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Briefing in Iveagh House on 8th December 1976 re Emergency Legislation

A list of participants is attached.

Following the normal introductions, Mr. Bourne said he was pleased to have this opportunity of receiving a briefing on the very important set of measures in question in view of the mutual interests involved. The briefing would most helpfully indicate what the Irish authorities were seeking to achieve in those measures, what were the problems and difficulties to be overcome or which might be encountered and to what extent the legislation were a spring board for the provision of more resources in the context of the Government's security efforts. Mr. Donnelly, referring to the murder of the British Ambassador and the explosions and break-out in the Special Criminal Court in Green Street, said that these events had precipitated the legislation. They had been thinking of improving the legislation particularly the emergency provisions and the police indicated that it would be helpful to have the ability to detain suspects for longer than two days. The Offences Against the State Act gave power to detain for up to 48 hours and on the basis of exchanges of information with the RUC, Scotland Yard, etc. the Gardaí thought that an extension of this kind would be helpful. The Government considered the matter and decided on the basis of the police view that detention would be extended to a maximum of 7 days. This raised a problem under the provisions of our written Constitution and the Law Officers and Attorney General advised that it would be necessary to invoke the emergency provisions in relation to an armed conflict in which the State is not a direct participant. The Emergency Powers Act was put through Parliament and referred by the President to the Supreme Court. That Court concluded that the legislation was in order with the terms of the emergency resolution. Allied to this measure was the Criminal Law Act which provided the number of powers principally dealing with increases in the penalties provided under the Offences Against the State Act 1939 e.g. membership of an unlawful organisation, usurping and attempting to usurp the functions of Government. The Government decided to increase these penalties substantially. In addition to tidying up the law spelling out and improving police powers of arrest and search the Act

also gives statutory expression to an offence of incitement (maximum penalties 10 years) and contained the novel provision giving members of the Army powers to arrest. There are also specific provisions regarding escapes from custody and bogus telephone calls. The legislative package was generally designed to strengthen the hand of the forces of law and order so as to deal more effectively with the type of activity in question. Mr. Bourne said he was interested in the advantages of expanded powers of detention in certain circumstances, as under the Emergency Powers Act and asked whether it had been anticipated that writs of habeus corpus would ensue. Mr. Donnelly referred to our particular circumstances with the written Constitution, an extremely vigilant Supreme Court and the quality of legal advice available to people in unlawful organisations. It had not been anticipated that the Bill would be referred to the Supreme Court before being enacted and that a judgement would be delivered. In the course of this judgement specific attention was drawn to the rights of a person detained under the 7 days provision and it was indicated that the Bill would not suspend any Constitutional rights such as habeas corpus. The Supreme Court spelled out a list of basic rights including the right of communication, access to a legal adviser and to a doctor. This focussed attention, giving rise to quite a number of habeas corpus applications and in view of the problems created the value of the provision has tended to be off-set. In one major Supreme Court decision it was concluded that the new power could be exercised only once in a given situation. In the case of Hoey who had bnow been charged with the murder of Garda Clerkin he was brought in for questioning under this provision and was subsequently released. After some 10 days fresh evidence became available and the Gardaí sought a further detention for questioning. Habeas corpus application was made and the High Court, feeling that the provision had been interpreted very strictly, decided that the second use of the detention provision in the situation was unlawful. During the Dáil debates on the Bill, the Minister for Justice had been questioned very carefully on this point and had given assurances that such multiple detention would not occur. In the Hoey case the police had felt that in view of the lapse of time and the fresh evidence involved the second detention was proper but the High Court decided otherwise. Mr. Colwell pointed out that in its passage through the

