

Procedure Committee

Oral evidence: Exiting the European Union: scrutiny of delegated legislation, HC 386

Wednesday 25 October 2017

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Watch the meeting

Members present: Mr Charles Walker (Chair); Bob Blackman; Mr Peter Bone; Dan Carden; Bambos Charalambous; Mr Christopher Chope; Ronnie Cowan; Nic Dakin; Chris Elmore; Helen Goodman; Mr Ranil Jayawardena; David Linden; Melanie Onn; Mr William Wragg.

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Witnesses

I: Rt Hon Keir Starmer QC MP, Shadow Secretary of State for Exiting the European Union, and Valerie Vaz MP, Shadow Leader of the House of Commons.

II: Rt Hon Dominic Grieve QC MP, Dr Ruth Fox, Director and Head of Research, Hansard Society, and Joel Blackwell, Senior Researcher, Hansard Society.

Written evidence from witnesses:

– [Add names of witnesses and hyperlink to submissions]

Examination of witnesses

Witnesses: Keir Starmer MP and Valerie Vaz MP.

Q77 **Chair:** It is nice to have you here. It is important work that we are doing and it is a subject you both have given great thought to. I will ask if you would like to make any opening comments. If you would not, we will crack on with the questions.

Keir Starmer: Crack on.

Valerie Vaz: Crack on.

Q78 **Mr William Wragg:** Good afternoon. It is generally accepted that implementing Brexit will require substantial change to UK legislation to provide certainty about the state of law at the point of exit. A question for Sir Keir: you set out your concerns about the Government's approach in your speech at the Second Reading. What approach would you take to ensure a functioning statute book when the UK leaves the EU?

Keir Starmer: It is obvious that we have to have a conversion exercise to convert EU law into our law and I made a number of criticisms of the Bill at the Second Reading. In relation to some matters, I think that they should not be dealt with by delegated legislation at all. Clause 9, which deals with implementing Article 50, is an example of that. I do not think Article 50 should be implemented by delegated legislation full stop; it should be taken out of the Bill and dealt with as a separate provision.

So far as the conversion exercise is concerned, there has to be much greater thought given to the way delegated legislation is to be used. The restrictions on delegated legislation, as set out in each of the clauses, are too narrow. You could use delegated legislation to interfere with rights and protections and so on and that ought to be something that is dealt with by primary legislation. The first thing I would do is restructure it completely to have different categories of primary legislation. I would then have enhanced scrutiny for really important policy issues.

Q79 **Mr William Wragg:** What would that be?

Keir Starmer: We have an amendment going forward for whenever the Bill comes back that proposes setting up a committee of some sort to triage and give greater scrutiny to particularly important policy issues. Obviously I recognise that both the affirmative and the negative procedure are going to be used because of the volume of provisions that have to be converted. However, I do not think the characterisation in the Bill between those that should go into the affirmative and those that go into the negative is the right characterisation. I would completely restructure it. I would take bits of it out altogether and start with a blank piece of paper.

Q80 **Mr William Wragg:** How do you reconcile that proposal with the need for timeliness, the resources, the hours and everything else? What would



the nature of this committee be, what would its composition be and what would it deal with?

Keir Starmer: It would be a committee of all parties, the Government and the Opposition and it would triage the legislation very quickly. Most of it would be pretty self-evident, to be honest. A lot of the legislation might fall into the technical changes, where it would be obvious to everybody that they go through a particular process. The only ones that would need any degree of discussion would be the ones that were looking like they were policy or substantial policy issues.

On the timing issue, I am not convinced by the argument that time is so tight that we ought to dispense with sensible scrutiny of what we are doing, particularly when it comes to policy issues.

Q81 **Mr William Wragg:** You spoke of your objections to the Prime Minister and Secretary of State and said that you were doubtful of their assurance at Second Reading.

Keir Starmer: Sorry, the assurance about what?

Mr William Wragg: When you talked about the powers, you said you could not just rely on the assurance of Ministers that they would not do X, Y, Z. You spoke of that at the Second Reading, I believe.

Keir Starmer: From memory, going back to the White Paper—I do not have it front of me, apologies—I am almost sure that David Davis said back in March that it was not intended that delegated legislation would be used for policy issues. He made a distinction between policy and technical. He put it in a slightly different way, but he has always maintained that distinction. What is interesting is that on the face of the statute, that distinction is not there.

Q82 **Mr William Wragg:** In terms of assurances then, what assurance could be given that, whatever committee and the nature of that committee, it simply would not be a committee whereby the process would be wrecked and we would be left with a disorderly statute book when we leave the EU?

Keir Starmer: Let me deal with that in two parts, if I may. I do not doubt assurances that are given by the Government at the Dispatch Box, but that is not the same as something that is written into a statute as limiting the extent of delegated legislation. When a piece of delegated legislation comes to court—and I have dealt with many of them in court—the court will look at what power did the statute give to the body making the delegated legislation, not what was said at the Dispatch Box. It is not a question of, as it were, not trusting what is said at the Dispatch Box. It is just that is pretty worthless when the legality of the instrument comes to be tested, if it comes to be tested.

I think it is wrong to approach any argument about scrutiny as an argument about the motives of those who might be involved in the



scrutiny. We have to trust the good sense and bona fides of everybody involved in the process that scrutiny means scrutiny. But if the argument is that somebody might use it for a purpose that it is not intended for and therefore we better rule out scrutiny, that would mean we would get rid of many of the safeguards we have.

Q83 Mr Ranil Jayawardena: Ms Vaz, Opposition parties and indeed, as Mr Bone pointed out last week, all Members in the House have the role of scrutinising the Government and holding the Government to account on primary and secondary legislation. In the case of affirmative instruments this often means that Opposition spokesmen will serve on the delegated legislation committees to debate those instruments. What is your party's view of the effectiveness of the process today?

Valerie Vaz: I suppose you could say I was lucky to have been picked for some statutory instruments. They are not as bad as people think they are. They are non-adversarial. They do give Members an opportunity to raise issues. If you have a good Minister, the Minister can clarify things on the face of the statutory instrument.

The key thing for us, and it happened to me many times, is you only get very short notice of when you are placed on a statutory instrument committee. It can be seven days at the maximum, but you can hear about it on the Thursday and you are up for the statutory instrument on Monday. I do not think that lends itself to good scrutiny. What I would like to see, and certainly what my party would like to see, is much more timeliness of statutory instruments so there is much more advance notice of when statutory instruments will come on.

