



Scottish Affairs Committee

Oral evidence: [The Referendum on Separation for Scotland](#), HC 271–ii

Wednesday 02 July 2014

Ordered by the House of Commons to be published on Wednesday 02 July 2014.

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Members present: Mr Ian Davidson (Chair); Mike Crockart; Jim McGovern; Graeme Morrice; Pamela Nash; Mr Alan Reid; Lindsay Roy

Questions 5791 - 5850

Witnesses: **Professor Adam Tomkins**, John Millar Chair of Public Law, University of Glasgow, gave evidence.

Q5791 Chair: Welcome, Professor Tomkins, to this meeting of the Scottish Affairs Select Committee. As you know, we have been conducting a series of hearings into various aspects of the referendum on separation. Indeed you have been here as a witness on previous occasions.

We were prompted to ask you to come along and speak to us today arising from the quite outrageous behaviour that you recently experienced at the Scottish Parliament, when you were interrupted in giving evidence by one of the members of the Committee and then the business was simply moved on by the Chair rather than rebuking the member involved. The matter was just glossed over, and moved on. We have always thought that it is important that all points of view are heard in relation to the separation referendum. Indeed we ourselves have made a point of inviting witnesses with whom subsequently or in fact we knew already that we were going to disagree in order that we got all views on the record.

I would like to start by checking whether or not you are fully recovered from your experience. I presume counselling was made available as necessary. I understand you want to make an opening statement to us before we swing in to the substance of the evidence that you were trying to give when you were so rudely interrupted.

Professor Tomkins: Thank you very much for inviting me, Mr Chair. It is nice to be back. I am fully recovered, thank you; it did not take me very long. I would like to make an opening statement in order to get on the record exactly what happened so we all have the right dates and facts.

I was invited to participate in a round-table discussion on 12 June 2014 on the international policy of an independent Scotland with the Scottish Parliament's European and External Relations Committee. During the discussion Jamie McGrigor MSP asked a question about continuator states

and new states and what the position would be were Scotland to leave the UK and become an independent state. The Convener, Christina McKelvie MSP, invited me to respond, which I did.

I explained the legal position and moved on to explain some of the legal consequences of that position. Scotland would be a new state, the rest of the United Kingdom would be the continuator state, and that has certain legal consequences. Among those legal consequences are that the public institutions of the United Kingdom become the public institutions of the rest of the United Kingdom. The United Kingdom Parliament, for example, becomes the Parliament of the rest of the United Kingdom. The United Kingdom Supreme Court becomes the Supreme Court of the rest of the United Kingdom.

It has different consequences with regard to assets and liabilities. Fixed assets in Scotland would become the property of the new Scottish state. Fixed assets in the rest of the UK would be the property of the rest of the UK. Movable assets, and indeed liabilities, would fall to be apportioned equitably between the new states. Why this was relevant to the discussion that we were having about international policy is that there are mistakes in the Scottish Government's independence White Paper about what would happen to the UK's overseas estate—its embassies, its diplomatic network and so on. I pointed out what those mistakes were for the benefit of the Committee.

The Convener challenged my interpretation of the law with alternative views that had been expressed in various forums by Dr Andrew Blick and Professor David Scheffer. I explained why I thought those views were mistaken. This was a robust but perfectly fair and polite exchange. Other MSPs then carried the conversation forward. Willie Coffey MSP was given the floor and he explained that he was “disappointed with the tone” of some of my contributions and then proceeded to misrepresent what I had said. He asserted that I had said that international law says that “the UK will keep everything and that we will start from scratch,” whereas I had in fact been careful to say that that would not be the case with regard to the UK's assets and liabilities, which would fall to be apportioned equitably between the two states, even though the legal position as regards the UK's institutions is indeed different.

The Convener then invited me to reply to Mr Coffey and I did so, seeking to correct the record and to correct the way in which he had misrepresented or misunderstood my earlier contribution. At this point Mr Coffey interrupted me, not once but twice, and at that point the Convener intervened to cut me off before I had finished explaining to the Committee the extent to which Mr Coffey had misunderstood the legal position. Other members of the Committee pointed out to the Convener that I had been interrupted and that I should be given the opportunity to complete my evidence uninterrupted, but she decided not to allow me to do so and instead to move the conversation on to fresh territory. A number of members of the Committee objected, some strongly, to her acting in that way. I said nothing. About 20 minutes elapsed before I spoke again, by which time the conversation had moved on to altogether different material. Again, as it happens, I was interrupted, by a different MSP, who immediately apologised and allowed me to continue. This all happened on 12 June.

On the following day, 13 June, I wrote to Mr Coffey to say how disappointed I was to have been treated so disrespectfully by him and seeking an apology. Mr Coffey has neither acknowledged this letter nor apologised. On the same day I wrote to the Convener inviting her to reflect on her actions and to see that the better course would have been for her to allow me to finish my evidence free of interruptions rather than cutting me off because I had been interrupted. I copied both letters to the Presiding Officer.

On 16 June I received a holding reply from the office of the Presiding Officer which stated, "This is an interim response to acknowledge receipt of your email and to note that it is currently receiving attention. A full response will be issued to you as soon as possible." I have heard nothing further from the office of the Presiding Officer since. On 19 June I received a reply from Christina McKelvie MSP, the Convener of the Committee. She declined to accept that she had done anything inappropriate, explaining that she had sought to avoid the meeting becoming too heated and pointing out that I had had the chance to make a further contribution later in the meeting. As to her first point, there was nothing heated about my evidence. I remained calm throughout the meeting. The only heat was coming from Mr Coffey, with his misrepresentations, misunderstandings and repeated interruptions. As to her second point, I have already said that by the time I was able to speak again the conversation had moved on entirely.

Chair, I maintain that Mr Coffey owes me an apology and that Ms McKelvie acted inappropriately in not allowing me to complete my evidence uninterrupted. I have a copy of all of the correspondence I have referred to, which I can leave with your Clerk if that would assist the Committee. That concludes my opening statement. I am very grateful to the Committee for allowing me to make it and I am, of course, happy to take any questions.

Q5792 Chair: Thank you. Could we go back to the matter of substance? Could you clarify for us and expand a little the points that you were making about the legal position, as you understand it, and the errors in the Scottish Government's White Paper? Would you clarify whether or not this is a matter of opinion or a matter of fact?

