LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

H. STEEL, CMG OBE
LEGAL SECRETARY

25 February, 1985

I am sending you, as requested, copies of the ruling which McGowan J. gave on the question of what is meant by "in the interest of the State" and his subsequent direction to the jury. May I point out that what you are getting is a "contraband copy", made in this Department, of another "contraband copy" made by the DPP from a copy which he legitimately obtained from the shorthand writers on the usual commercial basis. The making of extra copies in this way is, I think, a breach of the shorthand writers' copyright and I think that they would be aggrieved if they knew about it. I should therefore be grateful if you would use the enclosures with discretion.

Yours ever,

H STEEL

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CENTRAL CRIMINAL COURT

No(s): 841330.

Old Bailey, London, E.C.4.

Friday, 8th February 1985

Before:

MR JUSTICE McCOWAN

REGINA

-v-

OLIVE SHERIDAN PONTING

Transcript of the Shorthand Notes of Geo. Walpole & Co.,
Official Shorthand Writers to the Central Criminal Court.

CENTRAL CRIMINAL COURT

No. 841330.

Old Bailey, LONDON, EC4.

Friday, 8th February 1985.

B

Before:

MR JUSTICE McCOLLAN

C

REGINA

D

-v-

E

CLIVE SHERIDAN POINTING

F

MR R. AYLOT and MR T. LANGDALE appeared for the PROSECUTION.

MR B. LAUGHLAND QC and MR J. CAPLAN appeared for the DEFENDANT

G

Transcript of the shorthand notes of George Walpole & Co Official Shorthand Writers to the Central Criminal Court.

SUMMING-UP

H

DIRECTIONS IN LAW

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DIRECTIONS IN LAW

MR JUSTICE McCOWAN: I come to the first matter of law upon which I must direct you and it is a very important one which concerns the burden and standard of proof. The burden of proof is on the prosecution to establish the defendant's guilt and it is on the prosecution throughout. He does not have to establish his innocence. As to the standard of proof before you can convict him, you must be sure -- which is the same thing as being satisfied beyond reasonable doubt -- of his guilt.

I turn to the next matter of law which is the charge, and I know you have copies of the indictment. May I ask you at this stage to look at them. What I am going to do is to tell you the ingredients that the prosecution have to prove, and as I have said I am directing you here on law and you have to accept the law from me.

The first thing that has to be proved is that at the material time -- that is about the 16th July, no problem about that -- the defendant had in his possession or control information obtained by him or to which he had access as a person who held office under Her Majesty. The information that is being referred to there is, of course, the two documents, Exhibits No.1 and 2. Plainly, you may think, he had those two documents in his possession because he was a civil servant holding office under Her Majesty. I do not think you will have to trouble another moment about that ingredient because the defence have made a formal admission about it, no problem.

Secondly, the prosecution have to prove that the defendant communicated that information to Mr Tam Dalyell, who, as you know, is a Back Bench Member of Parliament of the largest party in Opposition. Again, the defence formally admitted that communication and so I say again no problem for you.

Thirdly, the prosecution have got to prove that Mr Dalyell was not a person to whom he was authorised

to communicate. Evidence on that came from Mr Motram, the Private Secretary to the Secretary of State for Defence, who said in simple terms Mr Ponting had no authority to disclose that material to Mr Dalyell. He was cross-examined about the fact and he said, "Ministers authorise who are entitled to reveal information. Either ministers themselves make statements in public or authorise others to reveal the information. It is not at all vague. Unless you are authorised to disclose information you may not."

Mr Hastie-Smith also gave evidence on this subject, namely, that Mr Dalyell was not an authorised person to receive official information. He said that, of course, a minister can authorise a civil servant in his department to disclose something to a Member of Parliament but there is no suggestion that that happened here, and, you may think, that obviously if Mr Ponting had asked a minister to give him authority to send this material to Mr Dalyell he would not have got it.

There the matter rested until the defendant himself gave evidence when he said this when cross-examined in terms of Civil Service Regulations, "I did not have authority to send the documents. The only person who could have given me authority was the Secretary of State." Following that the defence agreed that they could not mount a defence under these words, in other words, they accept that the evidence is all one way, that Mr Ponting was not authorised to communicate the information to Mr Dalyell. In those circumstances you will, I am sure, have no difficulty in concluding that that ingredient is made out.

So we are left with only one ingredient which is in dispute and that is the fourth and it is this. The prosecution have got to prove that Mr Dalyell was not a person to whom it was in the interests of the State his duty to communicate the information.

"His duty", may I start with those words. "His duty" I direct you means an official duty, a duty imposed

on him by his office under Her Majesty, namely, that of an Assistant Secretary in the Ministry of Defence, to communicate those documents to Mr Dalyell.

The prosecution say, in effect, "Where is there a scintilla of evidence that he was under any such official duty? On the contrary", they say, "it is plain that his duty was to preserve these documents."