Q84 Mr Ranil Jayawardena: What are you advocating then? What would be the number—

Valerie Vaz: It is something I have been thinking about through how we deal with the Bill. If I may, Chair, stray slightly on to how we triage and how we look to the future, basically until the Bill comes out in possibly March and until it becomes an Act, we effectively have a year. We have many Departments that have European legislation. Defra has the most, about 80%, but others have slightly less and others have none. I do not know, unless I ask the Library, which Department effectively has EU legislation. I do not know if this is something for your Committee to ask each Department how much legislation is going to come through.

Mr Ranil Jayawardena: We are slightly veering away from it then.

Valerie Vaz: No, but this goes to the timeliness of how we improve the statutory instruments. We have said that it is in a very short time. I would say that as we are looking to the future—because obviously we are talking about the EU (Withdrawal) Bill and the massive amount of statutory instruments that are coming through—certainly with the triaging of this committee that we are suggesting, if we all work together, I know that people can work on a cross-party basis, and it has been done. I know the House of Lords does it in two very good committees and



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they look at slightly different things on secondary legislation. I think there is an element of trying to work out within the usual channels when these statutory instruments are going to come on so people are not put off and people do not feel they do not have time to look at it. So we know exactly when there is a timetable for these statutory instruments to come out, whether they are in the normal circumstances or whether they are in the circumstances of the EU Bill.

Q85 Mr Ranil Jayawardena: We are very clear that your position is you want more notice for any statutory instruments. Do you think that the SIs are debated in committees today in a way that merits up to 90 minutes of debate?

Valerie Vaz: I do. If you think about when Members want to debate anything, we never have enough time to say what we want to say about legislation. I always think you can never have enough time. If you run short, that is fair enough.

Q86 Mr Ranil Jayawardena: How often have you been in a DLC that has run 90 minutes?

Valerie Vaz: I cannot remember off the top of my head; it is quite a while ago. It really does not matter, it is up to the Members at the time. If they want to speak, they can. If they do not, they do not. I do not think it is a good idea to cut short Members' speaking time. It is a good idea to have the maximum. It is only one and a half hours. We have people who have had to curtail their speeches to three minutes and it is absolutely impossible to say anything in three minutes. I do not think Members would want us to cut short that speaking time.

Q87 Mr Ranil Jayawardena: Could I turn to the principle of delegation of powers to Ministers? Do you agree that Ministers should have the delegation of powers to implement all sorts of legislation, including European legislation and incorporating that into British law?

Valerie Vaz: Clearly we have to, because that is—

Mr Ranil Jayawardena: Does Labour support that principle?

Valerie Vaz: You have to. You are asking me a hypothetical question. It depends on what the Bill is. I am for scrutiny; I am for transparency; I am for accountability. That should lie with Parliament rather than with Ministers.

Q88 Mr Ranil Jayawardena: You would rather there was no delegated legislation?

Valerie Vaz: No, I am not saying that. That is not what I am saying at all. There has to be, because that is how you function as a Government. I have drafted secondary statutory instruments so I know how important they are to the functioning of Parliament and how things work. However, at the end of the day, every ministerial action has to be scrutinised by



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Members of Parliament and therefore it has to lie with Parliament ultimately.

- Q89 **Mr Ranil Jayawardena:** Do you genuinely believe—and if so, how do you think it would be timetabled—that the 800 to 1,000 SIs can be timetabled in such a way that it provides the sort of length of debate that you have argued for? Potentially longer than 90 minutes is what I am gauging from you. The time to notify would elongate the process also and the fact you would want more parliamentary scrutiny rather than Ministers potentially determining it; I do not know if you want to comment on whether you think that committees should be able to amend SIs.

Valerie Vaz: You cannot amend SIs.

- Q90 **Mr Ranil Jayawardena:** No, but is that your policy?

Valerie Vaz: This is part of looking to the future and finding a good outcome for your deliberations. Currently the Leader of the House chairs a Parliamentary Business and Legislation Committee. My view is—and this is really blue-sky thinking, I suppose—to have a sub-committee chaired by the Leader, if so, on these many statutory instruments that are coming out so people are aware.

The Leader of the House in her evidence talked about ministerial champions in each Department. I cannot see anything anywhere where someone has a grip of all this legislation that is coming through in each of the Departments. I would say that would be a good committee to look at the secondary legislation that is coming through, then that is timetabled with each Department and you know exactly where you are. It is almost like in building terms you have a Gantt chart and I would suggest we need to have a Gantt chart of statutory instruments coming through. People do want to know what is going on. It is good for the public, it is good for transparency and it is good for accountability that you know exactly where each piece of legislation is.

It could be really exciting. We are at a crucial time and the most exciting time in the history of our country. We are doing something absolutely challenging and quite amazing. We are leaving the EU. We have to retain EU law. We have to make sure it is accurate. That is why the committee that we suggest to triage all this secondary legislation is going to be vital. The Government need to make sure that they get a grip of the timetable of how these statutory instruments come before us to get proper scrutiny.

- Q91 **Mr Ranil Jayawardena:** One very short question to Sir Keir, if I may. Sir Keir, I understand that it has been suggested you have said previously we must not get bogged down in discussions about technicalities. Is that the case? If it is what you said, or words to that effect, how does that correspond—



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Keir Starmer: You will have to give me some context. I may well have said those words. In relation to what discussion?

Mr Ranil Jayawardena: The Secretary of State for Exiting the European Union pointed this out in his speech in Manchester.

Keir Starmer: That still does not help me. I may have said those words many times over in lots of discussions. It may have been about this Bill; it may have been about a clause in this Bill; it may have been about models for a future with Europe; it may have been about a car. Honestly, I probably have in my life said those words, I do not know. What context, what was I talking about?

Q92 **Mr Ranil Jayawardena:** It has been said that just the week before at your conference, you said, "We must not get bogged in discussions about technicalities". My contention is that does not correspond with what we have heard around scrutiny.

Keir Starmer: Unless you give me the context. Listen, was I talking about delegated legislation; was I talking about primary legislation; was I talking about football?

Chair: This will be one of the great mysteries that this Committee can ponder over.