Dáil the Bill had originally no Section 2(v) (suspending Section 30 of the Offences Against the State Act). It had originally been intended not to alter the '39 Act but as a result of Dáil comment to the effect that the combined provisions might allow a possible total of 9 days detention, Section 30 of the '39 Act was suspended for the duration of the Emergency Powers Act. This had the effect of focussing attention and the referral to the Supreme Court created a climate in which habeas corpus applications would be likely. Up to the present there hasn't been a great deal of use of the 7 days provision but a number of habeas corpus applications have been made. The only decision to date has been in the Hoey case and two others are sub judice at the moment. Mr. Donnelly said that the picture emerging is disturbing under the Offences Against the State Act, while habeas corpus applied, the rights referred to by the Supreme Court in the present instance had not been invoked in such a way as to impede the Gardaí. There are now indications that the Gardaí will not be able to exercise the new detention provision without the possibility of a habeas corpus action and the Gardaí may now in fact be worse off as a result of the suspension of Section 30 of the Offences Against the State Act. In addition there was provision in the Offences Against the State Act making it an offence not to answer questions. Under the Emergency Powers Act however a person may refuse to answer questions. Following the Supreme Court judgement the constitutionality of the Act cannot be questioned but attention had been directed to the existing rights and to the fact that is emergency legislation sheltering under an emergency resolution. Mr. Colwell added that the Supreme Court was concerned in looking at the legislation in terms of its constitutionality but laid down certain guidelines and indicated that the legislation must be interpreted very tightly and narrowly, in effect, serving notice that the legislation would be under constant scrutiny and pointing up the limiting factors involved. Mr. Donnelly remarked that while a person might legally remain silent in the face of questioning his own view was that the 7 days provision would be very useful. Garda experience is that after 2 or 3 days a person begins to respond to questioning, particularly if fellow conspirators are also detained. We are in an evolving situation at the moment in that the legislation has not been fully processed through the Courts and Gardaí may have to tread very wryly until final judgements have been made during the

coming months. Mr. Colwell felt that it was inevitable that if all people detained sought habeas corpus applications the Courts would soon get shrift if they felt this right was being abused. In response to Mr. Donnelly about British experience in such cases Mr. Bourne said that in effect police had to think carefully about the use of extended detention and to use skilled men for questioning so as to obtain maximum benefit and diminish the possibility that the Courts would become involved. Mr. Burns added that the use of their 7 days provision has never been thought of as anti-habeas corpus. They had a common law approach to this right viz. question of unlawful arrests, rights of access, etc. are reflected in the Judges Rules and these come into play in the actual Court.case. In view of their use of exclusion, this had not been a bproblem. Mr. Jackson said that the power was used hardly at all in Northern Ireland and that one fear was that a statement made on day 7 for example might be suspect if attacked in Court. Mr. Donnelly said that such a case had arisen in a murder case here when the Court of Criminal Appeal acquitted a man because the taking of the statement had extended beyond the 48 hours permitted under Section 30 of the Offences Against the State Act. Mr. Jackson queried whether in a case of a terrorist caught red-handed it was deemed proper to use the 7 days period to clear up other crimes. He added that this had been happening in Northern Ireland. Mr. Colwell said that until recently the question had not arisen as the period involved was only 48 hours. In the present situation it may be possible for the Gardaí to get clarification of a number of other offences but not enough experience has been obtained to be definitive. Mr. Donnelly pointed out that in our case the use of the power is statutorily a matter exclusively for the police and Mr. Colwell added that if a substantial charge was involved the person would be brought before the Court. Mr. Donnelly said that the situation has arisen where police have evidence for example regarding possession of explosives whereas the person may have been involved in murder it would be counter-productive to go for the lesser offence and the use of the 7 days detention period which is a matter for the police would seem proper in that case. Many of the people involved in subversive activities are inevitably involved in a number of other offences and very often it is a very complex situation. Mr. Jackson said that in Northern Ireland basic rights are (helpfully) pretty clouded but police allow visits unless it impeded their investigations. Police