What then of the words "in the interests of the State"? I direct you that those words mean the policies of the State as they were in July 1984 when Mr Ponting communicated the information to Mr Dalyell and not the policies of the State as Mr Ponting, Mr Dalyell, you or I might think they ought to have been. "The policies of the State" mean the policies laid down for it by its recognized organs of government and authority. We have a general election from time to time and after the general election the party that can command the support of the majority of the House of Commons forms the Government. If it loses the support of the majority of the House of Commons it will cease to be the Government but while it has that support it is the Government and its policies are for the time being the policies of the State. It is not a question of the Conservative Party being the State no more than it would be of the Labour, Liberal or SDP Parties being the State if any one of them happened to be the Government. This is not a policical matter at all. They would be in exactly the same position. So please do not be misled about that. The policies of the State in July 1984 were the policies of the Government then in power, the policies as they were and not as they might have been or any one of us might think they ought to have been.

It is not in dispute that it was Government policy in July 1984, rightly or wrongly, not to give this further information. That is exactly what Mr Ponting was complaining about. he was saying, "This is the Government policy and I do not like it." So, as I say, there is no dispute that that was the Government policy. "So", say

the prosecution, "it cannot have been in the interests of the State, which means the Government then in power, to leak these documents to Mr Dalyell, the Government's self-proclaimed critic and interrogator."

Now what evidence or argument is there against that? In an endeavour to try to help you I will see if I can help about that, the result, however, is this. On my direction you are not concerned with whether you agree with the policies of the Government at that time. A political debate on those policies is wholly outside the proper range of your discussion.

I further direct you that you are not concerned with whether the defendant honestly believed when he leaked the documents that it was his duty to do so in the interests of the State.

The prosecution, as you know, have suggested that he was not motivated by noble sentiments at all. They say he was motivated, in a word, by pique. Whether they are right or wrong about that would be a matter for my consideration, if you convict him, on the question of sentence because, obviously, if somebody does things from noble motives, that is a mitigating factor which could lead to mercy. But it really does not matter, though we have spent a lot of time on it as we have on many other things in this case, from your point of view whether he was motivated by the highest sentiments or the lowest because I direct you in law that it is no defence that he honestly believed it was his duty to leak the documents in the interests of the State if, in fact, it was not his duty to do so in the interests of the State.

You may well be beginning to say to yourselves, "We have been treated for days to a great deal of irrellevant material." So, on my direction, you have, but in fairness to counsel they had not at the stage when you heard the evidence had my ruling in law. As you know, they advanced arguments to me that afternoon when I allowed you to go away, and having heard their arguments for the whole of that afternoon the following morning

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having reflected on their arguments I gave my ruling in law, and what I am now directing you reflects the ruling that I gave. So, as I say, I am not in any sense seeking to blame either counsel for going into matters which may now seem immaterial because they had not then sought my ruling.

May I make something quite plain. The Act does not restrict the type of information that you must not communicate to classified information. We have learnt in the course of this case that there are four categories of classified information. Starting at the bottom and going up: RESTRICTED, CONFIDENTIAL, SECRET and TOP SECRET. CONFIDENTIAL, the second from the bottom, and its definition is, "a document of which the unauthorised disclosure would be prejudicial to the interests of the Nation."

In this case Exhibit No.3, the Legge minute, was classified CONFIDENTIAL; Exhibit No.2, the draft letter to Mr Dalyell had no classification at all. It makes no difference. It is not one of the ingredients of the charge that it should be a classified document. It is not necessary that the disclosure should have prejudiced National Security, the prosecution have never suggested that it did, but it is no defence, you see, to say that it did not prejudice National Security though, let me say again, it would be a matter proper for me to take into account on sentence that it was not a matter which prejudiced National Security, but it is not, it has no part to play in your deliberations.

May I quote some words of a past Lord Chief Justice which I hope will make this very clear to you. "It matters not what the document contains, what the motive for disclosure was or whether the disclosure would, in fact, be prejudicial to the State.

This Act, most of us will have seen or heard, over the years has been a great deal criticised. Governments, whatever their complexion, they always say they are going to do something about it and they never do. Maybe that

is because it suits all Governments not of a different complexion to keep it as it is, I know not and it really does not matter. You may have heard the jokes that are made about it, that if the order for mid-morning refreshments in DS5, namely, 12 coffees and 8 teas, had come into the defendant's possession or control as head of that department and he had communicated that to Mr Dalyell it would have been an offence under the Act. Well, all that one can, I hope reasonably, assume is that the Attorney General would not in those circumstances give his consent to the bringing of the prosecution. Anyway, there is no question in this case but that these were not joke documents whatever else you think about them, they were clearly serious documents dealing with serious matters.

I do want to emphasise, we are not concerned in this court with whether this Act requires repeal or amendment. Until Parliament sees fit either to repeal or amend it my duty and your duty is to apply the law as it is. We cannot pick and choose and say, "This is a law we do not like and, therefore, we are not going to apply it." That would be acting wholly contrary to our oaths and that would be so whatever the colour of the Government.

You may have noted the last remark of Mr Laughland in his speech to you last night, that a conviction here could be a licence for ministers to withhold information from Parliament with the assistance of an acquiesant Civil Service. May I say to you quite emphatically that that would be a wholly wrong approach to your duties and to the oath you have taken. If the case is proved it is your duty to convict whatever the consequences. To say to yourselves, "Well, it is proved but I am not going to convict in case it discourages ministers from being forthcoming" would be being false to your oath. It would have been equally wrong for Mr Amlot to say, which he did not, that if you acquit Mr Ponting civil servants will be leaking documents all over the place.