Q93 **Mr Peter Bone:** Just quickly, Chairman, this is for the shadow Leader. I have had the great pleasure of serving on the Joint Committee on Statutory Instruments for a number of years. What that committee does, of course it looks at the technical merits, but also it looks at the timing, that the Department is given enough notice and it is laid. It should not go to a delegated legislation committee until it has been through the Joint Committee, so there is plenty of time. Are you saying that is not working? On the number of the SIs, in the past we have dealt with 6,000-odd in a year, so it is not abnormal and the time is laid out by statute. Where is the problem with that?

Valerie Vaz: The time that you tell us that we have to serve on them. I have not been a Whip, but the Whips tell me there is a certain length of notice they are given.

Q94 **Mr Peter Bone:** They are laid, so you know they are coming up.

Valerie Vaz: For a long time, yes, they are laid.

Q95 **Chair:** What you are saying is you do not know if you are serving.

Valerie Vaz: The problem is when they are allocated—the timing of when they are actually heard in committee.

Q96 **David Linden:** You mentioned a triage system. One of the things the Committee has been considering is the idea of a sifting committee. I have a degree of personal sympathy with that myself. For instruments of greater significance, do you think there should be a mechanism through which the sifting committee should be able to recommend that that be



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debated on the Floor of the House before approval?

Valerie Vaz: I do. This is where the committee will come into its own, because the committee will look at it. I have seen Dominic Grieve's amendment. I think he is suggesting the Ministers will say whether it is affirmative or negative in their memorandum. That is fine, but it will be up to the committee to decide what route it should go down.

Q97 **David Linden:** That is interesting. Obviously Mr Jayawardena mentioned the whole issue of time. As a new Member, I am quickly learning that time is a very precious commodity in this House. If we were to follow that route, what changes to the timings of the House would you envisage?

Valerie Vaz: Timings of the House? Sadly, that is not up to me. It is up to the Leader of the House and obviously they manage the business.

Chair: Have you finished? Excellent. Short, sweet and sharp.

Q98 **Mr Peter Bone:** Going back to SIs, I am a fan of them and I think the Committee has probably come to a conclusion we need some sort of sifting system. You may have said it in your evidence so far. Yes, we sit on two sides, but effectively scrutiny comes from both sides. I have seen SIs not move because Government MPs have said, "This is a nonsense". On the one and a half hours, the point there surely is that it is up to one and a half hours so it can be done in 10 minutes.

Some around this table will remember there was an SI where all the three Front Benches agreed. There were about 40 or 50 Members crammed in the room and of course the three Front Benchers tried to speak for one and a half hours to stop Members speaking, so there are some times when that happens, occasionally. But any Member of the House can come and speak if it is an affirmative and then of course it is voted in the House. It seems to me that system is fine as long as the House is happy that the right instruments are coming through as affirmative and nothing of that is going through as negative. Is that your view on that?

Valerie Vaz: I absolutely agree with you, Mr Bone. That is what this committee will do. It will look at triage and suggest which ones are much more important, which perhaps the Ministers have not thought are important.

Q99 **Chair:** In essence, a House sifting committee is something that holds great attraction for our two witnesses potentially?

Valerie Vaz: Yes. We have good practice in the House of Lords, so it is a way of merging the two. The key thing always is when you are getting retained law coming from Europe back here that it is accurate. I do not think either of the committees look at that.

Q100 **Helen Goodman:** I would like to begin by asking a question of the shadow Leader. Last week, the Leader of the House told the Committee if the Opposition were to hold a debate on the Floor of the House on a



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negative SI and to win the vote that that statutory instrument should be annulled, then it would be annulled under the parliamentary convention. Would you like to comment on that? Do you think that is true?

Valerie Vaz: I know the example that you are thinking of. I think it was the tuition fee one, is that correct?

Helen Goodman: Yes.

Valerie Vaz: Obviously I have raised it a number of times, that we prayed against it and we did not have a chance to debate it. That had key implications for students because it meant that tuition fees would be raised.

Q101 **Helen Goodman:** Why did we not get a chance to debate it?

Valerie Vaz: I think there were a number of reasons, business of the House and the election was coming up. I think I was told that once the election was coming up, it was difficult to timetable business.

Q102 **Helen Goodman:** Of course the election was a reason. The Leader of the House also went on to say, "The statutory instrument was prayed against and there were two or three Opposition Day debates during the 40-day period". Is that true?

Valerie Vaz: No, I do not think we did have a chance to have the Opposition Days we were asking for.

Q103 **Helen Goodman:** My next question is this: were we to have had an Opposition Day debate, would it have been on the subject matter of the statutory instrument or that the statutory instrument be annulled? Could you do an annulment in an Opposition Day debate motion?

Valerie Vaz: You will know that the subjects for Opposition debates are agreed by many people, including the shadow Cabinet, so I would not be able to say to you definitely we would have had that debate.

Q104 **Helen Goodman:** That is not the point I am making. The point I am asking you about is if the House was to debate a statutory instrument in an Opposition Day debate, the Government would be obliged to annul the statutory instrument.

Valerie Vaz: It depends on the vote, if there is a vote, clearly, doesn't it?

Q105 **Helen Goodman:** If the Opposition wins the vote, the Government must annul the statutory instrument?

Valerie Vaz: You are asking me to answer on parliamentary procedure.

Helen Goodman: Yes.

Valerie Vaz: I would have to take advice from parliamentary counsel on the issue.



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Q106 **Helen Goodman:** A moment ago, Sir Keir, we were talking about whether or not we could carry on using the negative and affirmative processes as we look at all this delegated legislation. There is a weakness in this, is there not, in that it does not allow the House to amend statutory instruments? Do you not think that is a problem?

Keir Starmer: Yes, it is a problem. There should be an exceptional category where amendment is possible. That is particularly important where you have so-called Henry VIII powers.

As this Committee knows better than any other, the whole scheme of delegated legislation is that the primary legislation will set out the aims, objectives and goals and the delegated legislation is, broadly speaking, to give effect to those aims and goals, but within strict limits that are set out in the legislation. As long as the legislation does that, you can make an argument it should not be capable of amendment on many occasions.

Once you have Henry VIII powers, which say the delegated legislation can not only give effect to the primary legislation that it is created by, but go on to change other primary legislation, you are disrupting the whole constitutional settlement that is delegated legislation. In those circumstances I think you do need a power of amendment, not least because—in my experience, having tested some of these delegated legislative provisions in court—Governments will quite often, if there is anything controversial, put one good thing and one bad thing in delegated legislation and ask people to vote on it. When it is a really important thing, particularly amending primary legislation, there ought to be an exceptional category capable of amendment so that is an enhanced level beyond the affirmative and negative.

