in mind. On this evidence, that is proportionate. Hang on, there is a bit of this that might involve the suspect having had conversations with his…doctor. You have to be careful there. I mentioned earlier an intrusive surveillance into the family car that is being driven by the wife. Nobody suspects her of anything, so you cannot have that; it is not proportionate… You are making a judicial judgment, which is what you have spent your whole career doing."

There we have a clear indication of the independence and the challenge. That is why I support the clause, which sets out and preserves the challenge and those oversight functions. The amendments go too far and would allow the judiciary to encroach too much into the realm of Executive decision making. To remove important considerations, such as those the later amendments would remove, would weaken the fair balance that is currently struck between security and privacy.

There is ample evidence that the oversight functions reflect the theme of scrutiny, accountability and safeguards that runs through the Bill. Notwithstanding the fact that some things will need to remain secret, without any impartial challenge the system will be opaque and its robustness weakened. I welcome clause 196, the improvement of the role of the commissioner, and the oversight functions in the Bill.

Mr Hayes: I can add little to the contribution of my hon. Friend, who has articulated these things better than I could. Nevertheless, I should emphasise two points. The hon. and learned Member for Edinburgh South West is right to say that the clause provides for IPC oversight of technical capability notices in subsection (1), and it lists the main oversight functions that should be undertaken. I accept that she is making quite a refined case, but my argument is that the clause already provides the oversight she seeks, because the notices are

"of statutory functions relating to"

the activities. That is a wide-ranging role for the commissioner, with absolutely proper capacity to probe, through oversight of public authorities, the necessary powers and an expansive remit to consider all such matters.

Amendment 747 would give the commissioner the function of keeping under review, including by way of audit, inspection and investigation, the exercise of the functions by Ministers. I am still less persuaded of that. It is a less refined and pretty basic argument about the relative functions of the Executive and the commissioner. I do not want to lecture the Committee on the importance of the separation of powers—we have already had an interesting discussion about that—but it is absolutely

[Mr John Hayes]

right that the process of scrutiny and review should be carried out by the legislature, as my hon. Friend the Member for Fareham implied. By the way, that includes the Scottish Parliament, which will of course have a role, alongside the Welsh and Northern Irish Assemblies. I consider that role to be of the utmost importance, and I would not want in any way to limit or inhibit the capacity for reflection and review with such an amendment.

As well as all that, we doubt that the amendment would provide for appropriate allocation of the skill and resources of the commissioner, whose key function is to provide oversight of the powers as defined in the Bill. I can see what the hon. and learned Lady is getting at—as I say, her amendments are at least in part an attempt to refine what is before us—but I do not feel that I am any more persuaded of their virtue than is my hon. Friend. On that basis, I invite her to withdraw the amendment.

Joanna Cherry: To clarify, we are currently dealing just with amendments 752 and 747; I have not yet made my submissions on the other amendments. I am not prepared to withdraw the amendments and would like to press them to a Division.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 10.

Division No. 110]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	
Matheson, Christian	Stevens, Jo

NOES

Atkins, Victoria	Frazer, Lucy
Buckland, Robert	Hayes, rh Mr John
Burns, rh Sir Simon	Kirby, Simon
Davies, Byron	Stephenson, Andrew
Fernandes, Suella	Warman, Matt

Question accordingly negatived.

Amendment proposed: 747, in clause 196, page 151, line 19, leave out subsection (4)(a)—*(Joanna Cherry.)*

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 10.

Division No. 111]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	
Matheson, Christian	Stevens, Jo

NOES

Atkins, Victoria	Frazer, Lucy
Buckland, Robert	Hayes, rh Mr John
Burns, rh Sir Simon	Kirby, Simon
Davies, Byron	Stephenson, Andrew
Fernandes, Suella	Warman, Matt

Question accordingly negatived.

Joanna Cherry: I beg to move amendment 748, in clause 196, page 151, line 42, leave out from "must" to end of line 44 and insert

"have due regard to the public interest in avoiding acts prejudicial to".

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

Amendment 750, in clause 196, page 151, line 47, leave out subsection (c) and insert—

"(c) privacy and the integrity of personal data; and

(d) the security and integrity of communications systems and networks."

Amendment 751, in clause 196, page 151, line 48, leave out subsections (6) and (7).

Joanna Cherry: The hon. Member for Fareham and the Minister have already anticipated what I am going to say in support of the amendments, so I will try to be brief. The Bill requires the Investigatory Powers Commissioner and the other judicial commissioners to prioritise

"national security, the prevention or detection of serious crime…the economic well-being of the United Kingdom"

above all other considerations in the exercise of their functions. It also imposes a particular duty not to

"jeopardise the success of an intelligence or security operation or a law enforcement operation…or unduly impede the operational effectiveness of an intelligence service, a police force…or Her Majesty's forces."

The amendments would create a "due regard" duty for judicial commissioners to exercise their functions in a manner that considers the range of important public interests that their oversight function is designed to preserve, including the protection of individual privacy,

"the integrity of personal data; and the security and integrity of communications systems and networks."

Amendment 750 is consistent with other amendments in that it would remove the reference to

"the economic well-being of the United Kingdom."