That would be an equally wrong approach. The political consequences of a conviction or of an acquittal are not a matter for you or me to trouble with for a second; let Parliament argue about those. If the case is proved in accordance with the law as I direct you then you must convict: if it is not proved you acquit.

There are a lot of other things that this case is not and I want to get those out of the way early on before I seek to get down to what it is about. It is not about which country, Britain or Argentina, has the better right to the Falklands. It is not about could or should the Falklands' War have been avoided. It is not about whether Falklands' Fortress is a good idea. It is not about whether there is likely to be any further Argentine aggression. It is not about whether Mr Ponting was wiser than Mr Heseltine.

Mr Ponting thought, as he has told us, that there was no good reason for withholding this information on tactical or any other ground; that more information could have been given without damage to National Security "because", he said, "this Country had nothing to be ashamed of", in other words, there were sound tactical as well as moral reasons for doing what he advised. It appears that the politicians, Mr Heseltine, the Secretary of State, and Mr Stanley, the Minister of State for the Armed Forces, thought otherwise. They believed that if they answered Mr Dalyell's points, his nine questions, he would be back for more and that little by little ministers would be led into security sensitive areas. These were the two viewpoints.

As Mr Ponting himself said at one stage of the story "these were political decisions." He thought he knew better but, as I have said, the case does not turn on which viewpoint was the wiser. Civil Servants cannot be unused to having their advice not followed by ministers and this they must bear with fortitude even when, as I am sure they often do, they think themselves infinitely more intelligent and wiser than their minister they may be but that is not the point.

Again what this case is certainly not is a political contest. If any of you support a particular political party, and why should you not, it is your duty to put your political allegiances or prejudices on one side and decide the case fairly and dispassionately according to the law as I direct you and the facts as you find them.

As It happens Mr Ponting chose, for what it is worth, to tell us his political allegiance. He put it like this: "I had worked closely with Sir John Nott during the Defence Review. I would have said I was in tune with the philosophy of the Government particularly with regard to the Civil Service. In my view a good civil servant has to take a day-to-day interest in political affairs", but he himself approached the problem in a neutral way. "For a number of years I have tended to incline to the Liberal party: that goes back to 1963. I have never been a member of that Party or of the Conservative or Labour Parties or of any extremist parties. I have been positively vetted a number of times. I joined the SDP when it was founded in 1981. My wife did so at the same time. I paid a subscription but at my level in the Civil Service I could not take an active part. My views did not bring me into conflict with the policies of any Government I worked for."

Nobody has suggested for a moment that he was or is a member of any extremist party. Bear in mind that it is the essence of democracy that it can be anticipated that one party will go out of Government and another come in and that any Government whatever its political complexion will have to face the problems about what it can or should reveal to the public and to expect from its civil servants loyalty and that they will not leak Government documents to politicians who oppose the Government. That, as I say, you may think -- this is a comment but it is entirely a matter for you -- is a problem that would face any Government of any colour.

I turn to another topic, the defendant's character. This is not a case where you do not know anything about his background: you know a great deal. It is not merely a case where he has no previous convictions -- obviously if he had he would not have been in the position that he was in -- you know positively that he is of previous good character. A man of ability and intelligence who had very much prospered in his chosen career. He told us a good deal about this himself and I will remind you of it in summary form.

He is now aged 38. He won a local authority scholarship to a grammar school. He has nine "O" levels, three "A" levels and two scholarship levels. He went to Reading University, read history and got a First. In 1970 he obtained a place on the Fast Stream Graduate Entry Scheme into the Civil Service. He went first to the Ministry of Technology and then to the Ministry of Defence. He was sent to the Civil Service College in 1973. He married a lady in the Ministry of Defence who remained there until last month when she was transferred to the Department of Employment. In October 1973 he became Private Secretary to the Head of the Procurement Section. In April 1974 he was promoted to Principal. In June 1979 the Conservatives came back into power and the Prime Minister invited Sir Derek Raynor, a Director of Marks and Spencers, to head the drive in Whitehall for greater efficiency. Each Ministry was asked to nominate one principal to work with Sir Derek and Mr Ponting was the person nominated for the Ministry of Defence. He had to consider one area of the Ministry and in 60 days suggest ways in which it could be improved. He produced a short report as to what he found making recommeddations for savings. Then there was a two-day conference and each of these Ministry representatives had to give a ten minute preeentation and Sir Derek was obviously so impressed by Mr Ponting's presentation that he asked Mr Ponting along with his colleague from the Department of Health and Social Security to come along to 10 Downing

Street and make their presentations to the Prime Minister. She in turn was so delighted with their presentations that she whipped them off into the Cabinet Room and made them give the same presentations to the Cabinet. There they stayed for about an hour or so to hear the Cabinet talk about how similar savings could be made in Whitehall. In the next Birthday Honours because of what he had done he was given the OBE and he added, "I think that is rare for a civil servant of my level and experience."

In September 1981 he was promoted to Assistant Secretary. There are only three grades in the Civil Service above that: Under Secretary, Deputy Secretary and highest of all Permanent Under Secretary. "Aged 35", he said, "is about the youngest you can be as an Assistant Secretary. I was then appointed Head of DS15. That Department has two separate parts: one dealing with the training establishments and the other with legal matters. We went to the Treasury Solicitors or the Foreign Office or the Attorney General's Office for legal advice."