Q107 **Helen Goodman:** Correct me if I am wrong, you are suggesting that the sifting committee should be able to say, "This should be negative, this should be affirmative and this should be something that can be amended".

Keir Starmer: Super-enhanced or enhanced, whatever you want to call it, yes.

Q108 **Helen Goodman:** Are you saying that we would do what we do at the moment, require them to show it in draft and then produce a new one, or are you suggesting that the House should be able to amend the SI, which is not the same as them laying it first in draft and then coming back with a new version?

Keir Starmer: The first in draft and coming back with a new version is by far the preferable route. I do not want to rule out an alternative route, but that would be the far better route.

Q109 **Helen Goodman:** Why is that the better route?

Keir Starmer: In the end, it is more seemly if delegated legislation is not amended, because the problem with amending on one level is you re-



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open the debate you have just had about the primary legislation. So long as the delegated legislation is within strict limits set out by the primary legislation you are on pretty safe territory. In this Bill, delegated legislation can change the primary legislation, so whatever the safeguards are in here for delegated legislation, they can be changed by delegated legislation. It seems to me that is the sort of provision that ought to go through an enhanced process because you are allowing the delegated instrument to change the primary instrument that created it in the first place, including the safeguards. There I think I want to hold in reserve the amendment procedure. But as a practical measure, it would be better to have a draft that could be taken away and changed.

Q110 Helen Goodman: What price would the Minister pay if he or she did not play ball?

Keir Starmer: I do not know. I have not been involved in that part of the process, to be perfectly honest, and therefore I do not know. What I do know is that as a matter of principle, when you are dealing with delegated powers as wide as in this Bill, in my view you should have more than the affirmative and negative procedures available to you, so that you can therefore enhance certain provisions so they can be amended by one means or another.

Helen Goodman: The price the Minister has to pay is that his piece of legislation does not get through, and whatever he is trying to give effect to in his statutory instrument is not on the statute book. Thank you.

Q111 Chair: Sir Keir, I do not want to put words into your mouth. It strikes me that you are suggesting, as Valerie is, that the House is pretty good at working across party lines in solving what look like complex problems without drawing blood from each other.

Keir Starmer: Yes. When you are trying to get through a lot of delegated legislation that is a necessary aspect of the procedure.

Chair: Peter Bone, Chris Chope and I have spent our careers persuading the Government to trust the House more. It has not quite resulted in a House Business Committee yet, but we hope that one day it might.

Q112 Chris Elmore: Ms Goodman has taken a few of my questions, but around more significant SIs and the withdrawal Bill powers—a question for both of you—should there be more provision for consultation inside and outside of the House relating to amendments? Do you also feel that, for SIs with the most significant change, the sifting committee that the Opposition are putting forward could provide a system for them to be debated on the Floor of the House before approval?

Valerie Vaz: If we are talking about the EU (Withdrawal) Bill, there is a very limited time in which we can do all of this. We all have to be conscious that come March 2019, we need the law to be enacted into our law. In any other circumstances I would say yes, it is a good idea to consult and you can consult now anyway and you can have time to debate on the Floor of the House, but we are under time constraints here.



Keir Starmer: Can I add to that? One of the reasons I am very concerned that the Act itself should be more tightly drawn is so that the disputes over what falls into what category and so on are smaller disputes. What you really need is a statute that sets out clearly what can be done by delegated legislation so it is clear for everybody to see. This is very, very wide.

Q113 **Mr Christopher Chope:** Can I ask Sir Keir about clause 9? He is saying that he thinks the provisions of clause 9 should require primary legislation, but in recent days it has become apparent that because of the delaying tactics of the European Union, it is quite likely now that there will not be a withdrawal agreement until, as the Secretary of State put it at the Committee this morning, “nanoseconds before midnight on 29 March”. In such an eventuality, when there is no gap between the time of the agreement and the implementation of the exit, what proposals do you have to ensure that there is the ability of Parliament to be able to ensure that the law reflects what is in the agreement agreed at one minute to midnight in time for the following day?

Keir Starmer: There are two answers to that, if I may. First, clause 9 has nothing to do with converting EU law into our law. It has nothing to do with what this Bill says is its purpose.

Q114 **Mr Christopher Chope:** It has to do with amending the law to take account of the withdrawal agreement.

Keir Starmer: It is to implement the withdrawal agreement. The second thing is that the theory that the withdrawal agreement will be nanoseconds before midnight falls apart when you realise that unless that agreement is voted on by the European Parliament, it does not hold anyway. Article 50 has built into it that there will have to be a vote by the European Parliament on this. The theory that it will be to the wire, a minute before midnight, leaves out of account that there is a procedure that will have to take place in the European Parliament, which will have to be convened and have the agreement put before it, because if that Parliament does not approve it, it is not a deal that can be ratified.

Q115 **Mr Christopher Chope:** At this morning’s evidence hearing the Secretary of State made it clear that because it is going to be a mixed agreement—the withdrawal agreement is going to incorporate the future trading relationship with the European Union—the approval by the European Parliament and the ratification by the other 27 member countries, and indeed probably our own Parliament, will take place after 29 March 2019. The question I am asking is how do you wish to see this legislation amended to reflect that possible reality? It seems at the moment to be drafted on the basis there would be, as has originally been envisaged, a comprehensive withdrawal agreement some six months prior to March 2019, so that there was the opportunity for the European Parliament and other actors to approve it before the deadline of 29 March.



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Keir Starmer: I did not hear the evidence that was given this morning, but I heard about it. In none of my conversations—either in this country, in any other EU country or in Brussels—has it been suggested that ratification can come after the expiry of Article 50. Therefore I really do not know the base upon which the Secretary of State was saying what he said, if he said that this morning.

What is envisaged in the European Parliament is that it will be put before the European Parliament before March 2019. Everybody is saying that will probably be in about October or November 2018. When we were debating in the House whether we should have a vote, I was very keen to extract from David Davis the undertaking that our vote would be before the European Parliament. The wording that both he and the Prime Minister have used, to the best of my recollection, is that it is intended that the vote in our Parliament will be before the European Parliament. I cannot see how that can be after Article 50 has expired, so I am struggling to make sense of what he said this morning, to be honest.

