

CAN PARLIAMENTARY OVERSIGHT OF SECURITY AND INTELLIGENCE BE CONSIDERED MORE OPEN GOVERNMENT THAN ACCOUNTABILITY?

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ABSTRACT

The nature of openness in government continues to be explored by academics and public managers alike while accountability is a fact of life for all public services. One of the last bastions of 'closed government' relates to the 'secret' security and intelligence services. But even here there have been significant steps towards openness over more than two decades. In Britain the Intelligence and Security Committee (ISC) of Parliament is the statutory body charged with scrutinising the agencies and since 2013 is more accountable itself to Westminster. This was highlighted by the first open evidence sessions involving the heads of the agencies which coincided with the unofficial disclosure of secret information by way of the so-called 'WikiLeaks world'. This article examines scrutiny as a route to openness. It makes the distinction between accountability and open government and argues that the 'trusted' status of the ISC in comparison to the more independent Parliamentary Select Committees weakens its ability to hold government to account but, combined with the claim to privileged information and the acquiescence of the agencies, makes its existence much more aligned to the idea of open government

Keywords - Westminster Select Committees, Intelligence and Security Committee, MI5 and MI6, scrutiny of public agencies.

INTRODUCTION

When the three heads of Britain's security and intelligence services, Sir Iain Lobban (Director of GCHQ), Andrew Parker (Director General of MI5) and Sir John Sawers (Chief of MI6), appeared in Westminster on 7 November 2013, a new marker was set for open government. But it was also about accountability. This was a significant event representing the first ever open evidence session for Parliament's Intelligence and Security Committee and the first time Parliamentarians had enjoyed the opportunity to publicly question spy chiefs.

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Official disclosure of Britain's security and intelligence agencies has come a long way since the first blurred images of MI5 Director General Stella Rimington were published in the early 1990s by the *New Statesman*. Indeed prior to the Security Services Act (1989), British governments denied the existence of the Security Service (MI5) and it took until 1994 to acknowledge the existence of the Secret Intelligence Service (MI6). Government Communications Headquarters (GCHQ) was outed in 1984 when the Thatcher government prohibited staff from joining Trades Unions leading to strikes and a protracted row.

Rimington began the process of openness under the watchful eye of the Major administration but this has also been a journey for parliamentary oversight. The Intelligence and Security Committee of Parliament (ISC) was established by the Intelligence Services Act (1994). Conducting its affairs behind closed doors and reporting to the prime minister (consequently only indirectly to Parliament) the ISC was given the authority to examine policy, administration and expenditure of the agencies.

It was not until the Justice and Security Act (2013) that the ISC became a Committee of Parliament, gaining greater powers and extending its remit to include 'oversight of operational activity and the wider intelligence and security activities of government' (Dawson, 2013). But perhaps overlooked in the spectacle of spy chiefs discussing their work in public is the increasing influence of Parliament itself (or at least parliamentarians). Indeed, despite criticisms over its ability to hold government to account (Bochel et al, 2013) and evaluations of how effectively Parliament has scrutinised the likes of counter-terrorism legislation (Walker & Horne, 2016), the ISC has established itself as a significant actor in making 'open government' work. Here, comparisons with the departmental Select Committees are naturally made, especially during recent years where they have become more confident in demanding answers from government. Indeed, the work of the ISC operates alongside and in competition with these increasingly combative committees.

There is a wider context. The ramifications of internet and information technology have not only made the work of the agencies more complex, they have also provided opportunities for unofficial disclosure. The 'WikiLeaks world', Edward Snowden leak and Russian hacking allegations demonstrate that irrespective of governments' willingness to manage openness, unofficial actors remain disposed to taking the initiative.

This article is not an examination of the activities of intelligence agencies, what has been revealed or indeed the deliberations of the ISC which has been covered elsewhere (Gill, 2007; Leigh, 2007). Nor does it evaluate the effectiveness of oversight which already has a place in the literature (Gill & Phythian, 2006; Phythian, 2007). Rather, it critiques the significance of these recent developments in parliamentary 'oversight'. The main aim of this article is to assess the extent to which parliamentary scrutiny can be a route to openness. The distinction between accountability and openness is central to this evaluation and yet is under-explored in the literature. This article burrows into some of the workings of the ISC to help draw out key differences. It sets the critique in the context of both unofficial disclosure and developments in Parliamentary Select Committee strength. Its distinctiveness, therefore, is largely conceptual in nature.