Professor Tomkins: Yes. My understanding of the legal position is that, if there is a yes vote in September's referendum, Scotland becomes an independent state. What that means as a matter of international law is that Scotland would be a new state in international law, and that the rest of the UK would be the continuator state of the current United Kingdom. Why do I say that? Let us just pause there to start with. Is it a question of opinion or a question of legal fact? Where do we stand on that spectrum?

What I have just said is a question of public international law. The person on the planet who knows most about the law of state succession in public international law is not me; it is Professor James Crawford, the Professor of International Law at the University of Cambridge. His legal opinion on this matter was published in full by the UK Government as an annex to its first "Scotland analysis" paper—I have a copy of it here—in February 2013. That legal opinion was co-written with Professor Boyle from the University of Edinburgh. They go through in quite some detail the various reasons as to why what I have just said is how international law would react to a yes vote in September's referendum.

For me, the single most important reason is that this is not a referendum that is happening across the United Kingdom. The question is not to UK citizens, "Do you wish to dissolve your state and recreate it into two new states, one called the rump of the UK and the other called Scotland?" This is a referendum which is being held only in Scotland. I am sure that all the members of this Committee will remember that the Scottish Government were very keen to ensure that this is a referendum made in Scotland. It is only people who live in Scotland and are on the electoral register there who have a vote in this referendum. It could not possibly be credible, could it, for anyone to imagine that Scotland, with 8.5% of the population, has the right to take a vote that has the legal effect of dissolving the United Kingdom? That is not what would

happen. What would happen is that Scotland would be voting to leave the United Kingdom, and the rest of the United Kingdom would continue as the continuator state.

That is what happened in 1922 when the Irish Free State was created and left the United Kingdom. The United Kingdom of Great Britain and Ireland became the United Kingdom of Great Britain and Northern Ireland. That is what happened much more recently with the collapse of the Soviet Union. Russia is the continuator state of the old Soviet Union. Russia has the seat on the United Nations Security Council that used to be occupied by the Soviet Union.

That is not what happened when Czechoslovakia was dissolved and when two new states were created: the Czech Republic and the Slovakian Republic. The opinion of Professors Crawford and Boyle goes into some detail as to why that precedent does not apply in this context. The principal reason, as I have already explained, is that this is a decision which is being made in Scotland. The question on the ballot paper in international law terms is, “Do you want to leave the UK or not? Do you want to become a state that is independent of the UK?” What happens to the UK is not a question to be determined by Scotland. The question to be determined by Scotland in the referendum is what happens to Scotland.

I really do not think that there is any credible evidence to suppose that the Crawford-Boyle opinion is wrong. The Scottish Government still have not accepted that it is correct, but they have never published a rival legal opinion. They have never expressed in legally robust or even legally coherent terms how an alternative view could be credible. That, I think, is generally accepted.

In the evidence session before the Scottish Parliament on 12 June, a number of the other witnesses in the round table, including somebody with extensive diplomatic experience who was joining the conversation via video-link—from Iceland, I think—endorsed that position. I really do not think that there is any credible challenge to the position that, if there is a yes vote, Scotland becomes a new state and the rest of the UK becomes the continuator state. There is more to be said after that, but I can see that other people want to come in on that point.

Q5793 Lindsay Roy: Professor Tomkins, if you were not heated in the debate, why do you think it was cut short? Why was it cut off? What is your view on that?

Professor Tomkins: You would have to ask that question of the Convener. I think there is an unfortunate pattern emerging in the Scottish Parliament of Committees in Holyrood not wanting to take adequate or sufficient account of evidence that suggests that core elements of the Scottish Government’s proposals for independence are flawed. Elements of the Scottish Government’s proposals for independence are legally flawed. They are legally flawed because they do as if there is no distinction in international law between what happens to the UK’s institutions and what happens to the UK’s assets and liabilities, when there is a very big and important distinction in international law between those things, which they seemed to have been ignorant of when they wrote their White Paper last year.

Even in this Committee, there is a history of the members of the Committee not being able to agree and having to have majority and minority reports on questions—for example, of EU membership. I do not know why I was cut off. I suspect that I was cut off because there is—at least in some quarters; it is not widespread across the whole of the majority party in the Scottish Parliament by any means, but in some parts of the Scottish National party contingent in the Scottish Parliament—an unwillingness to hear expert evidence that challenges the often false assumptions and assertions on which the independence White Paper was based.

Q5794 Chair: I want to clarify one point. This Committee has never divided on any matter relating to the referendum. The only matters on which we have divided have been on the bedroom tax, which is to some extent off to the side. All parties in Scotland except the Greens have representation on the Committee and get copies of the reports. Whether or not they choose to turn up is another matter, but among those that turn up we have never had a vote or a disagreement. All our reports have the great strength of being unanimous because they have been evidence-based.

Professor Tomkins: I am very pleased to hear that. It is absolutely the norm for Committees both in this House and in the House of Lords, and also of course in Joint Committees of both Houses. The established culture in this Parliament, as you all know better than I do, is that you leave your party loyalty in the corridor and you come into the Committee to act in the Committee's collective interests, in the public interest as you best understand it and in the interests of Parliament. It is the first job of Parliament to hold the Government to effective account. You cannot do that, whether you have a bicameral Parliament or a unicameral Parliament, if you have Committees who are unprepared to step up to the mark.

Q5795 Lindsay Roy: What disappointed you most about the way in which the meeting was conducted?

Professor Tomkins: There are two things, and that is why I wrote separately to Mr Coffey and to the Convener. What disappointed me about the way Mr Coffey behaved is that I thought it was rude. I thought it was disrespectful. I thought it was discourteous. I have to say that I have given evidence to numerous Committees in this Parliament, and I have worked as a legal adviser to the House of Lords Constitution Committee for five years. I have sat through a lot of evidence sessions, both as a witness and as an observer, and I have never in all that time seen anybody treated in quite the disrespectful way I was treated by Mr Coffey on 12 June. I was disappointed about that.

I was also disappointed that the Convener chose to deal with it, not by silencing Mr Coffey's interruptions from, as they say here, a sedentary position and allowing me to finish uninterrupted, but by cutting both of us off and cutting me off. I had not done anything wrong. I had not raised my voice. My microphone was on; in the Scottish Parliament you can see that my microphone was on with the red light. I was speaking, I was interrupted and then I was told that my evidence had become contentious and that the Convener wished to move the conversation on to material that was not contentious. I do not think it was contentious at all. I think it was inconvenient to the SNP's line.

