

Circulation

From: Clive Osborne
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Mr Mitten
~~Mr Rea~~
Mrs Hetherington

27 October 1999

Mr Maccabe
Mr Watson
Miss McClelland (HOLAB)

26
9
rush to
others
29/10

Robert Crawford
Constitutional & Political Division

Clive P. copy to Gylroy
D. McClelland
Miss O. Boyle
L. Deakin
RF. 1/11

ELECTION OF FIRST MINISTER AND DEPUTY FIRST MINISTER

We discussed the various proposals contained in Mr Watson's note of the Secretary of State's meeting with the Alliance Party and your note to me, both of 26 October. I also had a brief word with Mr Stephens yesterday evening.

Approval by Majority of Unionists and Nationalists and other Members

2. In response to the Secretary of State's specific question I confirmed to you and Mr Stephens that I think that a change in the interim standing orders which would enable the First and Deputy First Ministers to be elected on a basis other than the one specified in paragraph 15 of Strand One of the Belfast Agreement would be open to challenge. Although the Secretary of State's power to make standing orders under the Northern Ireland (Elections) Act 1998 is very wide, the underlying basis of the Act as a whole is to give effect to the Belfast Agreement. While the Secretary of State must have a fairly wide margin in relation to matters not covered, or only partially covered, by the Agreement, where the Agreement is clear on a fundamental matter (as it is in paragraph 15), I think departing from it in standing orders would run a real risk of successful challenge in judicial review.

3. It is not only the Secretary of State who might be the subject of a challenge. By virtue of paragraph 2 of schedule 14 to the Northern Ireland Act 1998 the election of a First and Deputy First Minister held before the appointed day is to have effect as if it had been held under section 16. Section 16(3) provides for the First and Deputy First Ministers to be elected after devolution in the way contemplated by the Agreement. While I do not think that provision necessarily means that an election in the pre-devolution phase has to be conducted in the way specified in order for the carry-over provision to work, the existence of paragraph 15 of the Agreement does, I think, mean that the status of the First and Deputy First Minister might be open to challenge in judicial review on the basis that the pre-devolution election was not to be regarded as an election qualifying under paragraph 2 of schedule 14.

Changing Designation at Short Notice and Changing it Back

4. I mentioned to you and Mr Stephens that I thought that a change of designation by members themselves, even though on the face of it somewhat bizarre, was far less likely to run the risk of successful legal challenge. There need be little or no overt interference by the Secretary of State in such a procedure, so that a challenge against him would be

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difficult to mount. I do not think that a challenge against the members themselves would be likely to get off the ground, since a court would probably take the view that this was a matter of pure politics falling outside its jurisdiction. Equally I doubt whether a challenge to an election won on the basis of the votes of those who had changed their designation would be likely to succeed.

5. As has been pointed out, the Secretary of State could not stay out of this completely, because changes in standing orders would be needed to enable a change of designation to take place quickly and to be changed back. But, if it were clear that the Secretary of State were simply responding to requests for amendments from Assembly members themselves in relation to the mechanics of a procedure which is already contemplated, I doubt whether he could be successfully challenged either.

Counting Votes as Nationalist/Unionist without a Change in Designation

6. This is the option canvassed in your note to me and which we have discussed on the telephone. You put to me quite forcefully the point that the arrangements for the election of the First and Deputy First Minister set out in the Agreement may be discriminatory because the votes of members designated as "other" can never have a bearing on that election in contrast to other key decisions. (I assume for these purposes that the designation "other" can amount to a political opinion for the purposes of the discrimination legislation.) This may be so, but I doubt whether it is now actionable. There is no getting away from the fact that, right or wrong, this method of electing the First and Deputy First Minister is expressly provided for in the Agreement; and, more importantly, it has been sanctioned by Parliament in section 16(3) of the 1998 Act. The Agreement itself is not, I think, challengeable, since it is after all only an agreement. The Secretary of State is challengeable in relation to his making the interim standing orders; and I suppose that a discriminatory standing order would be challengeable even if its purpose were to implement the Agreement. However, the Secretary of State would be able to point to the fact that Parliament, in section 16(3), had endorsed the proposition in a form which is not challengeable. Moreover, I think that any challenge to the standing orders should have been made long before now; and any current action would be likely to be out of time. I assume that the provisions are not yet in place to enable recourse to be had to section 75 of 1998 Act.

7. While I do not think the matter is as clear cut as the first proposal, I think that a standing order change to enable "other" to be counted for the purposes of one election without changing designation would be open to challenge and would render the position of those elected vulnerable post-devolution. I doubt whether the Secretary of State could successfully rely on the arguably discriminatory nature of paragraph 15 in his defence.

