

FROM: D A L COOKE, SIL
11 December 1990

[Handwritten initials/signature]

cc: PS/Ministers (L&B) - B&M
PS/PUS (L&B) - B
Mr Pilling - B
Mr Thomas - B
Mr Wilson - B
Mr Bentley - B
Mr Steele - B
Mr Bell - B
Miss Mills - B
Mr Maccabe - B
Mr McClelland - B
Ms Lodge - B
Mr McKervill - B

Mr Carmichael
6/12/12

PS/SECRETARY OF STATE (L&B) - B

RESTORATION OF THE DEATH PENALTY

I would be grateful if you would substitute the attached for Mr Johnston's submission of 7 December on this subject.

(signed)

D A L COOKE
SIL DIVISION
11 December 1990
EXT OAB 6587

AW/SIL/16521

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Mr McKervill	- B

PS/SECRETARY OF STATE (L&B) - B

RESTORATION OF THE DEATH PENALTY

As the Secretary of State is aware, a debate and vote on capital punishment is to take place on the floor of House on Monday 17 December. This submission invites his agreement to the terms of a paper (Annex B) to be passed to the Home Office, which they can use as a quarry for arguments; and offers a form of words which, if the Secretary of State wished, could be included in the Home Secretary's or Mr Patten's speech as representing his view.

2. There are currently three amendments tabled to the Criminal Justice Bill dealing with capital punishment. The texts are at Annex A. The first two amendments, dealing respectively with terrorist murder and murder of policemen, do not explicitly apply to Northern Ireland (although there would be obvious implications for us if either were adopted in England and Wales). The third explicitly does cover Northern Ireland. Fresh amendments or new clauses can be tabled up until 12 December; we should, barring manuscript amendments etc, have the final tally on the 13th.

AW/SIL/16521

3. Attached, at Annex B, is a paper which seeks to outline some of the considerations involved in a decision to apply the death penalty for murder in Northern Ireland (where the overwhelming majority of murders are committed by terrorists). The views of the current Chief Constable of the RUC are recorded at paragraph 8. Would the Secretary of State be content for this paper to be passed to Home Office officials for use as a quarry? (The precise way in which the arguments are deployed will depend partly upon the grouping of amendments.)

4. I understand that at this morning's meeting Ministers discussed mechanisms for making the Secretary of State's view on this subject known. One vehicle might, as suggested this morning, be by means of a press release; but our feeling (shared by Home Office officials) is that this might serve to stimulate public interest in a debate which Home Office Ministers seem, thus far, inclined to handle in low key, and might give Mr Brooke's position a higher and more exposed profile than would fit comfortably with this approach. The alternative, also discussed this morning, of asking Home Office Ministers to refer during the debate to Mr Brooke's views, seems a preferable alternative. I attach at Annex C a text which, if the Secretary of State felt minded to adopt it, might be offered to Home Office Ministers (the most likely arrangement is that the Home Secretary will respond to the amendment and Mr Patten wind up).

(signed)

D A L COOKE
SIL DIVISION
11 DECEMBER 1990
EXT OAB 6587

AW/SIL/16521

ANNEX A

- A. Mr Andrew Hunter
Mr James Molyneaux
Sir William Clark
Mr Ivor Stanbrook
Mr Roy Beggs
Mr Humfrey Malins

To move the following Clause:-

'A person aged 18 years or above who is convicted of murder committed as, or in pursuit of, an act of terrorism shall on conviction be sentenced to death'.

- B. Mr John Greenway
Mr Ivan Lawrence
Mr Roger Gale
Mr Michael Shersby
Mr David Gilroy Bevan
Mr Chris Butler
Mr Ann Winterton

To move the following Clause:-

'A person aged 18 years or above who is convicted of the murder of a police officer acting in the execution of his duty shall on conviction be sentenced to death'.

- C. Mr Ivan Lawrence
Mr John Greenway
Mr Tim Janman
Mr Richard Alexander

To move the following Clause:-

- '1) Subject to the following sub-sections the penalty for murder shall be death.
- 2) No person aged under 18 years shall suffer the death penalty.
- 3) As soon as practicable following a sentence of death, a special sitting of the Court of Appeal shall be convened to consider whether the circumstances of either
 - a) the commission of the offence or
 - b) the offenderwhether or not such circumstances were adduced in evidence at the trial, are such as would justify the substitution of a sentence of life imprisonment in place of the sentence of death.
- 4) This Act shall apply to Northern Ireland.'