Taking the developing strength of the Select Committees and the ISC becoming a Committee of Parliament as its framework, the article analyses oversight from a number of perspectives. It sets the developments in the wider context of government accountability to parliament to comment on the broader trend, definition and understanding of open government and whether powers of parliament can always be viewed as public participation in the oversight process. It compares the ISC to the departmental Select Committees, to argue that as their power has increased, Select Committees have become more focused on scrutiny and accountability and less about openness. The more compliant nature of the ISC, its trusted status and ‘exclusive’ claim to access and information, by contrast, is more closely identified with government. Its behaviour in scrutinising the agencies, while less effective, is nonetheless much more supportive of ‘open government’.

CONTEXT: TECHNOLOGY, LEAKS AND PARLIAMENT

To judge the significance of advances in parliamentary oversight of the Intelligence and Security services in terms of open government, it is instructive to review two substantial contextual developments. These can be termed as the still emerging ‘Wikileaks world’ and the new confidence of Westminster Select Committees. While these developments are separate with distinct origins and consequences, this section argues that unofficial openness supports the case for official scrutiny and that combined with broader policies encouraging freedom of information, it has also more clearly shaped the role of parliamentary Select Committees towards holding government to account rather than opening it up.

WikiLeaks World

Several scholars have referred to the ‘WikiLeaks world’ (Hood, 2011; Fenster, 2012; Grimmelikhuijsen, 2012; Munro 2016; O’Loughlin 2016); shorthand for the new context of classified information freely available courtesy of the eponymous organisation. Since its establishment in 2006, WikiLeaks has published thousands of secret documents ranging from Operating Procedures for Camp Delta to US vice-presidential candidate Sara Palin’s emails, membership lists of the far-right British Nationalist Party, details of a 2009 Iranian nuclear accident, Bilderberg reports, documents from collapsed bank Kaupthing, the ‘Afghan war diary’ comprising some 92,000 documents relating to military activities and several thousand US diplomatic cables, to the CIA’s ‘anti-forensic’ so-called ‘Marble Framework’ (WikiLeaks).

This ‘WikiLeaks world’ is bigger than a single organisation. A separate episode involved former CIA employee Edward Snowden who, in 2013, downloaded and leaked 1.7 million secret files to *The Guardian* and *Washington Post* including several thousand relating to British Intelligence. Believed by to be the biggest intelligence theft in US history, the US Department of Defense produced a report assessing the impact on national security. This was inevitably classified but one who read it, Chairman of the House of Representatives Permanent Select Committee on Intelligence, Mike Rogers

articulated its implications: ‘Snowden’s real acts of betrayal place America’s military men and women at greater risk [and] are likely to have lethal consequences for our troops in the field.’ (HPSCI, 2014). Elsewhere, former UK Homeland Security Adviser Sir David Omand was widely quoted describing the disclosure as the most ‘catastrophic loss to British intelligence ever’ (BBC, 2013). More recently allegations of Russian hacking is said to have disrupted the 2016 US presidential election process and released thousands of emails written by Democratic candidate and former Secretary of State Hilary Clinton (Follis & Fish, 2017). The potential repercussions of this not only have implications for democracy but also for how government handles ‘secret’ information.

There is little new in the leaking of secret information, something which has bedevilled intelligence agencies since they first existed. Indeed there is an extended, if potted, official and unofficial, history which includes such discussion (Andrew, 2009; Thurlow, 2000; West, 2005b; Vilasi, 2013). Aside from the sheer volume of this recent unofficial disclosure, what is new surrounds the global internet technology employed to circumvent national laws and the ease with which files can be copied and communicated electronically. For this reason governments and intelligence agencies face a brave new world rather than simply a new determined adversary. As Christopher Hood observes: ‘High volume “outing” of secret material in cyberspace seems unlikely to be just a passing phase....there does not seem to be much to stop replication of the WikiLeaks “business model”’ (2011, 637).

