Institution: **University of Glasgow**
Unit of Assessment: **20 - Law**
Title of case study: **National Security and Ministerial Responsibility: Shaping and Influencing Government Bills**

1. Summary of the impact (indicative maximum 100 words)

Professor Adam Tomkins of the University of Glasgow provides research-based evidence and advice to the House of Lords Select Committee on the Constitution, serving as one of their legal advisers since 2009 and, in that time, drafting reports on more than 30 Government Bills. His research has directly influenced law and policy, most markedly in two recent Acts of Parliament. Tomkins' research on the constitutional conventions of ministerial responsibility influenced a series of amendments to the Health and Social Care Act 2012; his research into national security and the due process of law proved critical, again resulting in several amendments, to the Justice and Security Act 2013.

2. Underpinning research (indicative maximum 500 words)

Professor Adam Tomkins holds the John Millar Chair of Public Law at the University of Glasgow (2003-present). The research which underpins the impact of his work centres on two main areas – the constitutional conventions of ministerial responsibility and national security law – both themes throughout Tomkins' academic career and key to several of his publications.

(a) The conventions of ministerial responsibility

The convention of ministerial responsibility establishes the accountability of government to Parliament. While at the University of Glasgow, Tomkins has undertaken doctrinal scholarship on both the UK constitution and EU public law in relation to such conventions. Among the research questions explored by Tomkins' work in this area are the following: how accountability and responsibility relate to one another; how resignation and responsibility relate to one another; how ministerial responsibility and the responsibility of others (e.g. civil servants) relate to one another.

Tomkins' methodology in exploring these issues combines detailed examination of case-studies, enabling him to distinguish constitutional from unconstitutional conduct in a context that is often politically fraught and lacking in clarity.

Key arguments advanced by Tomkins in the course of this work include the following: that constitutional responsibility is a discrete concept, which should be distinguished from what a minister is personally responsible for; that the constitutional responsibility of ministers is owed specifically to Parliament (although in other senses ministers may at the same time owe obligations of responsibility to the Prime Minister, to party, or even to the media); and that no constitutional distinction is to be drawn between responsibility, accountability and answerability.

(b) National security law

Tomkins' scholarship which led to his recent outputs of 2010 [4] and 2011 [5] has given him extensive knowledge of due process in national security litigation. National security requires the state to keep secrets; yet for litigation to be fair it needs to be conducted as openly as possible. How to trade off the competing public interests of national security secrets, on the one hand, and open and natural justice, on the other, has proved to be one of the most contested subjects in British public law in recent years.

In his article National Security and the Role of the Court, Tomkins sought to shift the focus from the treatment of national security and counter-terrorism in the case law of the House of Lords towards

an examination of the approach taken in the lower administrative courts and tribunals, whose task it is to consider such questions at first instance.

Through his analysis of decisions taken by these courts in the contexts of control orders, proscribed organisations, and deprivation of citizenship, Tomkins demonstrated that judicial scrutiny of government actions and decisions taken in the interests of national security appears never to have been more intense. Moreover, Tomkins' examination of the work of the lower courts in this area has revealed that the approach they adopt when considering whether something is in the interests of national security differs considerably from that of the House of Lords. Whereas the House of Lords argued that such questions are not questions of law but instead of judgement and policy and should therefore be left to the discretion of the Secretary of State, the lower courts have interpreted the provisions of the European Convention on Human Rights relating to the right to a fair trial to mean that because questions of national security have to come before the courts to ensure that such rights are not violated, the claims made in the name of national security must be subject to scrutiny by the courts.

Additionally, Tomkins has considered the issue of the use of closed material in cases that deal with issues of national security and counter-terrorism. Closed material is evidence that, for reasons of national security, cannot be disclosed to individuals who are subject to national security controls. Under such circumstances, a special advocate with security clearance is appointed who is able to see the closed evidence and make submissions to the court on behalf of the individual. Once the special advocate has seen the close material, however, s/he is not generally permitted to communicate further with the individual.

Suggesting that the use of special advocates and closed material represents one of the key struggles in accommodating security concerns with due process in law, Tomkins has argued strongly for reform to current rules governing such matters. He has proposed that a new rule should be introduced such that: it can never be in accordance with the due process of law for material evidence to remain closed in any form of legal proceedings-even where a special advocate is appointed- unless both the Government and the court have been required to balance the interest in disclosure against the interest in non-disclosure.

Tomkins' scholarship in this area has contributed important commentary to debates about the requirement for courts to be able scrutinise decisions made by the executive to impose severe restrictions on people's rights and civil liberties.

3. References to the research (indicative maximum of six references)

Tomkins, A. 2003. *Public Law*. Oxford University Press (especially chapter 5 on ministerial responsibility) [RAE 2008 - Available from HEI]

Tomkins, A. 2008. Political Accountability in the United Kingdom (in L Verhay, H Brooksteeg and I Van Den Driessche (eds), *Political Accountability in Europe: Which Way Forward?*, Europa Law Publishing), pp. 243-69 [Available from HEI]

Tomkins, A. 2010. National Security and the Role of the Court, *Law Quarterly Review*, 126, pp. 543-67.ISSN 0023-933X [Available from HEI] *(Output published in high quality journal operating rigorous peer-review).*

Tomkins, A. 2011. National Security and the Due Process of Law, *Current Legal Problems,* 64 pp. 215-53*)* (doi:10.1093/clp/cur001).*(Output subject to comprehensive peer-review process by Journal prior to publication).* [REF2]

Turpin C and Tomkins A. 2011. *British Government and the Constitution*, 7th edition. Cambridge University Press (especially Chapters 3 and 9 on ministerial responsibility). [Available from HEI]

4. Details of the impact (indicative maximum 750 words)

The House of Lords Select Committee on the Constitution (HLCC) is a cross-party committee that examines all Bills before Parliament for their constitutional compatibility, reporting to Parliament on the constitutional impact of legislation.