Q5796 Lindsay Roy: In effect you were muzzled?

Professor Tomkins: I have not used that word. I was disappointed in the behaviour of Mr Coffey and I was disappointed in the way that the Convener handled it.

Q5797 Lindsay Roy: It is common practice in this Committee to give the witness an opportunity to add anything at the end. Were you given that opportunity?

Professor Tomkins: Yes, I was. The conversation did come back to me towards the end, but, as I said, it was some 20 minutes or so after the events that we have just been talking about. It was a

round-table discussion; it was not just me. There were six witnesses, perhaps even seven witnesses. It was a round-table discussion and we all sat round in the horseshoe together. It was slightly more informal than this set-up, where you have one witness giving evidence to the Committee in one go. As I say, the conversation had moved on to different territory by the time I came back, but I was given the opportunity to come back. I did come back but I did not go back to the points in respect of which I had been cut off earlier, because I thought that that would have been disrespectful to the Committee, and, as I said, the conversation had moved on.

Q5798 Graeme Morrice: You said you were disappointed with the behaviour. Were you surprised at the behaviour?

Professor Tomkins: I was surprised by the behaviour. I was not expecting an easy ride. I am as well known in Scotland as I am to this Committee as being on the no side of the argument, and I was not expecting to be received with open arms and broad smiles by any of the SNP members, but I was expecting to be treated courteously. I was surprised to be treated discourteously.

As I said in my opening statement, what I had to say about the legal position was robustly challenged by the Convener. That was perfectly fair and proper, and perfectly civil and polite. I was expecting all of that. I was not expecting to be interrupted. I was not expecting to be told by a member of the Committee that my evidence was disappointing. I was not expecting to be silenced and cut off because I was interrupted by a member of the SNP who was acting rudely.

Chair: Maybe I ought to make it clear that we welcome, and have always welcomed, contentious evidence in this Committee. Indeed, we welcome witnesses disagreeing with each other on the basis that it sparks discussion, but while we have had some quite robust exchanges I do not think I have ever felt it necessary, as the Chair, to step in and stop any of my colleagues because they were misbehaving. We have had Hughes Hallett and Scott, with whom most of us disagree quite strongly, but they were treated perfectly reasonably here. It is a question of maturity, I suppose.

Q5799 Pamela Nash: I am looking at the transcript of the session that happened three weeks ago. Mr Coffey said that you said everything would start from scratch. Did you ever use that language?

Professor Tomkins: I did use the expression “start from scratch” in the context of institutions, but not in the context of assets and liabilities. This is the all-important distinction that the Scottish Government and their supporters routinely, and now I have to say wilfully, refuse to accept. You hear all of this in terms of currency union: “If we don’t get a currency union, we will walk away from the debt.”

That is legally an entirely incoherent position to have adopted. The currency is not an asset; the currency is a means of exchange. The currency does not belong to England any more than it belongs to Scotland. It is not an asset to be apportioned. Individual pound coins or bars of gold, if there are any left in the Bank of England’s reserves, are assets that would fall to be apportioned equitably, presumably on a per share of population or something like that, between the two states in the event of independence. The pound itself, the currency, is not an asset to be apportioned, and yet it is frequently, in the Scottish Government’s rhetoric, equated with the national debt: “If we don’t get our currency union we are walking away from the national debt.”

Again, that is why this is all so important. These points of law are important to me because I am a lawyer and I prefer it when people get the law right to when they get the law wrong, but

they are important to the conversation, to the debate and to the argument in Scotland because there is an awful lot of misunderstanding in Scotland around what would happen in the event of a yes vote. There is that misunderstanding in Scotland because Scottish Government Ministers and their supporters routinely confuse the legal position with regard to assets and liabilities with the legal position with regard to institutions.

What has to be understood about this—and I know this Committee is working as hard as it possibly can to help to ensure that it is understood—is that a vote to become an independent state is a vote to leave the UK. If you vote to leave the UK, you vote to leave the UK’s institutions. You vote to leave the BBC. You vote to leave the Bank of England. You vote to leave the pound. If you vote to leave the UK, you vote to leave the UK’s institutions. That has to be understood.

If there is a vote to leave the UK, and a vote to leave the UK’s institutions, thereafter there will be a negotiation to apportion assets and liabilities, but assets don’t equal institutions and institutions don’t equal assets. That is the point I was really seeking to explain to the Committee.

Q5800 Pamela Nash: Mr Coffey is not here to defend himself. The exact quote from him, according to the record, is that he said to you, “Professor Tomkins, you talked about international law saying that the UK will keep everything and we will start from scratch.” However, he went on afterwards, when he was questioning you, to ask you again what you meant by “start from scratch.” He also asked this question, which I find interesting: “Has Scotland always been some sort of second-fiddle, subservient partner in this union? I thought that it was an equal partnership.” That was in his questioning of you, inferring that that was an opinion that you had previously expressed, or expressed at that Committee. Just to be clear, you said that you did not get the opportunity at that Committee to come back on those points, and that while you were given space later to talk, it was after the conversation had moved on considerably from those points.

Professor Tomkins: That is right.

Q5801 Pamela Nash: You gave an answer just now, but is there anything else in addition that you would like to take the opportunity to put on the record today?

Professor Tomkins: As I said, the conversation in the European and External Relations Committee was about the international policy of an independent Scotland. The reason why it came up was that the Scottish Government said in the independence White Paper, “Scotland’s Future,” at page 211: “Scotland will be entitled to a fair share of the UK’s extensive overseas properties (or a share of their value) allowing us to use existing premises for some overseas posts.” That is the assertion—the claim—made in the independence White Paper, and, as I said in my written evidence to that Committee, and as I think I have said in written and oral evidence also to this Committee in the past, that assertion has no basis in law, because it confuses institutions and assets. The correct legal position is as explained by the UK Government in its “Scotland analysis” paper on EU and international issues, published in January of this year, in which it is said: “An independent Scottish state would not be entitled by right to any UK diplomatic premises, equipment or staff.” A vote to leave the UK is a vote to leave the consular protection that the UK’s diplomatic network gives you.

It is sometimes said on the other side of the argument that this indicates that the UK would somehow be in breach of the Edinburgh agreement by refusing to co-operate with an independent state. The Edinburgh agreement does not actually say anything about co-operation

between Scotland and the rest of the UK. It talks just about acknowledging and accepting the authority of the result in the referendum, whatever that result is.