The implications for sanctioned openness are twofold. Firstly, governments are incentivised to manage legitimate disclosure of official information by extending Freedom of Information programmes to embrace open data initiatives (Hood, 2011; Grimme-likhuijsen, 2012; Keenan, 2012). Secondly, there is the impact of leaked materials which begs the question as to whether disclosure really does have ‘lethal consequences’. There are numerous views here. Inkster (2014), for instance, claims that neither Snowden himself nor the acquiescing newspapers which published his revelations really understood the material they had. While O’Loughlin (2016) demonstrates that academics engage in ‘self-censorship’ of Wikileaks information. Dismissing claims made by transparency advocates around the benefits of the leaks, Fenster’s detailed study nonetheless concludes that ‘open sources provide no clear evidence that WikiLeaks caused significant damage...If we cannot assume or predict the existence of effects from a massive disclosure of classified documents, then a core theoretical concept and assumption for the laws governing access to government information are incoherent and conceptually bankrupt.’ (Fenster, 2012, 806). What this means is that where government cannot demonstrate that the maintenance of secrecy is essential for national security, there will be more compulsion to open up.

Parliamentary Confidence

Whatever the motivations, there is a further implication for the sovereign body whose job it is to hold government, and its agencies, to account: in Britain the Westminster Parliament. Here departmental Select Committees, which since 1979 have had powers to call for people and papers, are the organisational apparatus by which permanent over-

sight of the executive is conducted. But, as Brazier and Fox observe, ‘committees no longer have the privileged access to government information that they could once take for granted: the digital communication revolution, Freedom of Information, the range of policy analysis undertaken by academia and think tanks...means select committees cannot afford to rest on their laurels.’ (2011, 355).

Select Committees can hardly be accused of such complacency having been responsible for some of the most effective scrutiny of government over a period popularly considered to represent the ‘decline of parliament’ (Norton, 2005). This parliamentary oversight has become more professional and better resourced, especially since the adoption of core tasks in 2002 following proposals from the Newton Commission on Parliamentary Scrutiny which challenged the balance of power with government (Flinders, 2002; Brazier & Fox, 2011). Westminster’s Select Committees have increased their status, visibility and power most notably during the 2010 parliament where following the Wright Reforms (2009), committee chairs and members were elected by the House for the first time (rather than appointed by the whips). Analysis by Dunleavy and Muir (2013) confirm popular perception of the growing prestige of Commons’ Select Committees which saw a tripling of media coverage in the immediate aftermath of reform.

Inquiries have fed a popular post-credit crunch appetite for accountability. That is they can be said to be representing the electorate’s interests. Here, perceived unfairness ranging from bankers’ bonuses to corporate ‘tax dodgers’ to government inefficiencies are much less tolerated, Hilary Benn’s ‘Exiting the EU’ Committee has made much of the opposition running on this crucial issue, while 24 hour news, online content in all its forms and social media ensure the public is better informed than ever. These committees have in some ways created public interest with high profile, forthright, investigations; they represent one of the more deliberative aspects of the Westminster Model otherwise characterised by tribalism and oppositionalism (Barber, 2016). Elsewhere they have demanded the right to hold hearings into important public appointments and even appear to be establishing a right of veto and dismissal as was seen with the new head of the Office of Budget Responsibility (Waller & Chalmers, 2010).

Alas such power has not been extended to the heads of the security and intelligence services. Indeed, Select Committees have continued to be excluded from investigating the agencies and this cannot be blamed on apathy. The Home Affairs and Foreign Affairs Select Committees have both at various times staked a claim on monitoring the activities of MI5 and MI6, each being a function of the Home Office and Foreign Office respectively. Indeed, since the controversy surrounding the invasion of Iraq, MPs have shown greater interest in intelligence matters and greater scepticism over government communications. After all, in this unprecedented instance, government published considerable intelligence supporting the existence of Iraqi weapons of mass destruction which proved to be ‘unreliable’. A mainstream view is that the intelligence community’s ‘acceptance of these demands was to prove disastrous’. (West, 2005, 26)

The Foreign Affairs Committee went so far as to title an investigation into the decision to invade Iraq around ‘Government’s Lack of Co-operation’ with the Committee (FAC, 2004). The executive naturally favoured examination by the more dependable ISC. Such criticism compounded earlier comments from the Home Affairs Committee arguing

that: ‘we remain concerned that the principle of parliamentary, as opposed to statutory, scrutiny of the intelligence and security services has not yet been conceded... We do not want to wait for another crisis of confidence of the sort that has occurred in the past only to discover that the existing scrutiny arrangements are inadequate.’ (HAC, 1999). Indeed when crisis did arise in the form of Iraq, it was an independent inquiry headed by insider, Lord Butler a former Cabinet Secretary, which examined the evidence.