It is a matter for you -- you may think that his knowledge of those legal processes may be of some significance.

Under him in that Department there were some 25 people. That is the defendant's account of his career and character.

You may remember that a statement was read to you which became part of the evidence from Lord Raynor, as he now is, and I repeat the relevant passage. "He", that is Mr Ponting, "proved himself to be outstanding in contributing towards policy formation and the presentation of subsequent recommendations. In carrying out the work he undertook on my behalf he had to present his findings to colleagues across Whitehall, senior ministers and officials after consulting a wide range of interests. He handled this difficult task with distinction showing a capacity to think with clarity of purpose and having the strength of character to make his report with authority."

Obviously the fact that a defendant has no previous convictions and a positively good character does not mean that he cannot commit an offence or in those circumstances nobody ever would. The good character of the defendant is relevant primarily to his credibility, in other words, as to whether or not you believe his evidence. If, of course, you are satisfied that he lied to the police that might be taken adversely to affect his credibility.

The question of his credibility will arise in the areas where his evidence conflicts with that of prosecution witnesses. I would identify three of those areas: first, as between himself on the one hand and the two Ministry of Defence Police Officers, Hughes and Broom, as to the conversations he had with them; secondly, as between himself and Mr Darms and Miss Aldred as to whether he approved the line of the Darms minute which led to the Legge minute which he leaked; thirdly, as between himself and Mr Hastie-Smith as to whether, on his case, he was told the matter would be dealt with by resignation or internal disciplinary proceedings with no mention of prosecution -- that is what the defendant alleges -- or whether, as Mr Hastie-Smith asserts, he was plainly told by Mr Hastie-Smith that day that prosecution was one of the possibilities.

When it comes to deciding between the defendant on the one hand and those various witnesses who disagree with him on the other -- they are obviously of good character also or they would not be where they are, so in that context good character may not assist -- it is a matter for you but you will have to look, I suspect, at the probabilities and in the end you will have to decide having seen the people who you believe.

Another word about something that you must not allow to sway you and that is sympathy for the defendant. I imagine you are bound to feel some because of his comparative youth and his promotion and his lost career. All these would be matters properly for me to take into

account if you convict him. They are not matters which can properly be taken into account by you in deciding whether the case against him is proved.

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No: 841330.

CENTRAL CRIMINAL COURT OLD BAILEY, LONDON, EC4M 7EH

Thursday, 7th February 1985

Before:

MR JUSTICE McCOWAN

REGINA

-v-

CLIVE SHERIDAN PONTING

Transcript of the Shorthand Notes of George Walpole & Co, Official Shorthand Writers to the Central Criminal Court.

CENTRAL CRIMINAL COURT

No. 841330

OLD BAILEY, LONDON, E.C.4.

THURSDAY, 7TH FEBRUARY, 1985.

B e f o r e

MR. JUSTICE McCOWAN

R E G I N A

- v -

CLIVE PONTING

R U L I N G

MR. R. AMLOT and MR. T. LANGDALE appeared on behalf of the PROSECUTION.

MR. B. LAUGHLAND, Q.C. and MR. J. CAPLAN appeared on behalf the DEFENCE.

Transcript of the Shorthand Notes of George Walpole & Co.; Official Shorthand Writers to the Central Criminal Court.

R U L I N G

R. JUSTICE McCOWAN: The Defence now accept that all the ingredients of this charge are established on the evidence before the court, save the last, namely that the Defendant communicated the information in question to a person to whom it was in the interests of the State his duty to communicate it. I have been asked to rule as to what these words mean in law.

Mr. Caplan for the Defence submits that the Crown must satisfy the Jury that the Defendant did not honestly believe when he communicated the information that it was his duty to communicate it in the interests of the State, regardless of whether it was in fact his duty in the interests of the State. He relies in support of this proposition on the case of Sweet v. Parsley which is reported in 1970 Appeal Cases at page 132 where the House of Lords held that mens rea is an essential ingredient of every offence unless some reason can be found for holding that it is not necessary and that a court ought not to hold that an offence is an absolute one unless it appears that that must have been the intention of Parliament.

He further submits that in an unreported case of the Queen v. Cairns and Others, being, as I understand it, a prosecution under the same Section as in the present case, Mr. Justice Caulfield directed the Jury in the way that Mr. Caplan submits that I should. In other words, he says that Mr. Justice Caulfield left to the Jury the issue of whether the Defendant in that case honestly believed that he had a duty to communicate the document in question to the other person in the interests of the State.

I am told, however, by the Crown that in that case Counsel for the Prosecution conceded at the start of the trial that mens rea in that sense was a defence, and that therefore Mr. Justice Caulfield was never asked to form a view on that issue. In consequence the case is not of much assistance to me. On the other hand, there is clear authority the other way.

In the first place there is the decision of Mr. Justice Avory in the King v. Crisp and Homewood which is reported in 83 Justice of the Peace Reports at page 12. He said: "It should be publicly known that this Statute absolutely prohibited any person who held office under his Majesty from communicating information which he had obtained owing to that position to any person to whom he was not authorised to communicate it." Mr. Caplan conceded that this was against him, but pointed out that decision came before the House of Lords' decision in Sweet v. Parsley.