The point that really matters is that we are not talking here about co-operation. Again, this was very clearly expressed by the UK Government in its most recent and last “Scotland analysis” paper—the concluding “Scotland analysis” paper: “United Kingdom, united future.” Perhaps I could just read out paragraphs 1.14 and 1.15. They are not very long, Chair: “It is possible for independent states to cooperate. The UK currently does this with states like Ireland, where immigration policy is aligned to reduce border controls...However, the UK does not share public services, tax administration, pension systems or its currency arrangements with any other state. There are no states in existence that provide their neighbours with shared access to their public institutions on the scale the Scottish Government are promising on behalf of the continuing UK.”

That really puts its finger on exactly the issue. We are not talking here about the rest of the UK saying, “We wouldn’t let you use any of our consular services; the Scots would be unrepresented internationally in time of trouble.” That is not what the rUK position is at all. The UK’s position is that of course there would be co-operation, but the Scottish Government are not talking about co-operation; they are talking about shared public services. Neither the UK nor any other state shares its public services, whether we are talking about international public services like consular representation or domestic public services such as currency arrangements, IT support for the delivery of welfare benefits, tax administration or pension systems. There are no states in existence that provide their neighbours with shared access to their public services on the scale imagined, on the basis of false assertions about the law, by the Scottish Government. To try to expose where the independence White Paper goes wrong as a matter of law seems to be what these kinds of conversations should really be all about. The job of the Scottish Parliament is to scrutinise the policy of the Scottish Government. My job as a witness to a Committee, whether it is of the Scottish Parliament or of this Parliament, is to try to help the Committee expose the strengths and the weaknesses, the pluses and the minuses, of Government policy, or so it seems to me.

Q5802 Jim McGovern: Thank you, Professor Tomkins, for coming along here today. I would like to ask you to confirm something that you said earlier. I do not know if I am quoting you or paraphrasing you, but you said you were silenced during the evidence session in the Scottish Parliament.

Professor Tomkins: I was. As I said, my microphone was on and I was interrupted from, as you say here, a sedentary position, not once but twice. The result of that was not that the Convener said to the person who interrupted me: “Will you please stop interrupting the witness and allow him to finish?” but, “Let’s move on to something less contentious because this is becoming heated.”

Q5803 Jim McGovern: Hardly democracy in action.

Professor Tomkins: The language I would use is the language of effective parliamentary scrutiny. It is absolutely essential that Parliaments in systems of parliamentary democracy such as Scotland or the United Kingdom hold their Governments to meaningful account. That is what the whole doctrine of ministerial responsibility means. That is why we have Select Committees. It seems to me that you cannot have a system of effective parliamentary scrutiny if you have a series of Committees who are unprepared to hear or understand evidence that is critical of Government policy.

Jim McGovern: Thank you very much. Your evidence has been very clear.

Q5804 Mr Reid: You made the distinction between institutions and assets. Some institutions—I am thinking particularly of HMRC and DWP—have assets in the form of intellectual property, such as the computer software that is used to process taxes and benefits. Obviously, the day after independence the new Scottish Government would need a tax system and a benefits system. Is it your legal opinion that Scotland would have any right to a copy of the software that HMRC and DWP possess?

Professor Tomkins: I have asked that question a number of times and in a number of different forums. The truth is that I do not know the answer to that question. Intellectual property is property; it is therefore an asset. It is movable, because it is not buildings.

Q5805 Mr Reid: It's copyable.

Professor Tomkins: Yes. How can you apportion equitably intellectual property? I just do not know enough about the detail of apportionment of property to know what the answer to that is with regard to IT systems, copyright systems and the like. I am guessing—that is all I am doing. This is why, if there were to be independence, the independence negotiations would be very complex, because these are not straightforward matters and the law on them is not even straightforwardly accessible, never mind straightforward in terms of its content. These are matters that would have to be negotiated, and the outcome would presumably be some kind of political trade-off that would allow some sort of access—limited; perhaps also time-limited—for the payment of some sort of fee. But I do not know. Here, we are leaving the territory of international law and approaching the territory of what would be international politics. The detail at this level of how particular assets and liabilities would be apportioned is a matter of politics, not a matter of law.

Q5806 Mr Reid: If either side in the negotiations was dissatisfied with the way the negotiations were going, is there any international forum to which either side could appeal?

Professor Tomkins: Yes, I think so. Legal disputes between states are matters of public international law that can go to an international court such as the International Court of Justice.

Q5807 Mr Reid: Would any ruling there be mandatory or simply advisory?

Professor Tomkins: I do not know. You need to ask those questions of Professor Crawford or Professor Boyle.

Q5808 Chair: But they are not here, and you are.

Professor Tomkins: No, I know, but I don't know what the answer to that question is.

Q5809 Chair: I want to go back a step. I understand the distinction between assets and liabilities on the one hand and institutions on the other. Clarify for me that I have got this correct on things like membership of the EU, the UN and NATO. They are all institutions, and a separate Scotland would be able to apply to join all of them. None of the memberships would be inherited or automatic; there

would have to be individual acts of application. Sorry, unfortunately *Hansard* does not record nodding, therefore you've got to say something at this point.

Professor Tomkins: Yes.

Chair: Thank you.

Professor Tomkins: The UK's international treaty rights and obligations would fall to the rest of the UK, so the rest of the UK would inherit the UK's membership of the UN, the EU, NATO and so on. Scotland would have to apply for herself.

Q5810 Chair: The UK would not be in a position unilaterally to decide that Scotland would be granted membership of the UN, NATO or the EU.

Professor Tomkins: No, certainly not.

Q5811 Chair: However, the other set of institutions that we were discussing, or that you mentioned, were things like sterling or the Bank of England. Again, my understanding is that that would not be something Scotland would automatically have access to or membership of, but it would be in the gift of the UK to decide whether or not sterling was shared, or access to the Bank of England was provided. Unlike the EU, the UN and NATO, sterling and the Bank of England would be something where the UK unilaterally could decide, "Yes, these would be shared."