Amendment 751 would remove the exceptionally broad particular duty to refrain from impeding the work of the agencies, the police or the armed forces.

We have already had lengthy submissions on the issue of the economic wellbeing of the United Kingdom. On the "due regard" issue, the response from the hon. Member for Fareham and the Minister was that clause 196 is adequate as it stands, because we have heard evidence from a number of people involved in the system that everything is done properly and above board.

In these Houses yesterday, as a result of the second inquest into the Hillsborough tragedy, we had a classic example of it coming to light that the establishment and the state had not performed their duties properly. Sometimes the state and the establishment do not perform their duties properly; sometimes things that are not specifically laid down are not done properly. To take the Hillsborough example, until we had article 2 of the European convention on human rights and the particular duty to involve the family and next of kin in inquests, we would not have had what the Home Secretary read out to us yesterday, the detailed questions for the jury and the detailed answers that the jury members had to give. They were

the result of a specific requirement to involve and respect the wishes of the next of kin, and of duties under article 2.

1 pm

We should put into the Bill the requirement for the commissioners to have due regard to the protection of individual privacy, the integrity of personal data, and the security and integrity of communications systems and networks. There is a risk that, notwithstanding the fact that we are told the commissioners are performing their functions while taking such issues into account, they would not do so in future unless specifically mandated to do so. What possible harm can there be in spelling out that there should be due regard to those matters? If the commissioners are already taking them into account, what harm is there in spelling them out? It would certainly ensure that they would not fail to take them into regard in future.

The House has the opportunity to debate a Bill that seeks to put all the powers and safeguards on a comprehensive statutory footing, so why not take the opportunity to spell out the protection of the individual privacy and integrity of the personal data of our constituents, and the security and integrity of the communications systems and networks that serve our constituents? What possible harm can there be in spelling that out? The downside of not doing so is that it is possible in future that it will be overlooked. If the Government are opposing the amendment, I want to hear from them what possible harm it can do to spell the duty out?

Mr Hayes: Disraeli said that a precedent embalms a principle, and the amendment is certainly not unprecedented, since we are once again considering the issue of economic wellbeing, as we have done with some frequency. Familiarity is almost always desirable, but I am not sure that the same can be said of repetition, which can often lead to tedium, so I will not repeat the argument about that. Let me therefore deal with the other amendments.

Amendment 748 has a probably unintended consequence. At the moment, judicial commissioners must—I use that word advisedly—not act in a way that they consider prejudicial to the public interest. The amendment, perversely, reduces that, so that they should have "due regard" to the public interest. It is a weakening of the public interest. I am not sure that that was the intention, but it is certainly the consequence of the amendment, which can be dismissed accordingly.

That leaves me with the point that the hon. and learned Lady made about privacy and the integrity of personal data. Proust said—he was speaking of prejudices, but this could be applied here—that at their "moment of novelty…fashion" lends things a "fragile grace." On first acquaintance the amendment has such grace, but on closer examination the fragility becomes evident, because this is not by any means the best place in the Bill to advance that defence of privacy. A better argument, championed by the hon. and learned Member for Holborn and St Pancras, but supported by the hon. and learned Lady, would be to consider privacy at the early part of the Bill, which might then have ramifications for the whole of the rest of the Bill if an appropriate clause were constructed.

I have argued that privacy runs through the Bill and that it is an intrinsic part of the connection—the harmonious union that we seek to create in this legislation—between defence of personal interest and the capabilities of those missioned to keep us safe. The hon. and learned Gentleman put the case, right at the outset, that there was an argument for something more fundamental, which explained that relationship more explicitly through some clause. I put it to the hon. and learned Lady that that would be a much better place.

Keir Starmer *rose—*

Mr Hayes: I will give way to the hon. and learned Gentleman, because I have cited him and courtesy obliges me to give way.

Keir Starmer: I am grateful to the Minister for giving way. I remind the Committee that the way I saw it was that there should be some overarching clause that would apply throughout the Bill, and thus to this clause and all others.

Mr Hayes: That is exactly the point I was making. Again, I have no doubts about the hon. and learned Lady's noble intentions, but I do not think that this is a good place to do what she seeks to do.

Joanna Cherry: I can reassure the Minister that the SNP and the Labour party are jointly working at present to produce an amendment later today with an overarching privacy clause for the Bill, which would be a new clause to be debated next week. However, I have to say that, given the Government's attitude to date in relation to most of the amendments that we have tabled, I have no confidence that that new clause will be accepted, so I intend to push press this amendment to a Division.

Mr Hayes: I am a little hurt, frankly. I regard the caricature that the hon. and learned Lady has painted of my approach to all of these considerations as—I would not say insulting—hurtful. Far from the stony-faced zealot that I think she seeks to portray me as, I am the very model of this listening Government.

Peter Kyle (Hove) (Lab): The Minister demonstrates a listening Government in action by giving way to me and I am extremely grateful to him for doing so. With regard to clause 196(6), which would be removed by the amendment, Sir Stanley Burnton, the expert witness, said:

"We wonder what the function of clause 196(6) is. It is either telling a judge the obvious or it is a big stick to wave at the judge, to say, 'You have to approve this because if you don't, you'll be jeopardising the success of an intelligence operation.'"—[*Official Report, Investigatory Powers Public Bill Committee,* 24 March 2016; c. 74.]

