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29ix September 1989

*Dear Patrick,*

NORTHERN IRELAND INQUESTS/BALLYNERRY INQUEST

Thank you for copying me your letter of 1st September concerning the giving of evidence at the Ballynerry inquest. I have also seen Peter Brooke's letter of 15th September, your reply of 19th September, and John Major's minute of 24th September.

May I say first that I entirely agree with you that the Order in Council should be treated as a separate issue and implemented as rapidly as possible, thus allowing the Government to withdraw its appeal to the House of Lords. As you say, the assessment of Crown Counsel is that the Lords appeal is very unlikely to go our way. As H concluded earlier this year, it would be presentationally considerably more difficult to restore the status quo ante after what would be seen as a second legal set-back. To act swiftly now would also help to increase the fine separation between the Order in Council and any contingency legislation that might be required in respect of the Ballynerry inquest (contingency legislation which I note you assess would not be required for some 18 months to 2 years).

We had previously considered the possibility of primary legislation, but concluded that this course would be more controversial than an Order in Council. The latter would not apply specifically to the Security Forces, and could be presented against

Rt Hon Sir Patrick Mayhew QC





the background of the 'double jeopardy' aspect which is peculiar to Northern Ireland where all terrorist related deaths are investigated thoroughly by the RUC and referred to the DPP before the inquest takes place.

In taking that decision H accepted, I believe without reservation, the overriding need to protect both the identity of witnesses (who would otherwise become terrorist targets) and important operational details. Screening arrangements could not be guaranteed if witnesses were compellable, and it seems to me optimistic to assume that PII Certificates would be anything other than an uncertain basis on which to guarantee the protection of sensitive operational information material to issues arising in the inquest.

It is true that restoring the status quo ante by means of an Order in Council would not affect the compellability of individuals not directly involved in the killing. But it would certainly reduce the size of the problem considerably. The question of screening would be likely to arise much less frequently, and it would be easier to avoid certain lines of questioning on the grounds of relevance when the witnesses have not been directly involved in the shooting. In addition, the presence at inquests of those individuals who are directly involved in the killing would provide a focus for attempts to abuse the judicial process for propaganda purposes in a way which is not the case for other witnesses.

In sum, I strongly believe that restoring the non-compellability of those directly involved in a death is both necessary and worthwhile in its own right, and should be pursued with all speed. Not to do so would undoubtedly have an adverse affect on the morale and consequently the operational effectiveness





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of members of the Security Forces. The knowledge that they would unfairly be subjected to double jeopardy could well deter the soldier or policeman from responding appropriately in dangerous situations where he is confronted by terrorists.

To turn to the Ballynerry inquest, I sympathise with your desire to keep the numbers of witnesses requiring full screening as low as possible to reduce controversy. However, I have to record my very firm view that a distinction cannot be drawn in principle between the activities of the Security Service and those of certain covert Army units - as indeed you suggest in your letter of 1st September. Members of such covert units are required inter alia to operate incognito in plain clothes on the streets of Northern Ireland. As such they are a scarce and highly trained resource; and not one we should squander needlessly, thereby impairing the effectiveness of the most important elements of Security Forces operations in Northern Ireland.

As for the particular case of the witnesses required for the Ballynerry inquest, there are four individuals who were in the listening post at the time of the killing or subsequently listened to the tape recording of the events. Of these four, two are now civilians. As such we judge that partial screening and concealment of their names and addresses from the court would suffice. Both of the other two are however still serving in the Army. One is currently serving in the same covert unit in Northern Ireland as in 1982; the other, the officer involved, is presently in Germany but could well be posted back at some future date to the unit in Northern Ireland. These two should therefore be screened from all but the Coroner.

SECRET UK EYES A



I am copying this letter to the Prime Minister, Peter Brooke, James Mackay, John Major, Douglas Hurd, and to Patrick Walker and Sir Robin Butler.

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Tom King



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