When it comes to security and intelligence, there is justification for expecting insight from politicians and government departments. This is further evidenced by the careful words of a one-time MI5 Director General who argues that ‘if you approach questions of oversight without understanding the role of the Secretary of State you miss one of the key planks of the arrangement. I think it’s right to say that the degree of engagement of Ministers in our business has grown exponentially over the last decade’. (Lander, 2001, 30). For these and reasons of comparability with the ISC, scholarly connections between opening up the agencies and the work of the parliamentary Select Committees are established in the literature (Bochel et al, 2013; Defty, 2008; Norton, 1998, Phythian, 2007). This allows for an extension of conceptual understanding.

Accountability not Openness

The growing professionalism of Select Committees, combined with this opening up of information from other legitimate and illegitimate sources, has sought to define their role much more acutely (Brazier & Fox, 2011). This partly revolves around the need for information, whether released legitimately or disclosed unofficially ‘to be interpreted before it can be acted upon by interested citizens’ (Davis & Meckel, 2012, 463). Since 2010 in particular this has manifested in a greater sense of independence to set agendas and ask awkward questions. Committees can be seen as less compliant and more representative of voters. Here, it is instructive to critique the ‘core tasks’ articulated by the Commons’ Liaison Committee which increasingly represents their focus. These are: to examine and comment on departmental policy, expenditure and administration and to assist the House in debate and decision (HC, 2002). While there is a general duty ‘to monitor the work of the department’s Executive Agencies, NDPBs, regulators and other associated public bodies’, the focus and role of Select Committees can be interpreted as coalescing around the narrower responsibility to hold government to account rather than the broader concept of opening it up. That is they are performing a constitutional role, drawing on the sovereign authority of Parliament, to question and judge government in return for the maintenance of confidence required to sustain an administration. Parliament in turn is accountable to voters at election time.

This idea of a duty to inform, explain and justify is essentially what is understood by democratic accountability (Davis & Meckel, 2012) but it is subtly different from openness (a distinction underexplored in the literature). Indeed, it is perhaps for this reason that the contemporary direction of Select Committees has led Brazier and Fox (2011), in revisiting those core responsibilities, to argue for greater accountability towards fellow MPs; something which elections by the House goes some way to meeting.

In common with other democracies, Britain has stated a commitment to open government with the justification that ‘Openness and transparency can save money, strengthen people’s trust in government and encourage greater public participation in decision-making’. And yet none of the several thousand datasets available on its open.gov website relate to the security and intelligence services or the data gathered by GCHQ. Such ‘e-government’ is complex but is intended to improve decision making and services by fostering collaboration (Naith, 2011; Bannister & Connolly, 2012; Scott, DeLone & Golden 2016); something which is problematic when it comes to security and intelligence. Nonetheless, it serves to emphasise a subtle distinction between openness and accountability. While its origins lie in (public) oversight, as it has come to be understood, open government is about collaboration and improved services at least as much as scrutiny (Chun et al, 2010) and, importantly for this examination, implies the positive acquiescence of government or its agencies to disclosure. With this distinction in mind, comparisons with the ISC can be made.

ISC AS A COMMITTEE OF PARLIAMENT

The different contextual changes discussed herein can be seen to be at least partly responsible for recent developments in openness in relation to Britain's security and intelligence services viewed in terms of ‘parliamentary’ disclosure. The Intelligence and Security Committee, which is charged with scrutinising the agencies, is constitutionally abnormal having been established as a statutory body of parliamentarians appointed by and answerable to the prime minister. This contrasts with Select Committees which are accountable directly to parliament. Smaller in size than a Select Committee, its remit mirrors nonetheless those shadowing departmental activities, though it has met in secret session and based in the Cabinet Office rather than Westminster. Recent changes resulting from the Justice and Security Act (2013) have seen the ISC become a Committee of Parliament. With this, members are appointed by parliament (having been nominated by the prime minister) though are still subject to the Official Secrets Act (Dawson, 2013). Moreover, the Committee was given greater access to information, including ‘primary material’, enjoyed greater resourcing and saw its remit stretch into ‘all intelligence and security activities of Government, including parts of the Cabinet Office, the Office for Security and Counter-Terrorism in the Home Office, and DI’. (ISC, 2013, 43). The process also works partially in reverse when compared to the Select Committees since the ISC consults with the agencies before it puts information in the public domain. The process is explained in the annual report: ‘The Agencies have to demonstrate clearly how publication of the material in question would be damaging before the Committee agrees to redact it’ (ISC, 2016, 3). This all represents an advance in open government as well as accountability.