Q116 **Mr Christopher Chope:** Obviously he is in charge of this and is well advised. I suspect he is having to alter his position slightly because of the intransigence of the European Union negotiators, who seem to want to delay it right up to the wire, which is a tradition in European Union negotiations. They want to get everything sorted out between 11.00 pm and midnight on the day of decision.

Keir Starmer: My understanding is that the Article 50 process will have to go through a vote in the European Parliament. What I had intended to extract from David Davis as an undertaking, and what I heard the Prime Minister say, was that we will be voting on it before the European Parliament votes on it. I am sure that has been said over and over again in Hansard. I do not know why the Secretary of State has now departed from that view.

Q117 **Mr Christopher Chope:** He did not depart from that. What he was implying today was that the European Parliament would vote for it after 29 March 2019.

Keir Starmer: I cannot answer for him.

Chair: We have had a good go at it, Chris. Peter wants to ask one last question.

Q118 **Mr Peter Bone:** No, I am going to pass because Chris has asked that, because clearly that was what was said this morning. I am surprised the Opposition spokesman is not concurring. It is relevant to this Bill, because if that is going to be the case, I am assuming what you are saying is that if this vote in the European Parliament has not taken place we will just come out on the 29 March.

Keir Starmer: No, there are a number of different elements to this depending on how the negotiations go. Hopefully, and if successful, there will be an Article 50 agreement. I would envisage and hope that there



would also be a final agreement sometime thereafter. That is why I have argued strongly for transitional arrangements between March 2019 and whenever the final agreement is agreed, be it one year or two years after that in 2020 or 2021.

What I have sought to extract from David Davis is an undertaking that we will get a vote on the Article 50 deal before March 2019, including if it does include any transitional arrangements, and a vote on the final deal if there is one after that, because both of those are very important. Therefore I have always envisaged that if the negotiations are successful and if there are transitional arrangements, as I think there should be, there will be two votes on this, one on the Article 50 provisions and one on the final deal.

But the Article 50 deal has to be within the constraints of Article 50. It is very clear that if the Article 50 deal is not within the terms of Article 50 the ratification process is a different one and a much longer one. That causes all sorts of difficulties. Whatever is agreed between now and March has to be agreed within the confines of Article 50. That is very clearly the view of everybody I have spoken to in my very many visits across the EU in the last 12 months or so.

Chair: I am going to wrap this up now, because it is my prerogative to do that, because I am the Chairman. I would say this: this is a very serious Committee, populated by people who are giving the matter of scrutiny and oversight a great deal of thought. It is unlikely that we will recommend something that meets the requirements of every single Member of this House because some of their thresholds will be far higher than we could ever scale. But I think we will come forward with a package of measures around oversight, scrutiny and sifting that meets most of most Members' concerns. I would like to thank the two of you for being so frank and open in the answers you have given the Committee today. Thank you very much.

Examination of witnesses

Witnesses: Rt Hon Dominic Grieve QC MP, Dr Ruth Fox and Joel Blackwell.

Q119 **Chair:** We will now pick up with the Hansard Society and Mr Dominic Grieve, who was so miserably curtailed by the endless Division bells last week.

David Linden: An argument for electronic voting.

Chair: No, I think not, Mr Linden, but it is an argument for resilience. *[Interruption.]* Mr Bone says that is why we are not dividing the House any more—because we do not want to interrupt Select Committees. Well done, Mr Bone, for spotting the obvious there.

I am going to allow Mr Christopher Chope to kick off proceedings because he was in the chair when proceedings ended last Wednesday, so it would



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be good for the continuum if he was to start.

Mr Christopher Chope: Thank you for that, Mr Walker. Can I then take the witnesses forward to where we are today, when the Secretary of State for Exiting the European Union made it clear that there are not going to be two deals, a withdrawal deal and then a later deal, but there is going to be one comprehensive deal? He envisaged the possibility that that deal might not be signed until nanoseconds before midnight on 29 March 2019. In such a scenario, where does your amendment 7 to clause 9 fit in?

Mr Grieve: It will do exactly what it says in the clause, which is that the powers in clause 9 cannot be invoked until Parliament has, by statute, approved the terms under which we leave the EU.

Perhaps I can just make two points. One I realise is likely to be a subject of some controversy because there may be different views, but my own view is if the Government were to try to do it without statutory authority, there must be a serious risk that there would be a legal challenge to the Government doing it. Therefore I think it is very much in the Government's interests that they should have a statute to underpin the final deal, particularly as I think it may need it anyway because it is likely that such a deal may require matters to be put into statute. Simply to try to make use of the withdrawal Bill and the extensive Henry VIII powers is a rather risky thing to do.

As for the practical consequences, I have always been aware of the question—because it was raised a long time ago, and it was raised at the time we were debating Article 50—as to whether there would be a deal at 11.59 pm on the last day, thereby preventing Parliament from having the necessary time to deal with it. I have to say I think this is an academic point that completely misses the issue, because I cannot believe our European Union partners, if told that the constitutional requirement of the United Kingdom is that the deal has to be approved by statute of this House, and having reached a deal with us that they have approved, are going to say that we drop out of the EU at one second past midnight because we have not been able to approve it.

What will happen is there will be a necessary short extension of time on both sides for this matter to be resolved. I can see that with the wording of Article 50 in the way it is, one interpretation would be the two years and the guillotine comes down. I do not think this has any bearing on the practical reality of the way in which this negotiation will be carried out at all. If we are at the point where our partners in the EU are saying, "Terribly sorry, we cannot extend it by one millisecond" then all I can say is at that stage they probably want to get rid of us without any deal at all.

Mr Christopher Chope: They may well do.



Mr Grieve: All these things are possible, but my amendment, very carefully drafted from that point of view, presupposes that there is a deal for consideration by Parliament.

Q120 **Chair:** This Chairman wants to talk about the scrutiny of SIs, so I just want to drag the Committee on to SIs. What about a sifting committee? How would a sifting committee be constructed? Ruth, tell me about a sifting committee.

Dr Fox: What we are proposing is that the amendment that Dominic has laid—amendment 3, I think—establishes and strengthens scrutiny procedure on the face of the Bill, which is required because every power must have a procedure attached to it. If we do not have that on the face of the Bill, we will have to stick with the Government's affirmative and negative approach so we need something on the face of the Bill. But then in standing orders we need a sifting committee established. The Bill amendment refers only to a designated committee. It is for the Members to decide what that committee should be.