Professor Tomkins: Yes. If the rest of the UK perceived it to be in its political and economic interests to enter into a formal currency union with an independent state that wanted to use the pound as its currency, there is nothing to stop the rest of the UK doing that, just as there is nothing to stop the UK doing that now. Norway could decide that it wanted to use the pound and say to the United Kingdom, "We'd like to use the pound as our currency and give up on the krone." The pound is an internationally tradable currency; anybody can use it. Panama uses the US dollar as its currency. It does not have a currency of its own but uses the US dollar. I am not suggesting for a moment that I think Norway would want to use the pound, or that it would be in their interests to do it or that they should do it. It is just a hypothetical example. If Norway wanted to use the pound now, the UK could, if it thought that it was in its national interests, enter into a currency union with Norway. What we have learned from the Chancellor of the Exchequer, the shadow Chancellor of the Exchequer, the Chief Secretary to the Treasury and the Permanent Secretary to the Treasury is that all four of those individuals have come to the conclusion that they cannot see how it would be in the interests of the rest of the UK, either economically or politically, to enter into a currency union with an independent Scotland. There is nothing in international law, in constitutional law or in any other sort of law that would require the rest of the UK to enter into a currency union with a foreign state—which is what Scotland would become if it were independent—any more than there is now anything that would require the UK to enter into a currency union with a foreign state. The UK could do that if it wanted to, but there are no legal means by which the UK may be required to do that.

Q5812 Chair: Can I clarify whether or not the Scottish Government have referred to any legal opinion at all that has been made publicly available which would suggest that the UK was obliged to share the currency if it did not wish to do so?

Professor Tomkins: Let me break that question down a bit. Do I know whether the Scottish Government have obtained legal advice on this question? I do not know. Have the Scottish

Government published legal advice that they have commissioned on this question? Not to my knowledge, no. Are there other lawyers out there who have said things in print or on forums which Scottish Ministers have quoted from time to time? Almost certainly, but I cannot currently think what they are or who they would be. Have the Scottish Government done what the UK Government have done, which is to commission bespoke professional expert legal opinion from the best people on the planet to deliver it? James Crawford knows more about the succession of states and international law than anybody else on earth. No, they do not appear to have done that. They certainly have not published any such legal opinion.

Q5813 Chair: One point still confuses me, and that is the issue of overseas assets. You said that assets in Scotland at the date of separation would fall to the Scottish state.

Professor Tomkins: Fixed assets, yes.

Q5814 Chair: Fixed assets in the UK would fall to the residual UK state. Presumably assets that were abroad at the time would have to be divided in some way. Therefore, surely embassies and other buildings presently held by the UK would fall to be divided in some way.

Professor Tomkins: That is not how I understand it. This law is murkier than the distinction between continuator states and successor states that I was talking about earlier. I would now say that I am in the realm of legal opinion rather than legal fact. My understanding of the law is that, as I said a few moments ago, if Scotland votes to leave the UK it leaves the UK's public services, including internationally its diplomatic and consular services.

The UK's overseas estate—the assets and properties owned by the UK—houses diplomats and consular officials who act in the interests of the UK as a whole. If Scotland votes to leave the UK, they will be housing diplomats and consular officials who act in the interests of the rest of the UK, not in the interests of the whole of the UK. My understanding is that fixed assets which are in England, Wales and Northern Ireland become the property of the rest of the UK, with no compensation being paid to the Scottish taxpayer. Fixed assets which are in Scotland become the property of the new Scottish state with, again, no compensation being paid to the taxpayers of England, Wales and Northern Ireland. The UK's overseas estate becomes the overseas estate of the rest of the UK, because the effect of a yes vote in September is, as I keep saying, that Scotland votes to leave the UK. Scotland votes to leave the protection of the UK. Scotland votes to leave the jurisdiction of the UK. That is my understanding of the overseas assets. In other words, fixed assets are dealt with differently, depending on whether they are in Scotland, England, Wales and Northern Ireland, or overseas.

Q5815 Chair: Let me come back to the question of fixed assets in Scotland and in the rest of the UK. There is presumably a question of fairness. Say a particular part of the UK wanted to leave, and it was where particularly valuable assets were held, such as the entire royal art collection or the Bank of England building with the gold. There would be some division of the spoils, would there not? Therefore, in these circumstances, if we have a disproportionately either large or small share of fixed assets in Scotland, surely there would then have to be some calculation of value and an apportionment—a cross-payment. I am thinking in particular of Faslane and Coulport, which cost billions to create. There is presumably a debate about whether or not they are of any value to an independent Scotland that does not want nuclear weapons, and whether they are assessed at

current use value or on the basis of sunk costs. Surely there would have to be some trade-off in those circumstances, otherwise the allocation of assets would be entirely fortuitous.

Professor Tomkins: That may be right. Let me just clarify one aspect of what I was saying about the equitable apportionment of assets and liabilities. It is a matter of law that the UK's assets and liabilities would need to be apportioned equitably. That is a matter of law. What equitable apportionment means with regard to any particular asset or any particular set of assets is not really a question of law. It is a question of politics and of political negotiation. The kinds of questions that you have just brought to the table, Chair, are precisely the kinds of really tough, detailed, complex negotiating questions that would have to be negotiated between the two teams in the event of a yes vote. How any particular set of cards would fall would depend on whatever trade-offs those negotiating teams were prepared to make with one another.

Q5816 Chair: I am sorry for interrupting you. I don't want to set a precedent here.

Professor Tomkins: You don't want to follow a precedent.

Chair: Very true. Thinking in particular of Faslane and Coulport, in the event of separation they would fall to a separate Scotland, and the question of how they were valued would be the subject of haggling. Is that a fair way of putting it?

Professor Tomkins: I think so. In the event of a yes vote what you are talking about—Faslane and Coulport—is the biggest card that the Scottish Government have, and they would be well advised to play it very carefully indeed, because they could get quite a lot for it. The biggest headache that the rest of the UK would have in the event of Scottish independence is what to do with the United Kingdom's nuclear deterrent. Could it continue to be housed on the Clyde even temporarily? If it could not continue to be housed on the Clyde even temporarily, where would it be put? There would also be headaches for the Scottish Government down the track, particularly with regard to NATO membership, which might be difficult if Scotland were unreasonably stubborn about the nuclear question. It is the biggest card that the Scottish Government have and I can't predict how they would play it in the event.