Next there is the decision of the Court of Criminal Appeal in January 1963 in the case of the Queen v. Fell, a transcript of which I have been supplied with. This was an appeal against sentence by a Defendant who had pleaded guilty to counts under Section 2, Sub-Section (1) of the Official Secrets Act. Giving the judgment of the court, Lord Parker, The Lord Chief Justice, said at 3F of the transcript: "It must be realised, therefore, that this is an absolute offence provided that there was no authority to disclose the document, and provided it was not his or her duty to communicate it in the interests of the State. Accordingly, from the point of view of there being an offence at all, it matters not what the document contains, what the motive for disclosure was, or whether the disclosure would in fact be prejudicial to the State, quite apart from the safety of the State. In other words, the essence of the offence is the disclosure of confidential information."

Mr. Caplan again points out that this is before the decision in Sweet v. Parsley. He further says that as the appeal was against sentence only these remarks were overruled and may well not have been preceded by argument. Nevertheless, they are strongly persuasive, so Mr. Justice Mars-Jones found in the case of the Queen v. Berry at the Central Criminal Court on the 8th November, 1978, another case under Section 2, Sub-Section (1) of the Official Secrets Act, when he ruled against a submission on mens rea similar to that advanced here by Mr. Caplan.

It seems to me that Mr. Amlot is right when he contends that what this Section is concerned with is the preservation

of information which has been obtained by someone owing to his position as a person who holds office under Her Majesty. Such a person is not to pass on that information unless, in fact, he is authorised to pass it on to a particular person, or in fact is under a duty to pass it on to that other person in the interests of the State. That the person passing on the information honestly believes that he has a duty to pass it on in the interests of the State is immaterial, save on sentence, otherwise any Civil Servant who honestly believes that the wrong Government is in power, that it would be good for the country if they ceased to be and that it would help the process of evicting them if he leaked one of their confidential policy documents, would be entitled to be acquitted.

I do not for a moment believe that that was the intention of the legislature. In my judgment no mens rea is required beyond the intention to communicate the document, which in this case is not disputed. I therefore reject Mr. Caplan's argument.

He turns next to consider what the words, and I quote: "A person to whom it is in the interests of the State his duty to communicate it," mean. He submits that the words "his duty" add nothing to the other words. If that be right, why are they there? The Section could perfectly properly read: "A person to whom it is in the interests of the State to communicate it."

I feel bound to conclude that the words "his duty" are not mere surplusage, but are there for a purpose. Mr. Caplan submitted that if I took this view I should merely read the words to the Jury without giving them any assistance as to what they mean.

Finally he says if I do not think that that is the proper course I should tell the Jury that they include a contractual, civic or even a moral duty. Mr. Amlot, on the other hand, submits the expression "his duty" must in the context of this Sub-Section be related to the Defendant's duty as a person holding office under Her Majesty. It must, he says, be an official duty, a duty imposed upon the communicator by virtue of his office to communicate it to the particular recipient.

That was a view which appealed to Mr. Justice Ma[redacted] Jones in the case of the Queen v. Berry, and I respectfully agree with him.

As to the remaining words, Mr. Caplan argues that it is for the Jury to decide whether it was in the interests of the State that the Defendant should communicate the documents to Mr. Dalyell, a Back Bench Member of Parliament belonging to the Party in opposition.

The Prosecution say that the clue to what these words mean is to be found in the speeches of Lords Devlin and Pearce in the case of Chandler v. The Director of Public Prosecutions, which is reported in 46 Criminal Appeal Reports at page 347. That was a prosecution under Section 1, Sub-Section (1) of the Official Secrets Act 1911. I read the material parts of that Sub-Section, and they are: "If any person for any purpose prejudicial to the safety or interests of the State (a) approaches or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act he shall be guilty of felony."

In his speech Lord Devlin said this, beginning at page 384: "What is meant by 'the State'? Is it the same thing as what I have just called 'the country'? Counsel for the appellants submits that it means the inhabitants of a particular geographical area. I doubt if it ever has as wide a meaning as that. I agree that in an appropriate context the safety and interests of the State might mean simply the public or national safety and interests. But the more precise use of the word 'state,' the use to be expected in a legal context, and the one which I am quite satisfied for reasons which I shall give later was intended in this statute, is to denote the organs of government of a national community. In the United Kingdom, in relation at any rate to the armed forces and to the defence of the realm, that organ is the Crown. So long as the Crown maintains armed forces for the defence of the realm, it cannot be in its interest that any part of them should be immobilised. It is of course arguable that the Crown should not be maintaining the armed forces at all and that the nation would be much safer if the Crown disbanded them. If the

Crown was given different advice by the same or different ministers, the result might be that its interests might become different from what they now are. But the statute is not concerned with what the interests of the State might be or ought to be, but with what they actually are at the time of the alleged offence."