We are proposing it should be a delegated legislation scrutiny committee to sift and scrutinise all the instruments that come through. It would have the ability to upgrade negatives to affirmatives if, having looked at it, it felt they deserved more consideration. If it felt they had been recommended as affirmatives, but there was a general consensus that they were fine and there was not a need for much considered debate, it would not need to pursue them with more detailed scrutiny. It would give Members the flexibility to decide how to approach the scrutiny and the approach that would be taken. Joel, do you want to take it through and tell us what would happen?

Joel Blackwell: It may be helpful if I walk through the various stages of the strengthened scrutiny procedure that is in Mr Grieve's amendment, which would scrutinise any statutory instruments that came from clauses 7, 8, 9 and 17. On Royal Assent, the Government would be able to publish and lay a statutory instrument from the European Union (Withdrawal) Act. In the first instance, the relevant Minister will lay a draft SI with supporting documentation, so explanatory memoranda and additional information to help the committee scrutinise the statutory instrument. Once the Government lays that statutory instrument, it will also make an initial recommendation as to whether or not that statutory instrument should be subject to the negative or the affirmative procedure. Once that SI is laid, that triggers a 40-day scrutiny period.

In the first 20 days of that scrutiny period, the designated committee—we are recommending a new committee be established in the House of Commons to do this work—can recommend that a negative be upgraded to an affirmative procedure. If the initial recommendation is negative and the committee says, "Do you know what? It is a negative procedure. It is innocuous, it is very technical and we are happy with that," at the end of that 40-day period, that negative instrument can be made and can come into force. For those that have been upgraded to an affirmative, so sifting



has taken place and they have said, "This is a negative that we think is pretty significant. Members of Parliament should be able to debate matters of public policy interest, so we are going to upgrade it to an affirmative," plus all of the instruments that the Minister lays that are affirmative, for the extra 20 days the committee will conduct substantive scrutiny.

The key aspect of this substantive scrutiny is that it will provide the committee with what is called a conditional amendment. It will not be able to amend the text of the SI, but it can say, "We have a few issues with this affirmative or the SI that we have upgraded to an affirmative. If the Government were inclined to listen to A, B and C that we have put in our report, then that would bring it up to the bounds of acceptability". The key point in this is that legally the Minister will have to have consideration of any recommendations and representations that that committee has made to that statutory instrument.

Once the 40-day scrutiny period has expired, the Minister is free to lay the approval motion for the affirmative SIs and those that have been upgraded to an affirmative. It is intended that the designated committee would make a substantive report to the House, either recommending approval or disapproval. What happens next depends on how that committee has come to that decision. If the committee has recommended approval unanimously, the approval motion will just be that, it will be an approval motion put forthwith on the Floor of the House. It will not be preceded by a debate.

If the committee has decided that it should be approved, but it is divided on the decision to recommend approval then the approval motion will be preceded by a one and a half hour debate on the Floor of the House unless two-thirds of the committee say otherwise. For those SIs that have been recommended as being disapproved by the committee, there will be a one and a half hour debate on the Floor of the House before the approval motion can be put. Once that vote has been put, then the affirmatives can become law and be signed off by the Minister. That is basically how we envisage this sifting scrutiny committee to work.

Q121 David Linden: In some respects, Mr Blackwell has probably answered the question, but how did you arrive at that figure of 90 minutes? If it was for instruments of greater significance that are referred to the Floor of the House, what was the rationale behind 90 minutes? Should it not be longer, given the significance of this?

Joel Blackwell: The rationale behind that was basically past precedent. That is how we debate affirmative instruments. That is the length of time, so it is up to one and a half hours. Under the legislative and regulatory reform order procedure, if the designated committee recommends disapproval, it can debate it for up to three hours. We did think about that, but we have to basically be aware of the fact that 800 to 1,000 SIs are going to be put forward within 18 months. We do not want to clog up the time on the Floor of the House. We came to the agreement that a one



and a half hour debate would probably be enough, when it usually is enough for 99% of affirmatives that are debated.

For example, in the last session for affirmative instruments the House of Commons spent an average of 26 minutes in a delegated legislation committee debating an affirmative instrument, so we thought one and a half hours would be enough, but it would be up to the House to decide that. It could be three hours, it could be two and a half hours, as they do with Northern Ireland statutory rules, but it will be up to the House to decide. It was just a suggestion based on past precedent.

Q122 **Chair:** Dominic, you are entirely in tune with this?

Mr Grieve: I am entirely in agreement with this. I simply add this. At various times people have said, "Is this the only way of approaching this?" and I have said, "No". Of course there are other ways in which you can tweak this. Like any amendment, it was put up because I think it is essential that Parliament should take control of this process along the broad lines that I have tabled in the amendment. The Government may wish to come back with something similar but slightly different, in which case it doubtless would merit very careful consideration. It is not an absolute. Like anything else, you have to put something down on paper in order to stimulate the debate and get it going. That was the purpose behind my tabling this amendment.

Q123 **Mr Peter Bone:** At the moment, I think the Committee is moving towards having a sifting committee. From the Hansard Society, why can't the Joint Committee on Statutory Instruments do it? Why do you have to invent something new?

Dr Fox: We did think about that. We looked at whether it should be the JCSI, whether it should be a Select Committee, whether it should be the European Scrutiny Committee, because these do a form of document-based technical scrutiny. Our concern with the JCSI is that it has a very technical and very legal approach in terms of vires, in terms of drafting and so on. It has a very valuable role, as you know. We think that the political and policy scrutiny that is done is a slightly different form of scrutiny and you would be giving it quite a diverse remit. We think it would be better done through a separate committee.

There is also possibly a procedural issue in that being a joint committee, either the House of Lords would have to agree to give up the Secondary Legislation Scrutiny Committee, which I doubt they would, or the Commons' members of the Joint Committee on Statutory Instruments would have to sit separately to consider the policy issues. That potentially could be over-complicating it. I also note that the JCSI has not yet been convened as a whole.

Mr Grieve: I did consider the JCSI myself for exactly the same reasons. I have served on the committee and I know the good work it does, but I do



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not think it is really the right committee to deal with the issues that are coming up in this particular Bill.