Would the Minister care to comment on that point?

Mr Hayes: Now the Committee is getting exciting; it often happens, as one gets deep into consideration. I must say that the hon. Gentleman—unsurprisingly, given his reputation, but in a most welcome way—has illustrated a diligence in the consideration of the detail of this measure, which does him great credit.

[Mr John Hayes]

However, having been nice about the hon. Gentleman, now let me be less nice. The hon. and learned Lady wants to weaken public interest; he wants to take out a whole chunk of the Bill—

Peter Kyle: The witness did.

The Chair: Order.

Mr Hayes: The hon. Gentleman wants to take out a part of the Bill that says that, in the exercise of their function, the judicial commissioner should not

"compromise the safety or security of those involved".

Well, of course they should not "compromise the safety" of security personnel. The hon. Gentleman may say that that is self-evident, but, my goodness, if we took out everything that was self-evident we would have a Bill half as long as it is. The self-evident is sometimes an important part of guaranteeing all those things that we might, with good will, take for granted. That is the very nature of legislation, as the Solicitor General knows very well indeed.

The Solicitor General: I take on board what the hon. Member for Hove said, but we are talking about the oversight function. I reassure him that it is not about the exercise of the judicial discretion in approving warrants. It is about the oversight part, and I hope that reassures him.

Mr Hayes: I may have been judging the hon. Member for Hove harshly. If the Solicitor General is right that that is the misapprehension, I understand why the hon. Gentleman is making the case he is making. It is essential that we clearly set out the expectations for the exercise of the oversight function, as the Bill does.

Returning to the issue of common sense and what is self-evident, I say to the hon. Gentleman for at least the third time, and possibly the fourth, that there is always debate about how much is on the face of a Bill and how much is reserved either for the common sense of those who do what the Bill asks of them or for the supporting documentation, guidance and so on. We have had that debate a number of times. It is often important that what might appear as "self-evident" or common sense is placed on the face of the Bill, as the hon. and learned Member for Holborn and St Pancras has repeatedly asked me to do.

Keir Starmer: I simply remind the Committee that what my hon. Friend the Member for Hove said was, "This is what Sir Stanley said, would you care to comment on it?" In fairness, there is no criticism of the Minister in any of this. My hon. Friend is simply saying, "This is the witness's evidence. What do you make of it?"

Mr Hayes: I was, by proxy, making that clear, and I will leave it at that.

Joanna Cherry: Will the Minister give way?

Mr Hayes: I know the hon. and learned Lady is anxious to get to lunch, and I do not want to delay her any further. She may have been about to say that.

Joanna Cherry: The hon. Member for Hove quoted exactly what the witness said. The Solicitor General is trying to say that the witness was mistaken, because the clause pertains only to oversight functions and not judicial functions, but does that not illustrate the very difficulty of having the judicial and oversight functions mixed up together? Subsection (5) states:

"In exercising functions under this Act".

It does not say, "In exercising oversight functions".

Mr Hayes: I am going to sit down and suggest that the hon. and learned Lady either withdraws the amendment or allows us to oppose it. It will allow her to have that slightly broader conversation with the Solicitor General over their exciting lunch.

Joanna Cherry: I wish to insist on the amendments.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 10.

Division No. 112]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	
Matheson, Christian	Stevens, Jo

NOES

Atkins, Victoria	Frazer, Lucy
Buckland, Robert	Hayes, rh Mr John
Burns, rh Sir Simon	Kirby, Simon
Davies, Byron	Stephenson, Andrew
Fernandes, Suella	Warman, Matt

Question accordingly negatived.

Amendment proposed: 750, in clause 196, page 151, line 47, leave out subsection (c) and insert—

"(c) privacy and the integrity of personal data; and

(d) the security and integrity of communications systems and networks.".—*(Joanna Cherry.)*

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 10.

Division No. 113]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	
Matheson, Christian	Stevens, Jo

NOES

Atkins, Victoria	Frazer, Lucy
Buckland, Robert	Hayes, rh Mr John
Burns, rh Sir Simon	Kirby, Simon
Davies, Byron	Stephenson, Andrew
Fernandes, Suella	Warman, Matt

Question accordingly negatived.

Amendment proposed: 751, in clause 196,page 151, line 48, leave out subsections (6) and (7).—*(Joanna Cherry.)*

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 10.

Division No. 114]

AYES

Cherry, Joanna	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Kyle, Peter	Stevens, Jo
Matheson, Christian	

NOES

Atkins, Victoria	Frazer, Lucy
Buckland, Robert	Hayes, rh Mr John
Burns, rh Sir Simon	Kirby, Simon
Davies, Byron	Stephenson, Andrew
Fernandes, Suella	Warman, Matt

Question accordingly negatived.

Clause 196 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —*(Simon Kirby.)*

1.16 pm

Adjourned till this day at Two o'clock.