in Northern Ireland are in fact keen to have an initial medical examination and a further one prior to release, normally by a police doctor, although a request to have his own doctor as well would normally not be turned down. Mr. Donnelly said that the Supreme Court ruling dispelled vagueness in this area. The Supreme Court judgement gives protection against the Constitution being invoked for the purpose of invalidating the Bill and pointed to the detained person's right to communication and access to legal and medical attention and to the Courts. In the habeas corpus applications made to date the first related to the physical circumstances of confinement (i.e. the cell) and was rejected on the facts; the second alleged physical ill-treatment and the High Court has reserved judgement in this case; and the third was the Hoey case on the legality of the second period of detention. Mr. Colwell pointed out that the whole purpose of these applications was to get out. In these cases certain members of the legal profession are freely available. There is the doubt whether, as a result the legislation will be effective but reliance on habeas corpus procedures may back-fire. Mr. Donnelly added that the Courts could be depended upon to stamp out any abuse of these procedures and no doubt the judgement in the Hoey case will clarify mattersconsiderably. In response to a query, Mr. Colwell said that any such application must be dealt with forthwith i.e. at the earliest available time and can be brought before a Peace Commissioner. Mr. Bourne referred to the need to have the Secretary of State's approval in their case in any extension of detention beyond the 2 day limit. He asked whether the police notified the Department of Justice purely as a matter of record in these cases. Mr. Donnelly said that any police activity relating to subversion will be very closely monitored and irregularities would be pointed out. The decision to leave the discretion to the Gardaí was deliberate but if it seemed that the powers were being abused the Minister would be apprised and the Garda Commissioner would be notified. Mr. Bourne commented that the Irish authorities had to face up more quickly to Court proceedings in the matter but that the British have the same sort of approach and in their case the Minister is directly involved. With the possibility of Court action police have to be very careful. Mr. Donnelly referred to the inevitable inter-action between both countries and to the possibility that habeas corpus proceedings may arise in Britain.

Mr. Bourne said that an application for habeas corpus would be taken very quickly indeed - it is normally used as a lever or threat and a charge is usually quickly brought. Mr. Colwell pointed out that habeas corpus applications get immediate hearing here. Mr. Burns asked whether there was concern that the 7 days provision might require derogation from the European Convention on Human Rights. Mr. Donnelly said that an instrument of derogation had been lodged. Mr. Colwell added that detention up to 48 hours is generally accepted, beyond that there is an area of high risk and the Commission or an individual can challenge. The important aspect was how the people actually involved would seek to get out of it. Mr. Donnelly pointed out that the emergency resolution was the insurance against domestic constitutional difficulties regarding the Act and Mr. Swift pointed out that the provision in the Constitution refers to international relations.

On resumption after lunch Mr. Donnelly said in response to a query from Mr. Bourne that the Emergency Powers Act as far as could be seen would be renewed by Government order after the current 12-month period. He pointed out that in its judgement the Supreme Court reserved the right to look at the content of future resolutions in this regard.

Going on to the Criminal Law Act Mr. Bourne said that the increased penalties were of particular interest. He noted that refusal in the past to recognise the Court had allowed the evidence of police officers to secure conviction and he asked whether it would not be more difficult to get convictions. Mr. Donnelly said that this was a critical aspect regarding the offences of membership. A high proportion of the inmates of Portlaoise Prison had been convicted on membership charges, the success of which were dependent on Section 3 of the 1972 Act whereby the wsworn belief of an officer not below the rank of Chief Superintendent would constitute evidence in relation to IRA membership. It was confirmed that such evidence can of course be accepted or rejected. For ideological reasons members of the IRA have by and large in recognised the Court and have not denied membership of the IRA. Because of that attitude the Section in question has been particularly effective and since the