Q124 **Mr Peter Bone:** We explored this a little bit, Mr Grieve, when you were here before. The argument seems to be you are saying the personnel on that committee would not be up to making the—

Mr Grieve: No, that is not the issue.

Mr Peter Bone: That is my argument, because you are just inventing a new committee and putting people on it. I accept the argument about the joint committee. However, as you know, the joint committee does not always sit as a joint committee. The Commons looks at the financial ones only. I am still not convinced why you think we have to have a totally new one.

But leave that to one side, I am intrigued by the one and a half hour debates on the Floor of the House. Could I put to you that there is no reason why they could not be put on at the end of business of the House? Presumably the Divisions would then be a deferred Division, so not every Member would have to be here.

Joel Blackwell: If the committee has unanimously agreed to approve an affirmative SI there would just be the vote. As is standard practice now, that would be a deferred Division at the end of the day.

For those where there has been a Division and it has been decided there should be a one and a half hour debate preceding the vote, then the vote would be taken immediately after the debate so there is no decoupling of the vote with the debate.

Q125 **Helen Goodman:** Mr Blackwell, I thought you set that out very clearly, thank you very much. I wonder what you think would happen in the case where a Minister did not make any changes to a statutory instrument and says, "Of course I have taken everything you say into account, but I have not changed my mind". How do you think the House could deal with that? Do you think that is a likely upshot?

Joel Blackwell: Potentially. We have experience of it with legislative reform, although this is basically taking that element from that strength and scrutiny that already exists. In the case of that procedure, the Minister must table a written statement so the House could consider that as an option. It could also consider as an option, if the Minister decides to plough on regardless even though representations have been made, that an oral statement might be suitable. At the end of the day, the committee has the power to recommend a debate on the Floor of the House. Therefore ultimately it would go to the Floor of the House, where the House itself can decide on the merits of the Government's arguments for not revising the statutory instrument based on recommendations of that committee.

Q126 **Helen Goodman:** Mr Grieve, you just said to Mr Bone that you did not



think the JCSI was the appropriate Select Committee. What criteria do you think a new sifting committee should be using?

Mr Grieve: I said I questioned whether the JCSI was the wrong committee not because I think there is some inherent flaw in the members of the JCSI, I want to emphasise this. However, the JCSI is set up to do a specific task. The task the committee is going to be asked to do in this case is a different task. That is not to say the members of the JCSI cannot transform themselves for that purpose into a new committee. However, in view of the importance of this legislation, its astonishing reach and the extent of powers it is conferring on the Executive, I would have thought the sensible thing to do would be to set up a committee and hopefully identify individuals who can serve on it and who will be able to work together in a collective way to identify what really matters and have the confidence of the House for that purpose. That is not to say there are not members of the JCSI who might not also be very suitable to serve on this committee.

However, my view is this is so unusual—and we are, after all, trying to create a bespoke arrangement to cope with an immense constitutional Bill—that I would have thought it was sensible to set up a separate committee. It is a workload issue as well. This committee is going to have a great deal of work to do.

Q127 **Helen Goodman:** I was not really challenging the point about whether we need a newly-constituted committee. What I was trying to ask was whether you think we should have the criteria the committee should be using set out in standing orders.

Mr Grieve: You could, if the House wanted to, lay down criteria. The criteria seem to me to be fairly clear. We need to identify what is technical, and in reality makes no difference to the way in which the laws of our country operate, and those that will make a difference to the way the laws of our country will operate and therefore merit closer consideration. That seems to me to be what the issue is here. Hopefully the majority, perhaps hopefully even the vast majority, of these orders may be of a purely technical nature and present no problems. I have heard figures of up to 200 being likely to require debate.

That has not come from me, but from those who have an understanding in Government as to how this works. I would be interested to know what the Secretary of State thinks, if he were to give evidence in front of you. However, I think there is going to be a very large number. Identifying those and then working through them in the way that has just been described is the criteria that needs to be established, whether you need to put that down or whether it is so clear and obvious that that is what we are supposed to be doing.

I am also mindful of the Government's difficulties. The Government may be anxious that this committee will be in some way hijacked and just be used to put a spanner into the works of the Government's programme. It



is certainly not the intention of this amendment that that should be the case. It is the intention of the amendment that the House should have the reassurance that things that matter are going to be brought to its attention. But the one thing I have learnt in my 20 years in this House is how much can slip through due to inattention. This Bill is much too important for us to allow that to happen.

Q128 Mr Ranil Jayawardena: Mr Grieve, when you came before us a couple of weeks ago, in discussion we both mentioned sunset clauses. In respect of some of your amendments and your proposals around scrutiny of SIs, I wondered if I could revisit whether there will be any extent to which sunset clauses could be further deployed in the legislation, which might provide you with the comfort that the powers the Government seeks could not be held forever and therefore did not necessitate the level of scrutiny of the SIs that could be delivered under them in the here and now.

Mr Grieve: I have nothing against sunset clauses; they are very good things on the whole. However, I am a little bit puzzled as to what this would do. If the Government is going to change some of our primary law by statutory instrument in order to make it workable after we left the EU, one of the things I have been saying—perhaps I am wrong, but it is my own take on this—is that some areas of retained EU law may not be changed for 25, 30 or 40 years. I probably will not live that long, but I would almost be prepared to have a small wager that there will be leftovers to the second or third generation, the way this country operates. Therefore I am not sure a sunset clause is quite the best way to deal with that. Of course you could have sunset clauses on some things. Indeed, that is something the House may want to consider and there are sunset clauses tabled in various places.

However, what we need to do here, seeing the enormous scope and reach of this legislation, is to make sure our SI process is updated, modernised and worked in an effective manner. That is what I am trying to do. We can do it. It may be a model that never gets used again because nothing like this comes down the track. It may be a model that sets a good precedent for the future. I think when we are challenged and confronted with this, we need that. In my view, a sunset clause on its own is not sufficient.

Q129 Mr Ranil Jayawardena: You said earlier the Henry VIII powers were part of the problem, as you saw it, and that goes beyond the concept of simply a normal statutory instrument being laid to effect Government policy. It allows the Government to amend primary legislation, as you set out. You said in the previous discussion we had—and indeed you confirmed that now—there are sunset clauses in some areas. Are there areas where there are not provisions for sunset clauses that you would recommend the Government perhaps could consider, which might provide some comfort on the Henry VIII powers and the way in which those powers cannot be used in perpetuity?



