10 DOWNING STREET

Prime Minister

Three Man Courts

In fairness, you ought also to look at Tom King's paper – though it is hard to see how he reaches the conclusion that the arguments in favour outweigh those against.

CDP
23/9.

SECRET

From: THE PRIVATE SECRETARY

NORTHERN IRELAND OFFICE
WHITEHALL
LONDON SW1A 2AZ

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Charles Powell Esq
Private Secretary
10 Downing Street
LONDON
SW1

23 September 1986

Dear Charles,

ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND

In his minute of 18 September on this subject, Mr King undertook that a paper setting out the arguments which lay behind his recommendation would be circulated early this week.

I now attach a paper which summarises the key arguments both for and against the proposition that there should be three-judge courts for the trial of contested scheduled cases in Northern Ireland. It was after a very careful consideration of all these arguments that Mr King concluded that on balance it was in the interests of the administration of justice in Northern Ireland to recommend the introduction of three-judge courts.

I am sending copies of this letter to the Private Secretaries to the Lord President; the Lord Chancellor; the Foreign and Commonwealth Secretary; the Home Secretary; the Attorney General and Sir Robert Armstrong.

Yours Sincerely,
Neil Ward

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ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND

Part I of this paper presents in summary form the arguments for introducing three-judge courts for the trial of scheduled offences in Northern Ireland; and Part II marshalls the objections to this proposal.

Part I - The Case for introducing three-judge courts

Where an accused person is being tried for a serious offence but without a jury, and especially if the case is particularly complex or turns on the uncorroborated evidence of an accomplice, the credibility of the system of justice and public confidence in it would be enhanced if the case were heard by three judges rather than one:

(a) in normal criminal trials the defendant's guilt or innocence is determined by twelve independent people. Thus the prosecution has to convince twelve people (or a significant majority of them) that the defendant is guilty beyond reasonable doubt. In every Western society, even where there is no jury, the tribunal of fact in criminal cases consists of more than one person. Even if it is accepted that it would be inappropriate for members of the public to play a part in the trial on indictment of scheduled offences, it would be appropriate to recreate at least some of the sense that decisions about guilt or innocence in a criminal trial should be made by group, rather than an individual;

(b) if a trial was held before three people it would help to counteract any tendencies which individual members of the court might have to severity or leniency; any subconscious bias which might be present; and any individual inclination there might be to accept particular types of evidence, interpret the law in a particular way or accept the arguments of a particular barrister;

(c) In discussing its judgement, a three-judge court would be less likely to err in its analysis of the evidence or its interpretation of the law. The process of three minds working to produce a judgement on a particular case would be more likely to produce a comprehensive, sound verdict.

2. Any procedural difficulties could be overcome:

(a) Sir George Baker (paragraphs 113-129 of his report) said that he had some doubt about Lord Diplock's conclusion that a plurality of judges would lead to procedural difficulties;

(b) he referred to the experience of three-judge courts in India and the Republic of Ireland and concluded that they had not faced significant procedural difficulties;

(c) the drafting of a single written judgement when convicting for a scheduled offence should not be a matter of great difficulty for a three-judge court. It ought to be possible to draft such a judgement in a way which fully reflects all the nuances of each judge's position. (If it were quite impossible for the court to reach agreement on the wording of a judgement it could presumably order a retrial.);

(d) the alternative of providing separate written judgements when convicting for a scheduled offence (but not when acquitting, to prevent "tainted" acquittals) would avoid any difficulty over agreeing a joint judgement and facilitate the Court of Appeal. There would be no greater risk than exists at present of political motives being attributed to individual judges. In fact it would be easy to demonstrate the falsity of any such inferences by referring to the judgement of the judge in question which would set out in detail his grounds for convicting.

3. The setting up of three-judge courts would not pose insuperable practical problems:

(a) at present there are usually two major 'Diplock' trials underway at the Crumlin Road Courthouse at any one time, and one taking guilty pleas or simpler cases. There is provision for a fourth court. Thus a move to three-judge courts would probably require the appointment of a maximum of six additional judges. There are currently 22 judges (10 Supreme Court and 13 County Court - minus one who is a full time Social Security Commissioner) so this would only represent a 25% increase in the size of the judiciary. If guilty pleas continued to be heard before a single judge it might even be possible to manage with a smaller increase, particularly if three-judge courts were introduced for only a limited category of scheduled cases;

(b) the setting up of three-judge courts would undoubtedly put strains on the Court Service's ability to provide appropriate accommodation and services for the extra judges. It may be, however, that the proposed amendment to Section 6(1) of the Northern Ireland (Emergency Provisions) Act 1978 (the EPA) to permit trials for scheduled offences to be held other than at Crumlin Road would reduce some of the pressure, e.g. by allowing smaller or simpler trials to proceed at the new Craigavon courthouse or elsewhere in the province;

(c) any difficulty which might be experienced in finding Supreme Court judges to hear appeals in cases which many judges were disqualified from hearing (because they had heard bail applications or the original trial) would be countered by the appointment of the extra judges and perhaps by the removal of the special appeal rights conferred by the EPA in scheduled cases (see below);

(d) more judges could be appointed without unduly weakening the Senior Bar as 12 new QCs were appointed last year (a 50% increase) and the junior bar now contains far more barristers with ten years seniority than when Sir George Baker reported.

4. Everyone accepts that the removal of the right to trial by jury for scheduled offences requires a compensating safeguard. Gardiner concluded that the appeal provisions in the EPA constituted a sufficient extra safeguard. It would be better all round, however, for the safeguard to bite at the trial of first instance, rather than at the second stage of the judicial process - often several months after the original conviction and up to five years (in extreme cases) after the defendant was arrested. A corollary of this argument is that the special appeal provisions in the EPA could perhaps be repealed, leaving persons convicted of scheduled offences with exactly the same rights of appeal as everyone else (as in the Special Criminal Court).