Special Criminal Court was set up in May 1972 some 200 people have received sentences ranging from 6 to 18 months on the membership charge. Reflecting the Dáil's view of the gravity of the offences the Government decided to increase the maximum penalty from 2 to 7 years and this was enacted into law. In some respects reaction has been a little bit disturbing in that (a) in cases of convictions since the enactment of the recent legislation the Courts have nevertheless given sentences of less than 2 years and (b) there is a new tendency for people charged to swear that they are not members of the IRA and that disposes of the charges from the Courts point of view. This situation had not been entirely unforeseen. It is speculated that where conviction depends on the single factor of the Garda belief that the Court may be reluctant to convict on the higher sentence. While this is an evolving situation there are indications that the value of the new provision may be nullified. Mr. Colwell said that the use of the membership charge on its own is a matter of discretion. In the majority of cases other offences would be involved. Under the 1972 Act it is also possible to produce evidence other than police evidence although this would work only in regard to prominent IRA men (Section 3(i)). This was not a matter of evidence for conviction but rather of evidence which would be seen to be so and whether or not the Court rejects it is a secondary consideration. Mr. Donnelly referred to the way in which for example Ruairí Ó Bradaigh, President of Sinn Féin (Kevin St.) prefaced some television interviews with the phrase "while not speaking for the IRA" and then proceeded to do so. There have also been newspaper reports which imply that O Bradaigh is the chief spokesman for the IRA and he has not denied them. Section 3(i) was an attempt to deal with this aspect of the situation but in the event it hasn't worked out and the membership charge simpliciter tends to rely on the sworn statement of a Chief Superintendent. Mr. Bourne said that in Northern Ireland people usually would contest police statements and Mr. Donnelly pointed out that this had been discussed at the meeting between Mr. Rees and the Minister for Justice last January. The IRA attitude here is quite different from that in Northern Ireland and there are different attitudes towards the police forces. Mr. Bourne said that they had been wondering about how television material and "common repute" reports could be martialled and used in the Courts. So far they couldn't see how all this material could be used in view of the existing laws of evidence.

Mr. Donnelly said that the Minister for Justice had discussed this with the Attorney General but that no solution was yet apparent. The differences are in the legal areas and on the laws of evidence in particular. The question is being examined and it may eventually be found that the existing law is defective or on the other hand that it is not possible to bring the material into use. Mr. Colwell added that when the '72 Act was enacted the Special Criminal Court had been in existence 8 or 9 months and the IRA stance was well-known. It was clear that the measure would be effective because of the stance of that organisation and it seemed that if both police statements and other material were used this would in effect reduce the value of the former. This aspect remains relevant. Mr. Bourne gratefully accepted Mr. Donnelly's offer to let him have a report on the results of their current investigation on this question. Mr. Jackson referred to the Drumm case and indicated that the Director of Public Prosecutions had said that for purpose of evidence relevant testimony would be required. Mr. Colwell added that it is possible to convey a particular point without using constructions that would stand up in Court. Mr. Jackson referred to the inherent discretion of the Court to exclude such statements and Mr. Colwell added that it was difficult to legislate in the area of laws of evidence as the Courts are likely to have regard to precedent. The only way would be to radically change the laws of evidence. Mr. Donnelly pointed out that this might involve tampering with basic principles such as that a person is innocent until proven guilty and that this clearly depended on what democracy could accept. Mr. Colwell said that it would be a bad principle to seek to change the existing situation for a specific purpose in view of the fact that this would have serious consequences in other respects. Mr. Donnelly said that there were different views on this and that it was a matter of society protecting itself. It was a delicate area with political overtones and Governments would be reluctant to change the basics but people may have to make a choice. Mr. Colwell added that such changes would generate much controversy and involve almost insuperable difficulties. He didn't see much happening in this area. Mr. Bourne said that they had been tempted to seek to use such public statements but had hesitated. They would be most interested to hear the results of the current investigation here as it was at the heard of their problems. He asked whether there were any ideas declaring splinter groups unlawful and Mr. Donnelly said that there were not. The IRA had been declared an unlawful