Mr Grieve: Perhaps we are talking about two slightly different things, forgive me. Yes, of course there are sunset clauses as to when you can use Henry VIII powers. However, there are not sunset clauses that mean those Henry VIII powers have to be revisited. I think we are at cross-purposes.

Q130 **Mr Ranil Jayawardena:** Mr Grieve, I am not advocating that. What I am saying is that there are clauses in here that provide the Government with powers that are unrestricted in perpetuity. Are there powers you would see effected with a sunset clause that would provide you with confidence?

Mr Grieve: I have not tabled any amendments to add to sunset clauses as to the periods within which the powers can be used. It seems to me the periods that have been provided are reasonable, taking into account what the Government have to do. I would not be saying we have to reduce it to six months. It is possible I may have missed other areas that could do with sunset clauses, but that was not my response to the way I read the legislation.

I have tabled some amendments about whether there are areas of law that can be specifically identified where we would isolate or protect those from any interference by SI. I will offer those to the House in due course as something to consider. Perhaps I should say I do not offer them ultimately as an alternative to setting up a proper scrutiny mechanism. It seems to me the proper scrutiny mechanism is absolutely essential.

Forgive me, perhaps I misunderstood your question. One way you have sunset powers is to say that within a period of X you have to revisit something and do it again by primary legislation. That is when I was making my comment we would be imposing a burden on Parliament that would keep us here for generations to come.

Q131 **Mr Ranil Jayawardena:** I wonder if I can turn to the Hansard Society. In your paper "Taking back control of Brexit and beyond" you highlight clause 11, which provides the body of EU law and how that affects devolution in the UK. You advocate a potential solution being a sunset clause in that respect, so if an agreement is not reached it automatically defaults to the devolved Administrations. Do you not think that would create a huge problem in allowing the devolved institutions to simply obstruct any negotiation in the intervening period to damaging effect for the United Kingdom as a whole, and would lead to damaging consequences for their citizens and those in England?

Dr Fox: We put in the paper, in that section, that this is not without risk. The devolved Administrations might simply stonewall negotiations. It comes down to a question of trust and the balance of risk. It is slightly odd that all the other clauses have the sunset power, but not those. Clearly there is this issue about the lack of trust on both sides. We suggested it, but we have acknowledged exactly your point, that it is not without risk. I would also note that in terms of the explanatory notes to the Bill, the Government indicates that what is in clauses 10 and 11 are,



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as far as they are concerned, obviously not the final word and they would bring forward further detail on those clauses, subject to the negotiations with the devolved Administrations. In that context we have to wait and see what happens, I assume at the relevant committee stage, as to what they bring forward, subject to those discussions.

Q132 Mr Ranil Jayawardena: In any case you would agree—I know it is a matter of fact, but just to get it on the record—that even if Parliament might wish to devolve these powers we do not have to devolve them at any particular point in time and this Parliament can do that at any point in time?

Dr Fox: Yes.

Q133 Mr Ranil Jayawardena: I wonder if I can ask Mr Grieve again about his proposed amendment 3. If, as your proposal suggests, you would be happy to see Ministers consider recommendations on delegated legislation and have an opportunity to lay an amended draft before the House, but still then choose to lay an unamended draft, and if you agree, as I do, with the Hansard Society's statement that Parliament cannot amend SIs because that would undermine the principle of delegated powers to Ministers, then why should we be potentially wasting parliamentary time discussing these instruments and coming up with suggestions the Ministers ultimately could ignore? Could we not adopt a more informal process that does not take the time this process would take, noting that the Government have said there will be 800 to 1,000 SIs?

Mr Grieve: You could adopt a more informal process. However, again, the difficulty with informality is there is a tendency sometimes that people then do not respect the structures. I certainly think it is in everybody's interests that when a statutory instrument is tabled there should be an opportunity for its consideration and an opportunity for people to make points about it. Quite apart from anything else, it is in the Government's interest. There is a risk that the Government could lose a vote on a statutory instrument. If they lose the vote on the statutory instrument, it is not the absolute end of the world, they are going to have to go back and lay a fresh statutory instrument, but that is going to take even longer.

Clearly if the Government thinks a suggestion is pointless, they will not respect it. However, providing a mechanism by which you can say, "Just go back and think about this again because it could be better drafted and we think there is an ambiguity here," does not seem to me to be a waste of time. The risk to the Government is losing the vote.

Q134 Mr Ranil Jayawardena: Can Members not do that anyway?

Mr Grieve: You can. Occasionally the Joint Committee on Statutory Instruments sends the Government back under its very technical rules and says, "We do not like this," and the Government withdraws a statutory instrument. I have to say, in my experience Governments, on



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the whole, tend to say, "Thank you for letting us know that this statutory instrument has an ambiguity that might make it defective. We will cure it at a later date". We used to get this answer over and over again when we were in the JCSI. I do not think for the purposes we are dealing with here that this is the best way forward.

Chair: There is going to be a vote at some stage in the next eight minutes. Can I thank our witnesses—Dominic and the Hansard Society, Ruth and Joel—for coming in? There does seem to be interest around a sifting committee. There does seem to be a belief that the House is grown up enough and committed enough to good scrutiny to manage this.

Q135 **Dan Carden:** A final question. If these powers went through and we saw a change in the complexion of the House of Commons with a large single-party majority, would you be particularly worried about the extent of these powers in that situation? There is a feeling, from what you say, that the negotiations may be quite evenhanded at the moment.

Mr Grieve: There is no doubt that one of the points that has been made—but I think it is made as a matter of political argument—is that sometimes when supporters of the Government of the day say, "These powers are perfectly all right because Government Ministers say they would never be abused," it is always worth reminding one's colleagues in those circumstances that of course within the time period set by this legislation there could be a change of Government and there might be people who they trust less. Let us face it, one of the reasons Parliament exists as an entity is because we are quite adversarial, yet at the same time we have to have regard to the reality of the way power can shift.

I always think one has to put oneself in the position of not only oneself as a Government supporter, but also of being in opposition. Oppositions inevitably will view Government measures with a greater degree of anxiety than Government Back Benchers. However, the interesting thing of course with this legislation is that it has attracted a lot of different views on a cross-party basis. My view is this is worth doing because it is worth doing. It is a real opportunity, forgive me saying it, for the House to carry out a reform that future generations will thank us for.

Chair: Thank you very much. That is the end, so have a pleasant afternoon.