In 2009, Tomkins was appointed as one of two legal advisers to the HLCC, and has since drafted reports on over 30 Bills. On numerous occasions, these reports have identified matters that have led to significant legislative amendment by the House of Lords. Leading examples include the Health and Social Care Bill (2011-12) and the Justice and Security Bill (2012-13).

The Health and Social Care Bill (2011-12)

The Health and Social Care Bill sought to amend core aspects of the NHS Act 2006, which governed the National Health Service in England. By virtue of the 2006 Act, the Secretary of State is legally and politically responsible to Parliament for the NHS in England. Tomkins highlighted certain provisions in the Bill which would pose a risk to the Secretary of State's continuing constitutional responsibility for the NHS. Two of these provisions were; the definition of the Secretary of State's responsibilities (Clause 1) and the introduction of Clinical Commissioning Groups which would take over some service provision responsibilities (Clause 1C). Tomkins advised HLCC that these provisions would risk diluting the Government's constitutional responsibilities with regard to the National Health Service. Following Tomkins' advice, the HLCC reported (September 2011) that if the Health and Social Care Bill were enacted as it stood, the chain of constitutional responsibility within the NHS would be severed.

In November - December 2011, Tomkins and his fellow legal adviser represented the HLCC at a series of meetings with Department of Health officials and First Parliamentary Counsel, at which they discussed the significant consequences of the Bill. Tomkins prepared a follow-up report, which HLCC published in December 2011 [2; 3]. The report proposed amendments to the Bill which were crucial to ensuring that the Secretary of State's constitutional responsibilities for the NHS were positioned beyond legal doubt. The House of Lords endorsed these amendments and the amendments to Sections 1 and 1C of the Bill were adopted in the Act.

The follow-up report contains an Appendix (written by Tomkins) which sets out in authoritative form the HLCC's understanding of the constitutional conventions of ministerial responsibility to Parliament. This understanding formed the basis of HLCC's subsequent work on the Accountability of Civil Servants, an inquiry undertaken by HLCC in respect of which Tomkins and Rawlings was a specialist adviser. Many of the recommendations contained in the HLCC's final report from this inquiry were supported by the Government in its response to the report.

The Justice and Security Bill (2012-13)

In *Al Rawi v Security Service* ([2011] UKSC 34) the UK Supreme Court ruled that the courts had no inherent power to order that a civil action may be heard under 'closed material procedure' (CMP). CMP, invented by statute in 1997, is used in some counter-terrorism contexts: it allows sensitive material to be used as evidence in litigation without it being served on the parties. Instead, it is served on a security-cleared 'special advocate'. The procedure is highly controversial.

In May 2012, the Government introduced its Justice and Security Bill into Parliament. The Bill as introduced incorporated a number of recommendations which Tomkins (together with Tom Hickman from University College London) had made in an earlier response, on behalf of the Bingham Centre for the Rule of Law, to a Green Paper published by the Government in 2011. This response had argued that proposals such as advocating for 'closed material procedure' (CMP) to be available generally in civil litigation were excessive. The Justice and Security Bill (as introduced) proposed that CMP be available in civil trials only in the interests of national security, a crucial

recommendation made by Tomkins. However, despite being an improvement on the 2011 Green Paper, the Bill remained problematic.

When it was introduced into the House of Lords, Tomkins examined the Bill and advised the HLCC. On the basis of his advice, HLCC published a report (June 2012) which urged several amendments, including that; (a) any party to a case (not only the Secretary of State) should be permitted to apply for a trial to adopt a CMP; (b) the Bill needed to clarify the intended relationship between CMP and the common law principles of Public Interest Immunity; (c) Ministers should not be able to extend the availability of CMP to other proceedings, such as inquests; (d) the Government should be required to report annually to Parliament on the use of CMP; and (e) the Bill should be independently reviewed five years after it comes into force [7]. All of these recommendations were accepted by Parliament and now appear in the Justice and Security Act 2013.

In both his work for the Bingham Centre and his advice on the Justice and Security Bill for HLCC Tomkins drew extensively on research first presented in his articles in the *Law Quarterly Review* and *Current Legal Problems* on the Role of the Court, and Due Process in Law, as they relate to questions of National Security (see (3) and (4) at Section 3, above).

5. Sources to corroborate the impact (indicative maximum of 10 references)

[1] House of Lords Select Committee on the Constitution, Report on Health and Social Care Bill, published 30 September 2011 (link)

[2] House of Lords Select Committee on the Constitution, Report on Health and Social Care Bill: Follow-up, published 20 December 2011 (link)

[3] Published Letter from Baroness Jay of Paddington to Earl Howe, Parliamentary Under-Secretary of State re: Tomkins and Rawlings meeting with Department of Health Officials, sent 9 November 2011 (link)

[4] See Health and Social Care Act 2012 (link)

[5] Tomkins, A. and Hickman, T. 2011. 'Response To The *Justice And Security* Green Paper', Bingham Centre For The Rule Of Law (link)

[6] See, in particular, Section 6 of Justice and Security Act 2013 (link)

[7] House of Lords Select Committee on the Constitution, Report on Justice and Security Bill, published 15 June 2012 (link)

[8] QC responsible for independently reviewing counter-terrorist legislation can attest to the influence of the research in the preparations of the Justice and Security Bill.