While significant, this development is perhaps not uncharacteristic since there is now an established history of piecemeal openness which goes back to the early 1990s. Indeed early steps were taken by the agencies themselves including public appearances by the Director-General of MI5, declassification of historic records, visible new headquarters along the Thames and websites all ‘designed to present an image of greater openness

and accountability' (Defty, 2008, 622). Since then, ISC activities themselves have represented greater openness having moved from operating in secret but reporting to Parliament to an annual Commons debate after 1997, to the historic decision to hold evidence sessions in public in 2013. Nonetheless, the difference should not be understated since initial openness, compelled by the European Court, had been intended to 'eliminate unnecessary secrecy and identify the key players, but not to make them significant public figures' (West, 2005, 30). This coincided with the longer trend towards Parliament taking greater advantage of its sovereign authority to demand answers from all areas of public life. It suggests that once government commits to openness, momentum gathers behind greater transparency as objections are gradually eroded.

This section makes the case that while the ISC's activities can be judged as less democratically legitimate than those of the departmental Select Committees and less effective at holding the executive to account, recent developments can be viewed as being more about open government. But more than this, given that new insights into the intelligence services resulted from a process of negotiation and agreement, even though the power of the ISC remains muted, the practice can also be said to more closely resemble open government than the more focussed accountability of Select Committee hearings. The direction of travel could see this change.

Opening Up Dullness

The ISC has been subject to unfavourable comparisons with the Select Committees and its weakness highlighted most convincingly by failure to ask awkward questions about the invasion of Iraq. This criticism continued more recently in response to instability in Syria. Reprieve director Clair Algar claimed that despite 'its purported role in providing scrutiny and oversight of the intelligence services, it is in fact far more often a cheerleader than a watchdog.' (Algar, 2013). A perusal over the ISC's annual reports (for instance ISC, 2016) lends credence to this view as does the public questioning of spy chiefs in November 2013.

Introducing the first open hearing, Chairman Sir Malcolm Rifkind described this as 'a very significant step forward in the transparency of our Intelligence Agencies.' (ISC, 2013b). Indeed, the session which ran for an hour and a half and broadcast with a short delay, involved wide ranging questions for Lobban, Parker and Sawers including technology and the cyber threat, global co-operation, practical operational considerations, terrorism, agency powers and balance with liberty. While historic, the session was hardly sensational with little new learned about the activities of the services. The style of questioning was firm but scarcely demanding, particularly when one contrasts with the Home Affairs Committee's robust questioning subsequently of Alan Rusbridger, editor of *The Guardian* which had published Snowden's leaks. (HAC, 2013). It can be observed that such output is consistent with the understated and dull style of the ISC's published reports since its establishment (Gill & Phythian, 2006, ch8). Indeed, the ISC does not see its role as creating headlines but rather 'providing reassurance' (Defty, 2008, 639).

Despite comparisons with the more vigorous Select Committees, when one views the occasions when Parliament has taken an interest in the agencies (for example Iraq) it has tended to be due to some event which has come to public attention. This is of course the nature of secrecy but it does not sit comfortably with the idea of open government. In this sense, while the ISC's role is to scrutinise, it is a step removed from the sovereign responsibility to represent voters. The Committee and its members are of and trusted by government and its intelligence agencies. This makes their activities much more closely aligned to the idea of openness.