A little later on at page 385 Lord Devlin went on: "In my opinion the crucial term in this statue, as applied to this case is not 'purpose' but 'safety and interests of the State.' No doubt the interests of the State ought to be the same as the interests of the community. It would be the claim of those who advise the Crown, that is, the Government of the day, that they are. It is permissible to argue that they are not. Argument of that sort is in comparatively minor matters the stuff of party politics and even in great matters on which substantially the whole country appears to be united, argument is permissible. In such argument 'the State' is used loosely to mean the community; and 'interests' to mean the objects which ought to be secured for the community. Both words have in this statute a more precise meaning. 'Interest' in legal phraseology generally means something concrete, something akin to property, property rights and interests, beneficial interest, insurable interest, controlling interest and so on. In this statute it may well have a wider meaning than that, but it has not the widest possible meaning. If you say that an object is not in a man's best interests, you have in mind what his interests ought to be. If you say that you will protect his interests, you have in mind his interests as they are; you do not make good your word by defeating his objects because you disagree with them. This statute is concerned with the safety and interests of the State and therefore with the objects of State policy, even though, judged sub specie aeternatis, that policy may be wrong. If in this statute these words were given a wider meaning, absurd results would follow. Rebels and high-minded spies could be heard to argue that defeat in battle would serve the best interests of the nation because it would be better off under a different regime. The licence allowed to them would also have to be allowed to

traitors. This point was dismissed by Counsel for the appellants as theoretical. It was said that no jury would in such circumstances acquit. But even if it be looked at purely on the practical plane, the Judge has to decide whether he will allow hours or days to be spent at the trial in giving an accused the opportunity of expounding his political views. The court is not the forum for such a debate and the jury is not the body to determine what the interests of the State should be."

I look next at a passage in the speech of Lord Pearce which is to be found at page 392. He said: "I cannot accept the argument that the words 'the interests of the State' in this context mean the interests of the amorphous populace, without regard to the guiding policies of those in authority, and that proof of possible ultimate benefit to the populace may for the purposes of the Act justify an act of spying or sabotage. The protection covers certain specified places which are obviously vital to defence and other places to which the Secretary of State sees fit to extend the protection. Section 3, as amended, includes in prohibited places '(c) any place belonging to or used for the purpose of His Majesty which is for the time being declared by order of a Secretary of State to be a prohibited place for the purposes of this section on the ground that information with respect thereto, or damage thereto, would be useful to an enemy.' Parliament clearly intended to give stringent protection to such places. It is hard to believe that it intended to withhold that protection in all cases where a jury might think that the place in question was not necessary or desirable or where the authorities could not by evidence justify their policies to a jury's satisfaction. Questions of defence policy are vast, complicated, confidential, and wholly unsuited for ventilation before a jury. In such a context the interests of the State must in my judgment mean the interests of the State according to the policies laid down for it by its recognised organs of government and authority, the policies of the State as they are, not as they ought, in the opinion of a jury, to be. Anything which

p[redacted]udices those polices is within the meaning of the Act 'prejudicial to the interests of the State.' "

Mr. Amlot points out that the words of the section there being considered were "prejudicial to the interests of the State." The words "his duty" do not figure there. The addition of the words "his duty" in Section 2, Sub-Section (1), he argues, means that the narrow interpretation of the interests of the State, supported by Lords Devlin and Pearce, applies with even greater force in the context of Section 2, Sub-Section (1).

While acknowledging that those passages from those speeches lend support to the Crown's argument, Mr. Caplan says that these were the views of only two of their Lordships. The others either did not address their minds to the question or did not answer it. So he says the views of Lords Devlin and Pearce are not binding on me.

I think he is right about that, but nevertheless I am wholly persuaded by them.

Mr. Caplan accepts that his interpretation is likely to involve the jury in a political debate. I echo the words of Lord Devlin: The court is not the forum for such a debate and the jury is not the body to determine what the interests of the State should be. I accept the view of Lord Pearce that the "interests of the State" must mean the interests of the State according to the policies laid down for or by its recognised organs of government and authority, the policies of the State as they are, not as they ought, in the opinion of the jury, to be. This again was the view of Mr. Justice Mars-Jones in the case of Berry, and I respectfully concur with them.

Ponting file

MR FLESHER

25 February 1985

TIMES LEADER, 25 FEBRUARY 1985

Further to our conversation, I understand that the Prime Minister would respond to any Parliamentary Question on today's main leader (attached) by referring the matter to the Law Officers. You will see the main allegation of the Leader is in its last paragraph.

From the transcript of Mr Justice McCowan's direction to their jury in the Ponting Case, you will see on page 3 letter E the following interesting and relevant passage appears:

> "It is not a question of the Conservative Party being the state no more than it would be of the Labour, Liberal or SDP Parties being the State if any one of them happened to be the Government. This is not a political matter at all."

While a lengthy constitutional reply might answer the Times more fully, the Judge's remarks may prove useful in briefing material.

I am copying this minute to Henry Steel of the Law Officers Department.

HARTLEY BOOTH

TIMES PAST
THE TIMES
P.O. Box 7, 200 Gray's Inn Road, London WC1X 8EZ.
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NATIONAL INTEREST

Mr Justice McCowan directed the Ponting jury that "the policies of the State were the policies of the government then in power". His direction was intended to deter the jury from thinking that Mr Ponting had some wider or higher duty to exercise by informing Mr Tam Dalyell of ministerial intentions to be less than open with Parliament. In the Commons later the Attorney General was asked to comment on the judge's direction. He said he agreed with it as a statement of the law.