ANNEX B

IMPLICATIONS FOR NORTHERN IRELAND OF RESTORATION OF CAPITAL
PUNISHMENT

Terrorist and ordinary murder in Northern Ireland

Almost (but not quite all) murders in Northern Ireland arise from the security situation. The following table slightly exaggerates the proportion of terrorist murders, inasmuch as "deaths arising from the security situation" include some caused by the police and army in the execution of their duty; but not by much:

	<u>Murders</u>	<u>Deaths arising from the security situation</u>
1987	100	93
1988	111	93
1989	67	63

2. It will be seen that, whilst the number of "ordinary" murders in Northern Ireland is relatively small, the scale of terrorist murder in Northern Ireland is far greater than in England and Wales. In England and Wales between 1983 and 1989, [9] people were convicted of what could be called terrorist murder and [1] of the murder of a police officer. In Northern Ireland during the same period, 189 people were convicted of terrorist murder. These figures indicate that a hanging would not have been a rare occurrence; secondly the higher incidence of the use of the death penalty would have taken place in a much smaller community (population 1.5m), a factor which would be of relevance in assessing its impact on the community.

AW/SIL/16496

Soldiers and Policemen

3. Whilst a proportion of terrorist murders are of police officers (in 1989, 9 members of the RUC and its Reserve) more often they were outnumbered by Army (including UDR) deaths (14 in 1989, for example.) Any arrangement which discriminated between the murder of police officers and that of soldiers, or indeed between current and former members of these services, would in Northern Ireland terms be invidious.

Community Reaction

4. It is likely that the re-introduction of capital punishment for terrorist murder would be welcomed by many in the Protestant/Unionist community. That community as a whole advocates more stringent measures against terrorism and the death penalty is seen (with exceptions) as being likely to have a valuable effect on the incidence of terrorism (in the 1988 vote all Unionist MPs present voted for re-introduction). The measure might be seen as a token of the Government's will to tackle terrorism. A few prominent representatives of the Protestant/Unionist community have publicly stated their opposition, however. A growing concern over the safety of the convictions of the "Armagh 4" (4 UDR men convicted of the murder of a Catholic in Armagh in 1983) may have swung some opinion within that community against restoration.

5. The vast majority of the Catholic/Nationalist community would be strongly opposed to the re-introduction of the death penalty for terrorist (or indeed police) murder. It would be assumed that most of those liable to be sentenced to death would be from the Catholic/Nationalist community and it is likely that vigorous protest action would be mobilised. There would be significant and extensive disaffection with the Government within the Catholic community.

AW/SIL/16496

Security Implications

6. The re-introduction of the death penalty and its periodic implementation could prompt public disorder in the Catholic/Nationalist community which would have serious resource implications for the security forces. They would also create an environment of instability in which terrorist organisations would be likely to resort to further violence. Terrorist organisations would be likely to be able to rely on greater support or tolerance from the community - a crucial factor in determining how openly and effectively they are able to operate. Under these circumstances much of the information gained from the Catholic/Nationalist community (eg through the confidential telephone network) could dry up.

7. It is difficult to conclude whether the re-introduction of the death penalty for terrorist (or police) murder would or would not have a deterrent effect. Those engaged in terrorism are highly motivated and ruthless and have shown themselves ready to run persistent risks in making their attacks. The risk of arrest and conviction in respect of terrorist offences is not perceived as high and it is not likely that republican terrorists would be influenced by the availability of the death penalty. The possibility of arrest tends to be higher amongst "loyalist" paramilitaries, who might therefore feel more at risk. Against this, some terrorist prisoners believe that they are likely to be granted an amnesty in due course, so that the prospect of a long sentence does not deter them as it might. The re-introduction of the death penalty would arguably be an important new element. But the deterrent value of a shift to capital punishment could not be said to be clearcut.

Views of RUC

8. The Chief Constable and the most senior officers of the RUC are of the opinion that the re-introduction of capital punishment could make the task of the police more difficult in combatting terrorism.

Administration of Justice

9. The re-introduction of capital punishment would cause serious difficulty in Northern Ireland in relation to the system of "Diplock" courts which sit without a jury for particular categories of offences ("scheduled" offences). Murder is always a scheduled offence unless the Attorney-General "certifies out" any particular case from the schedule; if terrorist murders were defined as those not "certified out" then a heavy burden would be cast upon the Attorney. But it seems likely that almost all terrorist or police murder cases would, in practice, be tried in Diplock courts. These special courts were established to overcome the difficulties which were encountered in obtaining convictions for serious offences under the jury system because of the risks of intimidation. Lord Colville in his review of the Emergency Powers Act completed in July 1990 took the view that the time was not yet ripe for a return to the jury mode of trial. It would seem undesirable to expect a single judge to decide whether the death penalty should be imposed. Northern Ireland Office Ministers have in the past looked at the arguments for introducing a system under which cases would be tried by three judges rather than one, but are not persuaded at present that such a change should be made.