Q5817 Chair: To be fair, that is not your area of expertise. It gets us into the realm of haggling, politics and so on. I want to follow up Alan's point about intellectual property. Can I seek some guidance on the two ways it could be dealt with? One is presumably that the UK says, "This is a UK asset. You're only getting access to it if we agree." Alternatively they could say, "It is a UK asset but here is a copy of it. We are now going to haggle about how much of it you pay for"—the sunk costs and so on. Is there any legal ruling or guidance about which of those it would be, or again would that all be subject to discussion and negotiation? I ask because the Scottish Government have said that they want to use the UK's benefits architecture for a period, but they also want to amend it. It is a question of whether or not they would have a copy of it, if indeed it is copyable, and would then have the responsibility themselves to amend it, or whether or not the UK would retain it and we—the Scots—would have to pay for the UK to make those changes.

Professor Tomkins: I think there is an a priori problem with that. I just don't understand the Scottish Government's position on welfare at all. They say, for example, that an independent Scotland would immediately stop the rollout of universal credit and would immediately make changes to the UK's current welfare settlement. For example, there would be no bedroom tax in an independent Scotland. I do not have a copy with me, but I think these things are in the independence White Paper. At the same time, they say that at least for a transitional period—

that transitional period might be rather a long one—they would share the UK’s benefits system. Those two statements are incompatible with one another. The UK’s benefits system, if universal credit is indeed successfully rolled out, will be a system that can deliver universal credit. An independent Scotland will not be able to use that system at the same time as not having universal credit.

It is the same with their immigration policy. In order to fill, or close, the fiscal gap that there would be on day one of an independent Scotland, we learned last month, or the month before, that one of the strategies to be employed by an independent Scottish Government would be a very aggressive policy of inward migration. They put a number on it. They do not like to put numbers on many of their policies but they put a number on this one: 24,000 people a year will be coming into Scotland. That is net immigration to Scotland every year. That is a city the size of Dundee every six years. Query where they would be housed, who would educate them and who would look after them when they get sick. Put that to one side for a second, though those are not unimportant questions. An independent Scotland would have an aggressive immigration policy of 150,000 people coming in net every six years, and at the same time they want to be members of the common travel area with the rest of the UK and Ireland.

These are straightforwardly incompatible policies. You can have one, and we can argue about the merits of that, or you can have the other, and we can argue about the merits of that, but you can’t have them both. You could not possibly have an immigration policy which was that different from London’s immigration policy, and also for that matter that different from Dublin’s immigration policy, and be a full member of the common travel area. You have to choose.

What the Scottish Government have said about welfare is that it would just carry on; there would be some seamless transition from welfare now being dealt with mainly as a reserved matter by this Parliament to welfare being dealt with in an independent Scotland—seamless transition. It is the same with immigration. We would move seamlessly from one immigration policy to another, as if there were no immediate knock-on consequences. These are the flaws that are inherent throughout the prospectus for independence that has been put in front of the Scottish people.

Q5818 Lindsay Roy: There is a very interesting article that you wrote recently.

Professor Tomkins: Which one is that—for Vote No Borders?

Q5819 Lindsay Roy: Yes. Are there any other areas where you think it is unlikely that there will be a smooth and seamless transition? You described some of the language of the White Paper as “blithely reassuring.”

Professor Tomkins: Absolutely. The strategy that the Scottish Government have chosen to adopt to sell independence to the Scottish people is a strategy of de-risking it as much as possible, because they know that independence has always been a minority pursuit in Scotland. They also know that in order to win the referendum they need to turn that minority into a majority. How do you do that? You do that by de-risking it. You do that by saying, “We’ll keep the Queen. We’ll keep the pound. We’ll keep the welfare system, or all the bits that we like, but we’ll get rid of all the bits we don’t like. We’ll keep the border open. We’ll be in the common travel area. There’ll be no border controls. There’ll be no passport controls. There’ll be nothing like that. Nothing really will change.” I think I used this quotation in the piece to which you have just referred. In the foreword to the Scottish Government’s consultation document in January 2012, the First

Minister said something like, “The day after independence children will still go out to play and we will still go out to work. It will make no difference.” This is all about trying to de-risk.

I understand why they have adopted this policy. It is because, as I said, they know it is the only way in which they can turn the natural minority in favour of Scottish independence in Scotland into the majority that they need, just for one day, on 18 September. They are not going to be successful, and one of the reasons why they are not going to be successful is that Committees like this have spent the last year—two years—looking at the Scottish Government’s proposals in great detail, pointing out that they are full of flaws. The independence White Paper is replete with legal error. We now know that it is also replete with economic error because they have had to revise and change so many of the economic figures on which the independence White Paper was based. We also know that it is based in large part on fantasy—for example, fantasy as to not understanding the rather elementary distinction between the usual co-operation that you get between friendly neighbouring states, and saying to a state that you have just voted to leave, “Oh, by the way, we’re taking your welfare system with us, we’ll impose a currency union on you and will you please help us get into the EU?” It is fantasy politics. I sometimes think our mistake has been to take them so seriously.

Q5820 Lindsay Roy: It is your contention that even in the most basic areas they have not done any significant homework to substantiate their claims.

Professor Tomkins: There are numerous unsubstantiated assertions and claims in the independence White Paper which were evidently never stress-tested in ways you would expect.

Q5821 Lindsay Roy: You have highlighted the key ones to us this afternoon.

Professor Tomkins: Yes, I have tried to.

Q5822 Lindsay Roy: Are there any others you would like to highlight?

Professor Tomkins: I am sure there are. Probably on broadcasting and other areas where there have been rather bald assertions about the free and easy sharing of British public services in an independent Scotland, there would be similar sorts of mistakes, but the two that jumped out at me the last time I looked at the independence White Paper were welfare and immigration, which we have already talked about.

Q5823 Lindsay Roy: I take it that Dounreay would be a fixed asset.

Professor Tomkins: Yes.

Q5824 Lindsay Roy: Negotiations on how to dispose of nuclear waste would be a political decision.

Professor Tomkins: Yes. And the oil fields—

Q5825 Lindsay Roy: Is it not the case that with the fixed asset goes the liability of disposing of the nuclear waste?

Professor Tomkins: Yes. Apportioning those liabilities, and also decommissioning costs and North sea oil, would be matters that would have to be negotiated. Again, this is why I think the more you look at it, the more complicated the negotiations become. The last time I was in front of this Committee I said that the Scottish Government's proposed timetable of moving from the referendum to independence day by March 2016 was risible, and I stand by that.