Furthermore, the 'trusted', insider, status of the ISC can be finessed. In its own report the Committee contrasts itself with the rest of Westminster: 'Unlike other parts of Government, intelligence and security matters cannot be effectively scrutinised in Parliamentary debates, or by a normal departmental Select Committee, the media, academia or pressure groups. Only a body with powers to access highly classified information can fulfil such a role.' (ISC, 2013, 42). A further distinction is raised here in that the ISC still enjoys privileged access to information and as such the genesis of its deliberations are not necessarily those of public or media comment. And unlike the Select Committees, the ISC is not competing with other equally informed and impactful forums. Its unique position is, therefore, guarded jealously. Writing after seven years of operation, the first Chair of the ISC gives some sense of what that trusted status means: 'There is obviously a need to balance what is a sensible level of oversight requirements and allowing the intelligence agencies to perform in an effective and sensible way.' (King, 2001, 26). One only has to peruse the status and background of Chairs and members to realise that the ISC is filled with trusted establishment figures who have previously served in government and typically hold Privy Council status. This contrasts with the makeup of typical select committees where more junior and oppositional politicians can be found.

Effectiveness

The ISC has proved itself to be 'reliable' for the executive and its investigations are notable for what they do not cover. Iraq has been mentioned but early on members chose not to examine historical issues and later ignored revelations published in the newspapers by disgruntled MI5 officer David Shayler that the services had investigated Labour ministers and that MI6 had been involved in a plot to assassinate Libya's Colonel Gaddafi without then Foreign Secretary (and later ISC chair) Malcolm Rifkind's knowledge (Hollingsworth & Fielding, 1999). It can be said that the ISC does not see its role as either forcing the security and intelligence services to justify their actions or indeed as a conduit of open government. But in playing the part of trusted insider, it has furthered the cause of openness in this 'secret' area of government. Indeed, while it is widely acknowledged to have underperformed in holding the agencies to account, its greatest service has been to opening up government by publishing some of the information to which it has privileged access and extending its remit further into government. Moreover, its relative ineptness goes to the heart of the balance between legiti-

macy and effectiveness central to academic critiques of democratic oversight (Gill & Phythian, 2006).

The secret nature of the intelligence services means that it is impossible to judge the impact of scrutiny other than to observe that the agencies have not been subject to the public interrogation that has befallen other arms of government. Furthermore, Worthy's (2010) critique of Freedom of Information concludes that while transparency has increased, broader objectives of widening participation, enhancing decision making and improving trust have met with limited success. Openness can increase mistrust in government as reporting of new information is customarily negative. For similar reasons, Bannister and Connolly (2012) argue that transparency can be 'inimical' to good governance requiring careful management. Given the additional limits surrounding the activities of security and intelligence, this might be said to apply more pointedly to MI5, MI6 and GCHQ whatever the intention of Parliamentary oversight and are areas for future research.

CONCLUSION

Parliamentary scrutiny is not the only form of accountability but it is the most democratically legitimate. In the case of the Security and Intelligence Services, a significant amount of cooperation is required for it to work. This is broadly what has happened since the agencies and their oversight were put on a statutory footing. This article has been limited in its coverage of the opening up of the services but in viewing the development of accountability has contributed to the understanding of parliament's role in 'open government'. In most areas of government, parliament no longer has a monopoly on information and yet its Select Committees' new found confidence has seen it use that data to hold the executive to account much more effectively. The constitutionally abnormal nature of the ISC, however, much more clearly resembles open government since it is both 'trusted' by the state and it still enjoys privileged access by acquiescence.

One can only speculate as to the future given recent moves to increase the ISC's legitimacy by making it a Committee of Parliament. The changes in the 2013 Act, which included Parliament's right to appoint members nominated by the prime minister, did not alter the inherited composition of the ISC. Changes in personnel since have been very much in the traditional mould of trusted, establishment, insider including its latest Chair, former Attorney General Dominic Grieve QC, PC. Nonetheless, the increased status of Westminster's departmental Select Committees present new career paths –and status - for parliamentarians.

The context is compounded by the impact of technology and the new 'WikiLeaks world' which means that rogue actors are increasingly able to put classified data into the public domain. This could weaken the ISC's claim to privileged information as 'tech-

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nology makes it more and more difficult to take secretive decisions at any scale' (Grimmelikhuijsen, 2012, 301). The trend is clearly in the direction of more robust parliamentary questioning which will make scrutiny more legitimate. Should the relationship change, however, accountability's gain could well be open government's loss.

Notes

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