Even as a legal direction concerned with the narrow point at issue in the trial, it was a disgraceful statement. That the Attorney General should endorse it as he did was both disgraceful and damaging. Is there nobody on the Treasury bench who is capable of seeing how damaging, inept and fundamentally ill-conceived is Mr Justice McCowan's direction as a standard text to define the intricacies of the British constitution?

This is not just an academic point. The consequences of McCowan go far wider than the snub he received from his duly directed jury. They can be found already in the row over the range and quality of MI5 surveillance. They colour attitudes to the coal strike. They will sour discussions with moderate trade unionists. They will be used by every militant – particularly those in the civil service unions – to forge an anti-Conservative government alliance supposedly against the doctrine that the State and the government of the day – this government – are indivisible.

On issues of national security the courts recently have shown a reluctance to go behind ministerial decisions. They have argued that such decisions are prerogative acts which preclude judicial review. At the very heart of state security that must still be the case. But the doctrine is in danger of being stretched so widely that it gives the idea that the whole administrative apparatus of national security only has to nod at the courts to be exempt from further scrutiny. And when a judge comes along to add the gloss that the security of the state and that of the present Government's policies are indivisible may give them temporary power to use the permanent institutions of the state – the monarchy, the civil service, the armed forces – to further their policies. But those institutions will outlast them and be at the service of their political opponents.

It follows that the enemies of the state are those who want to subvert this system. Hitherto, there have been more covert subversives than overt ones. However, the rise of the unparliamentary Left which has deeply permeated some sections of the trade union movement and thus has threatened the Labour Party itself, has brought about a situation where the opponents of this Conservative government are too often associated with the opponents of parliamentary government itself.

The internal policies of the Labour movement have meant that this dividing line on the Left is not often enough and clearly enough identified by the Labour leadership. That leadership has failed on occasion to stand fair square on the side of parliamentary democracy when events have tended to blur the issue. In a saga such as the miners strike, for instance, which has unquestionably involved an open challenge to the Parliamentary system and was clearly meant to by those who organised it, Labour spokesmen have tried to trim with this malicious wind in the interests of Party unity.

Opposition and Alliance backbenchers would reject this argument by saying that it is the government which has subverted the parliamentary system by cutting corners with its huge majority and showing disdain for parliamentary punctilio in, for instance, the Belgrano affair. Ministers should have been more sensitive to this criticism. Had they been more sensitive then they might have been more alive to the damaging effect of letting the McCowan doctrine take root elsewhere. Ministers, forced at close range to observe the behaviour of Labour back benchers treating the Parliamentary process with contempt, may feel that such behaviour is more widely known than it is, including the fact that Mr Kinnock's own well founded attempts to

Doubt on 'special relationship'

From Professor Emeritus Keith Buchanan

Sir, We ar asked to believe that Mrs Thatcher's visit to Washington has led to a rebirth of the special relationship between the USA and the UK. I find this comment unconvincing.

I am British-born but taught in a New Zealand university for much of my working life. My father came over in 1914 with the first Anzacs to contribute to the defence of Britain. His reward: a massive dose of phosgene and long years of unemployment here.

With this background I find the spectacle of Mrs Thatcher aligning herself with the US against a Commonwealth country (New Zealand), following so close on the empty protest against the US invasion of Grenada, another Commonwealth country, singularly unedifying.

Her schoolmistressy dressing-down of Mr Lange for daring to go against US nuclear policy and for standing up for what he perceives as the interests of New Zealand is both gratuitously insulting and an example of the interference in the affairs of another country that she would be the first to condemn.

The "special relationship" of which so much is made always seemed to imply a measure of partnership between equals; it has been Mrs Thatcher's achievement to reduce the status of Britain from that of a partner to that of a US satellite.

Yours truly,
KEITH BUCHANAN,
2 Ffridd Helyg,
Llanuwchllyn,
Y Bala, Gwynedd.
February 22.

From Mr George Ivan Smith

Sir, As a citizen of another Commonwealth country, Australia, I find it unusual, unfortunate and unwelcome that Britain's Prime Minister chose to criticise the Prime Minister of New Zealand publicly while visiting a non-Commonwealth country, the USA.

Whatever one may feel about Mr David Lange's decision to bar nuclear equipped warships from New Zealand's ports, it remains an accepted convention that British politicians do not, when on a foreign visit, decry the policies and practices of their own country. Still less should they use some foreign platform from which to criticise the policies of fellow-Commonwealth countries because that would be adding interference to bad taste.

Yours sincerely,
GEORGE IVAN SMITH,
Elm Cottage,
Butterow West,
Stroud,
Gloucestershire.
February 22.

of the day – this government – are indivisible.

On issues of national security the courts recently have shown a reluctance to go behind ministerial decisions. They have argued that such decisions are prerogative acts which preclude judicial review. At the very heart of state security that must still be the case. But the doctrine is in danger of being stretched so widely that it gives the idea that the whole administrative apparatus of national security only has to nod at the courts to be exempt from further scrutiny. And when a judge comes along to add the gloss that the security of the state and that of the present Government's policies are indivisible untold damage is done unless ministers seek to put such narrow doctrines in a much broader context.