Q5826 Lindsay Roy: Can I clarify that there are no clear principles or parameters under which these negotiations would take place?

Professor Tomkins: There are some principles and parameters. I have sought to explain them. The legal principles are that Scotland would be the new state and the RUK would be the continuator. That has consequences in terms of what happens to the UK's public institutions, and it has consequences in terms of what happens to assets and liabilities. All the law will really tell you about movable assets and liabilities is that they should be apportioned equitably. The law does not tell you anything very much about what that equitable apportionment will amount to.

Q5827 Lindsay Roy: In your opinion that would take some considerable time to negotiate.

Professor Tomkins: Yes.

Q5828 Chair: To be fair, in the event of a vote for separation, separation could take place while some things were still being negotiated, as was the case with the Czech and Slovak Republics.

Professor Tomkins: Yes.

Q5829 Chair: It is not a big bang and everything has to be decided before anything can happen.

Professor Tomkins: That is inevitable, Chair. I have to say that, in the very unlikely event that there is a yes vote, the negotiations would not be completed by the time of independence day. There would be some matters that would go on for a decade or more. Clearly it would be in no one's interests, if there was a yes vote, for Scotland to be hanging on in constitutional limbo as part of the United Kingdom that it is about to leave because negotiations could not be completed before independence could be triggered.

Q5830 Mike Crockart: You have given evidence to this Committee a number of times. Obviously it was not giving evidence but taking part in the session with the European and External Relations Committee in the Scottish Parliament. Are there other Committees that you have given similar evidence to in the Scottish Parliament?

Professor Tomkins: I think that was the first time I have given evidence to the Scottish Parliament. I have given evidence to this Committee and several others in this House, and to Joint Committees here as well, but that was the first time in the Scottish Parliament.

Q5831 Mike Crockart: You obviously follow the debate quite closely. Is there any evidence of similar types of things happening in other Committees, where inconvenient facts were stopped from being presented?

Professor Tomkins: I have not come across any direct analogies, but there are certainly a range of stories around that suggest not altogether happy working relations in a number of Committees of the Scottish Parliament. I mentioned a few moments ago that in May this year the European and External Relations Committee published a report on the EU membership of an independent Scotland. There were a series of votes that split on party lines as to the content of that report. The *Daily Telegraph* reported that the Committee had “used its majority to water down crucial concerns about an independent Scotland’s European membership...softened criticisms of the Scottish Government’s stance against the will of opposition members.” The *Telegraph* reported claims that “the SNP was censoring legitimate debate about Government policy in the run-up to the referendum.” Those are not my words; they are the words of the *Telegraph* journalist who wrote the story. I think it was Ben Riley-Smith.

Similar claims have been made in various newspapers about the report in May this year of the Public Audit Committee of the Scottish Parliament on police reform in Scotland. There were also claims more recently, just a couple of weeks ago—claims strongly denied by the Scottish Government—that an Audit Scotland report on Scottish schools had been diluted, removing critical comments apparently contained in an earlier draft. Again, that story was in the *Telegraph*, on 20 June. These are newspaper reports I am talking to you about, so I cannot vouch for their validity. I was asked by Mr Morrice a few moments ago whether I was surprised to be treated in the way that I was. Part of the reason why I was not altogether surprised is that there is a pattern emerging in the Scottish Parliament, particularly in the Committees of the Scottish Parliament, of SNP-dominated Committees not wanting to subject SNP Government policy to perhaps the full rigorous scrutiny that we would expect from a more mature Parliament.

Q5832 Mike Crockart: Is it your contention that the whole independence debate is getting in the way of effective governance in the Scottish Parliament?

Professor Tomkins: I think the independence debate is getting in the way of effective parliamentary scrutiny in the Scottish Parliament.

Q5833 Mike Crockart: What about more widely? Obviously you do not just give evidence in person; you’re out there in social media as well, which I think we would all agree is a rather more wild set of circumstances. I take it that you have been subjected to behaviour in social media circles that would potentially be designed to silence debate in that way.

Professor Tomkins: I love Twitter. Twitter is great and I enjoy it. It has a dark side, but it also has a block function. Anybody that abuses me on Twitter gets blocked, which I suppose is a sort of censoring. I do not often agree with George Galloway and I do not think I have ever knowingly cited him before, but, “I am sick and tired of being called a quisling or a traitor.”

Chair: Earlier on, I thought we had never had a Division. The staff have just drawn to my attention that there was apparently a Division on 21 March 2011 in relation to the Scotland Bill, about which I had forgotten. We have had no Divisions on anything to do with separation since that date in March 2011. In fact, the staff are busy searching the records to see whether they can find any other occasion on which there has been a Division. I just wanted to place that on the record.

Q5834 Jim McGovern: Professor Tomkins, you mentioned welfare and immigration as being probably the most important points. I should ask the staff to search the records for me on this point.

I am sure we took evidence from witnesses on this subject. You mentioned net immigration, and I am trying to configure that. Do you mean that, if 40,000 people leave Scotland but 60,000 people come into Scotland, it is 20,000 net?

Professor Tomkins: Yes.

Q5835 Jim McGovern: If I recall correctly, the evidence we heard was that in order to maintain the welfare and pension systems an independent Scotland would have to bring in 60,000 people every year—just to maintain the welfare and pension systems.

Professor Tomkins: The number that I gave a few moments ago was 24,000 a year. I do not have the relevant Government paper in front of me. I will go back and check, and if I have got it wrong I will write to the Committee.

Q5836 Jim McGovern: It could be me that is wrong.

Professor Tomkins: My recollection is that in its most recent publication on this the Scottish Government said that in order to meet the fiscal deficit that an independent Scotland would have on day one, which is the deficit between the amount of public money spent in Scotland and the amount of public money raised in Scotland, they would need net inward migration of 24,000 a year, but I will go away and check that.

Chair: That is right. There was a disagreement in the Committee about clarifying net and gross immigration. Of course gross immigration—the number having to come in—given that there has over a number of years been substantial emigration from Scotland as well as net immigration, would be much more than 24,000 a year. It was not just a question of numbers; it was also a question of changing the cultural make-up of Scotland.

Q5837 Jim McGovern: Chair, can you recall that evidence session, and am I right in saying that the figure we were given was that 60,000 people per year would need to come into Scotland over the next 10 years?

Chair: I seem to remember that it was something like a 60,000 figure, but that might have been a gross figure rather than a net figure, with all the ambiguities and distinction between gross and net.