5. The creation of three-judge courts for the trial of scheduled offences would have major presentational advantages:

(a) it would be less easy for critics to claim that the Diplock system involved no more than the removal of the jury;

(b) the safeguard would be visible right from the beginning of the judicial process and would bite at that stage. The current enhanced rights of appeal are difficult to explain convincingly; and if they operate to acquit a person it is usually long after the publicity surrounding the original trial; and there is usually an added ground of complaint to the effect that the defendant has been in prison for several years before finally being acquitted.

6. Three-judge courts would increase public confidence in the judicial system:

(a) there has been a significant erosion of the minority community's confidence in the judicial system over the past 3 or 4 years and despite some practical problems which

might well mean that three-judge courts were not in a technical sense any "better" at dispensing justice than the current Diplock courts, the minority could be expected to welcome their introduction and be more inclined to support the judicial system and the forces of law and order. The Government would at least have been seen to address an issue of major concern;

(b) despite recently-voiced political objections to anything which might emerge from the Anglo-Irish process, Unionists might privately welcome any such development, which has long been part of DUP policy;

(c) moderate voices such as SACHR and the Alliance party have also long supported the introduction of three-judge courts on the grounds that this would increase public confidence in the judicial system.

Part II - Objections to the three-judge court proposal

7. There is no objective case, in terms of the actual performance of the judicial system, for changing the present "Diplock" structure:

(a) there is no evidence or substantial belief that it has resulted in perverse convictions or acquittals or other unfairness. Indeed, guilty pleas and acquittal rates are comparable to those in non-Diplock courts. Despite the unfettered rights of appeal there were proportionately fewer appeals lodged in 1985 against conviction for scheduled offences than in ordinary criminal cases (and no evidence has been adduced that failures to appeal are due to lack of confidence in the appeals machinery);

(b) there is no evidence of any substantial perception that the judiciary is biassed in favour of Loyalists. Indeed there is often criticism of the judiciary from the Unionist side for not convicting alleged Republican terrorists;

(c) the special appeals regime constitutes a substantial safeguard which independent legal figures, eg the Gardiner Committee, have found to be sufficient to compensate for the absence of a jury.

8. The three judge court proposal involves a number of substantial practical difficulties. On an objective analysis it is not easy to show why it should be considered "better" than, or even as good as, the current Diplock system in terms of its ability to dispense justice even-handedly:

(a) in any trial of first instance, difficult legal and procedural issues may arise: while a three-judge court might sometimes dispose of these without difficulty, the need to reach collective decisions would be liable to disrupt the process of examination and cross-examination, and prolong the trial proceedings;

(b) particular problems would arise in determining whether a three-judge court should be entitled to reach a majority verdict, or whether a guilty verdict should require unanimous support. The related difficulty is whether the views of the individual judges should be revealed or not. The Irish Special Criminal Court (in which three judges try terrorist-type cases) can reach majority verdicts but is expressly forbidden to reveal differences of view between the judges. In the divided society of Northern Ireland such concealment would lead to unhelpful speculation: if guilty verdicts had to be unanimous there would be speculation that a judge of a particular persuasion had secured acquittals by holding out against his colleagues' views, and if verdicts could be reached by a majority Catholics might come to believe that any judge from the minority would always be "outvoted"; but if individual judgements were revealed it could give rise to even more unhelpful speculation that particular judges

were politically-motivated. All this would tend to bring judicial decisions within the ambit of political discussion and would not serve the aim of increasing public confidence in the judicial system;

(c) additionally, the suppression of the views of individual members of the court of first instance would not be in the interests of justice at any subsequent appeal hearing, particularly if the gravamen of the appeal was a matter on which the judges in the court of first instance had in fact disagreed.

9. While the Special Criminal Court might function adequately in the Republic it would not necessarily provide an acceptable model for a less homogenous society, particularly the deeply-divided society of Northern Ireland. Northern Ireland has substantial political lobbies concerned about the rights of suspected terrorists; and a vociferous civil liberties lobby. Any scheme for bringing suspected terrorists to trial in NI would have to withstand intense scrutiny. Moreover the Special Criminal Court deals with such a low percentage of criminal trials in the Republic (and such a very small absolute number of cases each year) that it would be rash to generalise from its experience.

10. Substantial practical difficulties would arise in finding sufficient judges (or other suitably qualified persons) to constitute three-judge courts for the trial of scheduled offences in Northern Ireland. Increasing the workload of existing judges or reducing the size of the Senior Bar by appointing more judges would probably exacerbate the problem of 'delays' between first remand and trial.

11. It seems questionable if the introduction of a 3-judge court would achieve its stated aim of encouraging minority confidence in the judicial system in NI. It would still be the case that judges from the minority would be outnumbered in virtually every 3-judge court which was constituted. The

minority perception might well be that the judge from their community had been 'outvoted'.

12. In the present political climate in Northern Ireland, the introduction of a system of three-judge courts would run up against significant opposition from the majority community, particularly if it offered no objective advantages over the present system and failed to increase minority confidence in the judicial system. If they felt that the new system would be likely to lead to more acquittals it might well exacerbate their lack of confidence in the Government's security policy. Regardless of earlier statements in favour of three-judge courts, Unionist politicians would undoubtedly express vigorous opposition to and refuse to co-operate with any such proposal which was seen to have emerged from the Conference.

NORTHERN IRELAND OFFICE

23 September 1986

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