The sovereign state of Britain is the Crown in Parliament. The system of parliamentary democracy embraces the notion of governments formed from parliamentary majorities for limited periods of office, with regular provision for peaceful change when the parliamentary majority reflects a different balance of political interest. To be loyal to the principles of parliamentary democracy involves a residual disloyalty to the Government of the day since it must imply acceptance that a different Government with different policies from the present one would also command the same loyalty from its servants and from the other state institutions as this one does. There is only one proviso: that such a Government shows the same fundamental loyalty to the system as its predecessors.

There is no formal ultimate guarantor of such a loyalty other than the convention that the government of the day is "Her Majesty's Government". Government business is the Queen's business. Thus ministers may have their Parliamentory majority behind them and it government which has subverted the parliamentary system by cutting corners with its huge majority and showing disdain for parliamentary punctilio in, for instance, the Belgrano affair. Ministers should have been more sensitive to this criticism. Had they been more sensitive then they might have been more alive to the damaging effect of letting the McCowan doctrine take root elsewhere. Ministers, forced at close range to observe the behaviour of Labour back benchers treating the Parliamentary process with contempt, may feel that such behaviour is more widely known than it is, including the fact that Mr Kinnock's own well founded attempts to correct these tendencies in his Party have themselves attracted the contempt of the Labour Left, in and out of Parliament.

Mr Leon Brittan's explanation of the principles which govern surveillance by the security services of subversisve elements in the country is wholly respectable. British politics has for too long pretended that there is no concerted attempts to subvert our institutions and that the notion of the Communist front "couldn't happen here". It has always happened here and it is happening now. While politicians should obviously be concerned that the security services are correctly monitored, they should also be reminded that the first technique in this game is to rubbish the police and the security services so as to inhibit them in their task.

It is in these circumstances that the McCowan statement is so damaging. It should not go unchallenged and unexplained. Ministers should attempt to set these matters – including Ponting – in a coherent non-party and truly national context by reminding the public that it is our multi-party system, not the policies of the day, which deserve the highest protection, and will receive it. That is indeed the national interest.

GLEMP'S EXILES

The position of the Polish Primate is unlike that of any other religious leader in Europe. When Poland was still a monarchy, the Primate governed as "interrex" between the death of one king and the election of the next. After Poland was divided between three foreign empires at the end of the eighteenth century, Polish nationhood was increasingly identified with, and carried forward by, the Roman Catholic Church. For centuries, therefore, the Polish Primate has been a national as well as a religious leader – and most often a leader of the nation in opposition to the secular powers that be.

In Poland today, the Church is the only national institution to

Prime Minister. Let this, then, be a visit of religious communion with a sister church; of shared reflection on the spiritual unity of Christian Europe; and a pastoral visit to the large community of Polish Catholics in Britain. Yet with this last purpose, politics again inevitably intrude. For this is no ordinary community of "emigrants", who have freely decided to seek their fortune in another land.

The majority of Poles living in Britain are still, in the true sense of the word, exiles. Whether they found themselves here as Stalin imposed Soviet domination on Poland in 1944/5, or as General Jaruzelski reimposed it by proxy in 1982, they are unnaturally

New Zealand publicly while visiting a non-Commonwealth country, the USA.

Whatever one may feel about Mr David Lange's decision to bar nuclear equipped warships from New Zealand's ports, it remains an accepted convention that British politicians do not, when on a foreign visit, decry the policies and practices of their own country. Still less should they use some foreign platform from which to criticise the policies of fellow-Commonwealth countries because that would be adding interference to bad taste.

Yours sincerely,
GEORGE IVAN SMITH,
Elm Cottage,
Butterow West,
Stroud,
Gloucestershire.
February 22.

Forty divided years

From Mr George H. Vassiltchikov

Sir, In the flood of reminiscences, editorials, explanations and apologies that have marked recently the anniversary of the Yalta conference I have sought in vain mention of one consideration that certainly weighed heavily on the attitudes and decisions: the latent suspicion that at the last minute the Western or the Eastern allies (as the case might be) would strike a separate deal with the Germans.

As the war progressed this suspicion literally obsessed the Soviet side, while in the West, "to keep the Russians in the war" at any price – and understandably so, since it was they who were doing most of the fighting at the time – was, we know now, one of the reasons why Roosevelt and Churchill connived in pussyfooting over the Katyn massacre and why the latter would have nothing to do with the anti-Nazi German resistance.

Yours sincerely,
GEORGE H. VASSILTCHIKOV,
73 Durrels House,
Warwick Gardens, W14.

Lack of linguists

From Mrs Patricia A. Forsyth

Sir, The comments of the Vice-Chancellor of London University, Sir Randolph Quirk, concerning the shortage of linguists in commerce and industry (report, February 13), are appalling.

Surely he is aware that good female linguists are being channelled into courses in science, technology and engineering to give them greater opportunities in the labour market.

Why then encourage more boys to concentrate on languages in schools? There is already a glut – albeit mainly female – of perfectly suitable candidates who can offer innate language ability coupled with technical qualifications.

Less specialization at A level would perhaps enable our sixth-form girls to make a greater contribution to improving our international image.

Yours etc,
PATRICIA A. FORSYTH,
St Elmo,
Anderton,
Millbrook,
Torpoint, Cornwall.

Race law and the Jews

From Dr Jacob Gewirtz

Sir, Your editorial, "Hatred, history and the Holocaust" (February 15),