Professor Tomkins: Let's say it is 24,000. No one has ever satisfactorily explained where those 24,000 are going to come from or what guarantees the Scottish Government can give—or even what evidence; they cannot give guarantees about the future—that a target figure of 24,000 annually is credible or plausible. There is independent expert analysis that suggests that even if that is what an independent Scotland really wanted to do—query that—

Q5838 Chair: To be fair, there are millions of people throughout the world who would wish to come to Scotland, I would have thought. They are not necessarily the type of people that the Scottish Government would want in terms of high skills, but there would be no difficulty in having mass immigration were the borders to be opened.

Professor Tomkins: Exactly so. This is targeted immigration that is designed to fill a fiscal gap that we have currently in the Scottish budget. We are talking about certain categories of immigrant.

Q5839 Lindsay Roy: To what extent is it fair to summarise that what independence does not mean is clearer than what it does?

Professor Tomkins: I think I wrote that line, didn't I?

Q5840 Lindsay Roy: I am sure you did. It is somewhat ironic if that is the case.

Professor Tomkins: There are respects in which the Scottish Government's vision for an independent Scotland is such a diluted understanding of independence that it would actually make Edinburgh more dependent on decisions made in London, and not more independent of decisions made in London. That is particularly the case with regard to monetary policy.

Chair: I am being told that there is about to be a vote. I would not like to be accused of cutting you off at any point. However, one of my colleagues has a question, and, as you will be aware, the procedure in the Committee is normally that at the end we ask witnesses whether or not there are any answers they have prepared to questions we did not think to ask. If we can manage to work all that in relatively quickly, we will finish the session before the vote takes place.

Q5841 Mike Crockart: I have a very quick question. It relates to the quite worrying picture that you paint about the way the independence referendum is impacting on effective corporate governance. In your evidence you said that during the session you were taking part in there were members who objected quite strongly to what was happening within that Committee. Are you aware of any moves by members of Committees to complain about the way this is happening in the Scottish Parliament?

Professor Tomkins: No, I am not. I do not know either way. I think that is probably why I copied the correspondence to the Presiding Officer. If what happened to me, or anything remotely similar to what happened to me, is also being experienced in other Committees, the Presiding Officer should know about it.

Q5842 Graeme Morrice: In terms of the Committee meeting in question, you have gone through a graphic description of what happened. To clarify for the record, you said you had written both to Willie Coffey and to Christina McKelvie, the Convener of the Committee, seeking an apology. I think you said you had received a response from Christina McKelvie but she did not apologise. Is that the case?

Professor Tomkins: I did not seek an apology from Christina McKelvie. I sought an apology from Mr Coffey.

Q5843 Graeme Morrice: But you did not receive a reply to your correspondence with Mr Coffey; is that right?

Professor Tomkins: I have not received an acknowledgment of my letter from Mr Coffey and I have not received a reply or an apology. Christina McKelvie did reply. I did not ask for her to apologise, because she did not treat me rudely or with disrespect. I think she made a mistake and I sought only that she might acknowledge that she could have handled it differently and perhaps

better. I did receive a response from her, and she said that she did not think she had done anything inappropriate.

Q5844 Graeme Morrice: She said she felt that she did not do anything inappropriate, but did she respond to the behaviour of Mr Coffey?

Professor Tomkins: No. Just to be clear, in Christina McKelvie's letter to me she did not refer to Mr Coffey's behaviour. What she said was, "My intention had been to try and avoid the Committee meeting becoming too heated. As you alluded to in your letter, I subsequently ensured that you had the opportunity to complete your point later in the meeting."

Q5845 Graeme Morrice: You mentioned that you had also contacted the Presiding Officer.

Professor Tomkins: Yes.

Q5846 Graeme Morrice: Did you write to her? Have you had a reply from her?

Professor Tomkins: The only reply I received from the office of the Presiding Officer was an interim holding reply on 16 June, which said: "This is just to acknowledge receipt of your email and to note that it is currently receiving attention and that a full response will be issued to you as soon as possible." I have not heard anything further.

Q5847 Graeme Morrice: Have you had any correspondence or post-discussion with any other members of the Committee?

Professor Tomkins: No, not with any other members of the Committee. I met one of the researchers who works for Jamie McGrigor MSP and discussed it informally with him, but I have not discussed it with Jamie McGrigor or Alex Rowley since the day in question.

Chair: There is another issue about whether or not any members of the Committee have themselves complained about the conduct of the meeting. My understanding is that they are forbidden to tell anybody whether or not they have lodged a complaint. They are allowed to make complaints, but the act of having made a complaint is itself a secret in the Scottish Parliament. People to whom I spoke said that they were not able to tell me whether or not they had complained, which is somewhat bizarre. I do not know whether or not, if a complaint is upheld, it would still be a secret. Hopefully not.

Q5848 Lindsay Roy: Given the issues that you have raised about not being able to complete your evidence, do you expect to be invited back?

Professor Tomkins: I would not return to that Committee until I had received an apology from the member on it.

Q5849 Lindsay Roy: Would it be helpful, having received an apology, to complete your evidence?

Professor Tomkins: I think the Scottish Parliament is in recess now. I am not sure that it is going to meet very much more between now and the referendum. On 18 September all of this is going to become academic because there is going to be a no vote.

Lindsay Roy: Thanks for your reassurance.

Graeme Morrice: Could you be more specific?

Q5850 Chair: Are there any thoughts unexpressed?

Professor Tomkins: No. Thank you very much, Chair, for giving me the opportunity to come here today and to explain what happened and why I think it is sad. I do not come here in anger. I am not angry with anyone. I come here in sadness about the condition of public discourse in Scotland. I am concerned about the quality of robust, effective parliamentary scrutiny in the Scottish Parliament.

Chair: Having said earlier that we wanted to close the meeting before the vote, I ought to say that after quickly consulting my colleagues we were of the view that had we not been able to finish your evidence we would in fact have offered to come back and give you the opportunity to continue thereafter. It was not that we were using the clock as an excuse.

Thank you very much for your observations to us. I think they have covered pretty well the evidence that you wanted to give at the Scottish Parliament before you were cut off in full flow. We have covered the conduct of the Committee and matters in principle in relation to free speech, and the need for free speech and discussion to be open and without rancour or recrimination in the debate on the referendum. Thank you very much.