8. If all else fails, this is an option with less risk and than first one. But it nevertheless still involves the Secretary of State's rigging the election, rather than the much safer course of allowing the members to rig it themselves.

(Signed)

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FROM: Robert Crawford
Constitutional & Political Div
26 October 1999

~~Mr Millen~~
~~Mr Rea~~
Mrs Hetherington

cc ~~Grady~~
Dennis
Rosa

Mr Jeffrey
Mr Stephens
Mr McCusker
Mr Brooker
Mr Maccabe
Mr Watson
Miss McClelland (HOLAB)

Mr Osborne
HOLAB

ELECTION OF FIRST MINISTER AND DEPUTY FIRST MINISTER

My minute of 22 October invited the Secretary of State to agree the way for on this. Since then, Jonathan Stephens has pointed out a potential difficulty with a change of designation by Alliance and NIWC Assembly members, currently designated as "other" for the purpose of voting in the Assembly. Assembly Standing Orders, to be determined by the Secretary of State before devolution, state that a Member "may change his/her designation of identity on no more than one occasion during the life of an Assembly." If an Alliance or NIWC Member were to change his or her designation of identity (under our proposed revised Interim Standing Order) to assist in achieving a successful FM/DFM election, this provision would operate to prevent any further change of designation in the life of the current Assembly. Even if the Alliance or NIWC member changed his/her designation again immediately after the FM/DFM election, I presume the provision would operate to invalidate the second change.

2. The Alliance party met the Secretary of State last night to register their concern about the FM/DFM election, and the unwillingness of their Assembly Members to change their designation from "other" to "unionist" to boost the unionist numbers. (Mr Watson's minute of this morning refers). They proposed instead that we should amend the Interim Standing Orders so that the election of the FM/DFM would be

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successful if a joint candidature were approved by a majority of "unionist" and "other" members present and voting and by a majority of "nationalist" and "other" members present and voting. We argued, and I think they accepted, that this approach could not be adopted because it would mean re-writing the procedure for the election of FM and DFM clearly and explicitly set out in the GFA (paragraphs 5 and 15 of Strand One). However, the Secretary of State agreed to check this view with our legal advisors, and I should therefore be grateful if you would confirm that our view is correct.

3. The Alliance unwillingness to change their designation to unionist will create a problem for us. Trimble is unwilling to rely on NIWC support and, in the event of a number of UUP defections, NIWC support alone might anyway not be sufficient to provide the necessary majority. We discussed this morning an approach whereby we allow those Assembly Members currently designated as "other" to have their votes treated as "unionist" or "nationalist" for the election of the FM and DFM only, where they have given notice to the Presiding Officer that they would wish him to do so (Mr Watson's minute sought your reaction to this idea.) I promised to provide a little more detail.

4. In practice, that this would mean that we revise Standing Order 14 to add something along the following lines:

"Where the Office of the First Minister or Deputy First Minister is vacant, whether by resignation or otherwise, and a joint election is held to fill both offices, a Member of the Assembly who has registered a designation of identity as Other under Standing Order 3 may request the Presiding officer to treat his vote as a vote from a Unionist or Nationalist member for the purpose of the election of the First Minister and Deputy First Minister only. Where a Member requests the Presiding Officer to treat his vote as Unionist or Nationalist, his vote shall be treated in all respects as a vote from a

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designated Unionist or designated Nationalist member for the purpose of establishing whether or not there is a majority of the unionist and nationalists designations present and voting.”

5. Unlike the Alliance proposal, this leaves untouched the GFA stipulation that the FM and DFM election should be decided by parallel consent. Our argument in the event that we are challenged on consistency with the Agreement could be that the Agreement is silent with regard to the treatment of the votes of Assembly Members designated as “Other” voting in an election to fill the FM/DFM posts. The election of the FM and DFM is determined by the “parallel consent” test only - the weighted majority option is not available. The votes of Members designated as “Other” therefore can never have a bearing on the FM/DFM election unlike other key discussions and even if one of the candidates were himself designated “other”.

6. This approach might allow us to solve our difficulty with the FM/DFM election. The Alliance Party are clearly prepared to vote for Trimble and Mallon, but do not want to change their designation to Unionist to do so, and could be caught by the Assembly Standing Orders restrictions, which they have not yet spotted. Allowing their votes to be treated as Unionist, without a change in designation, may get around their reservations and side-step the Assembly SO restrictions.

7. I should be grateful for your urgent advice as to whether there is any legal difficulty with the proposed way forward set out above, in particular whether any legal challenge is likely to be possible.

(Signed)

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