10. An alternative approach would be to try all capital cases in England and Wales. This would require legislation. This would be strongly resented in Northern Ireland and would raise security problems of its own. Any trials transferred to England would be held under English law. The law of evidence in England and Wales is different from that in Northern Ireland where special

AW/SIL/16496

provisions apply, for example, to the admissibility of confessions by those accused of scheduled offences. Many convictions of terrorists in Northern Ireland turn on such confessions. The differences between the two sets of law are complex, but they would certainly provide considerable scope for legal argument. They would also bound to be seized on by propagandists in the province as showing that the purpose of transfer was to make convictions more likely. In Great Britain there would be the risk of attacks on jurors and the administration of justice.

Prisons

11. It is the view of the prison authorities that the re-introduction of capital punishment would be a grave setback to the recently successful policy of denying prisoners and their supporters any issue on which to a campaign. Such action would be certain to provoke widespread and extreme reaction in the prisons, and would be strenuously opposed outside by those to whom terrorist prisoners are affiliated. These activities would almost certainly be violent and would present major control problems for the prison authorities and public order difficulties for the security forces.

Reactions in the Republic of Ireland

12. The British and Irish Governments under the Anglo-Irish Agreement share the view that measures must be taken to increase public confidence in the administration of justice, particularly amongst the Nationalist community. The introduction of the death penalty would do nothing to assist this process. Cases such as the Guildford Four and Birmingham Six have given rise to widespread Irish suspicion that "justice cannot be expected from British courts" and strong opposition by both the Irish and the Nationalist community could be expected to a measure which would allow for no redress in the case of wrongful convictions. The extradition of terrorists from the Republic of Ireland has proved

AW/SIL/16496

difficult in the past; it would almost certainly be made much more so for any category of cases which attracted a capital penalty. There has already been a strong reaction to proposals under the Emergency Provisions Bill to retain the power of internment. Much stronger reactions could be expected to the return of the death penalty with subsequent damage to Anglo-Irish relations and prospects for political co-operation.

Summary

13. The main points outlined in this paper are:
- a) The different scale of the problem in Northern Ireland.
 - b) The risk of creating martyrs.
 - c) The risk to public order and of exacerbating the political situation generally.
 - d) The implications of there being no jury in terrorist ("scheduled") cases. The idea that the judge - already burdened by having to sit alone and already a target for terrorist attack - should in addition decide between life and death is in principle undesirable.
 - e) The political impact on relations with the Republic of Ireland of a unilateral move to reintroduce capital punishment. The Anglo-Irish Agreement has created an expectation of consultation and receptiveness to Irish views on matter of this kind.

ANNEX C

POSSIBLE FORM OF WORDS TO REFLECT THE SECRETARY OF STATE'S VIEW

This debate is primarily directed to the situation in England and Wales. But it should be forgotten that the overwhelmingly largest proportion of terrorist murders in the United Kingdom is committed in Northern Ireland. So are the largest proportion of murders of policemen.

[Only one of the amendments under discussion today applies directly to Northern Ireland; but adoption of any of them in England and Wales could not but have the most serious implications for Northern Ireland.]

I am, therefore, authorised to say, by my Rt. Hon Friend the Secretary of State for Northern Ireland, that it is his view that the imposition of capital punishment in cases of terrorist murder in Northern Ireland would make the defeat of terrorism in the Province more difficult.

It would do so, partly, by creating martyrs; partly by distorting the special legal processes which exist in Northern Ireland for the purpose of dealing with terrorism, and which would be more difficult to operate if capital punishment were one of the possible outcomes of the judicial process; and partly by damaging the prospects for the trust between the security forces and the community which is essential if information about terrorist activity is to be collected, and acted upon.

For all these reasons, my Rt. Hon Friend does not believe that capital punishment should be made available [in Northern Ireland] for any of the categories of murder which we are discussing tonight.

AW/SIL/16525

I am also authorised to say that the Chief Constable and the most senior officers of the RUC, like my Rt Hon Friend the Secretary of State, are of the opinion that the reintroduction of capital punishment could make the task of the police in Northern Ireland more difficult in combatting terrorism. I am also authorised to report the view of the prison authorities in Northern Ireland that re-introduction of capital punishment would be a grave setback to their successful policy of denying prisoners and their supporters any issue on which to mount a campaign.

AW/SIL/16525