organisation under the Offences Against the State Act and bearing in mind developments since then any attempt to amend the Government Order in question would focus on the weakness inherent in it as there might be some difficulty in establishing that the Provisional IRA is the IRA of 1939. Mr. Colwell pointed out that it would be necessary to consider the situation in regard to other organisations also. As regards the Provisional IRA, that organisation might challenge in the High Court that it was not an illegal organisation and it would be difficult to contest adequately without jeopardising other aspects of the security operation. Mr. Donnelly added that until the matter was challenged in Court - and there was no indication up to now that this will happen - it would seem preferable to sit tight. Some 3% to 5% of the population support the IRA, ranging from active militancy to the provision of a haven and this is based on the basic philosophy of an entering into Court procedures. In addition some members would be violently opposed to changing the present stance. Any person may apply to the High Court within 30 days that an organisation is not unlawful and with changes in Court attitudes there is a possibility that a new Suppression Order might be challenged. Mr. Colwell referred to the inter-changeability of the names of many of the organisations e.g. Saor Eire and Saor Uladh. Mr. Donnelly said that there was no distinction between Sinn Féin Kevin St. and Provisional IRA Kevin St. but it had been decided not to take action as it might spark off a worse situation. In response to a query from Mr. Bourne, Mr. Colwell said that the broadcasting ban has been broadly successful in that it removed from television and radio clear and direct IRA propaganda by spokesmen. Mr. Donnelly added that the Minister for Posts and Telegraphs has legislation modifying and clarifying the particular Section. The Government is sensitive about interfering with the freedom of expression of the media. The fact that Daithí Ó Conaill or Ruairí O Bradaigh can be on ITV has been a source of criticism and it would seem necessary to look at this aspect also. Mr. Bourne said that if his Minister tried to take action of this kind there would be criticism from both extremes but it would be interesting to hear of Irish experience. Mr. Stevens asked whether there was a general trend on the part of Courts showing a reluctance to apply the greater penalties. Mr. Donnelly said that not enough time had elapsed. While the old maximum has not yet been exceeded cases so far have included other serious offences. They had adverted to the

possibility that Courts might react in different ways but had reached the concept of a minimum sentence. The Constitution must always be considered and Courts take very seriously the need to safeguard basic rights. Mr. Colwell said that a very important aspect of the increased penalties was the objective of dissuading particularly young people from becoming members. On the provision relating to the new powers of the Irish Army under the legislation, Mr. Donnelly said that the Army could act only if a senior police officer requested it. Internal security is a matter for the police and that the Army acts solely in aid of the civil power. The differing Army roles have indeed caused difficulty in the field of security co-operation. The new powers are an attempt to cater for cases such as the Herrema kidnapping and would allow greater coverage and cordoning of large areas. The power has not yet been used. Mr. Colwell said that it was not expected that the power would be used unless an exceptional situation arose where this was the most effective way of dealing with it. Mr. Donnelly said it could be use in border areas e.g. in South Armagh area but it had been design designed for an exceptional situation. Public attitudes are central as could be visualised if the British Army's Northern Ireland powers were translated to London, Birmingham or Glasgow, for example. It must always be borne in mind that in cross-border situations only some 3% of Northern Ireland violence has a cross-border dimension. In response to a query from Bourne, Mr. Donnelly said that the new powers of arrest were a step forward but that considerable fears had been expressed. Mr. Colwell explained that the Army and the Gardaí had individual and separate instructions but that this situation had worked fairly well since the foundation of the State. Under the new powers a Garda Superintendent may request the Army to do a specific job. There have been wide-ranging discussions on this between the two forces and a lot of attention has been paid by the Army to their legal position. The request by the Superintendent must be related to a specific incident and must be in writing. Searching of premises is dealt with under another provision and again must specifically relate to a particular incident. He added that there was a need to scrutinize very carefully the use of these powers which are seen to be emergency powers (although not strictly speaking so) and which are circumscribed by the legal limits set out. He added

that outside this new provision the Army does provide assistance in escorting explosives, guarding installations, etc. and may be requisitioned in cases of break-outs. The present legislation gives them powers to act a little bit further. Mr. Donnelly said that the Government would be very sensitive if it were proposed to invoke this provision on any wide scale as there would be an immediate reaction amongst the community at large.

Mr. Donnelly suggested that if there were any risidual points on the whole question these might be discussed in London in January. Mr. Bourne thanked him for this offer and expressed his gratitude for the information conveyed in the course of the present meeting. He suggested that it would be helpful to have a similar sort of meeting every 6 months or so and that this wouldn't cut across contacts relating to police co-operation or explosives. Mr. Donnelly saw mutual advantage to this and agreed to the suggestion.