

<p>1 Monday, 5 December 2016 2 (11.00 am) 3 Opening statement by THE PRESIDENT 4 THE PRESIDENT: Before we start, I would like to raise a few 5 matters. We order that no one shall publish or reveal 6 the names or addresses of various parties, prospective 7 claimants and interested parties in these proceedings, 8 or any information likely to lead to the identification 9 of those people or their families, in connection with 10 these proceedings, or the home address of the first 11 respondent or any of the interested parties. Copies of 12 this order with further details will be available to 13 anybody who wishes to see it. 14 We have made this order largely because various 15 individuals have received threats of serious violence 16 and unpleasant abuse in emails and other electronic 17 communications. 18 Threatening and abusing people because they are 19 exercising their fundamental right to go to court 20 undermines the rule of law. Anyone who communicates 21 such threats or abuse should be aware that there are 22 legal powers designed to ensure that access to the 23 courts is available to everybody. 24 Secondly, it is right to record that at the 25 direction of the court, the registrar has asked all the</p> <p style="text-align: center;">Page 1</p>	<p>1 oral submissions than they would have wished. We are 2 grateful for their cooperation and understanding. 3 I remind those advocates who will be addressing us 4 that their oral submissions must not repeat points 5 already raised by other advocates in earlier 6 submissions. 7 Next, many people are watching these proceedings 8 because they are being streamed on our website and 9 broadcast on television. This is a very important 10 aspect of open justice, and we are pleased that so many 11 people are able to read the written arguments online and 12 listen to the oral arguments as they are being 13 developed. 14 Finally, I would like to take this opportunity to 15 remind everyone who has taken an interest in these 16 proceedings that the Supreme Court exists to decide 17 points of law which fall within its jurisdiction. The 18 justices of the court are of course aware of the public 19 interest in this case, and we are aware of the strong 20 feelings associated with the many other wider political 21 questions surrounding the United Kingdom's departure 22 from the European Union. 23 However, as will be apparent from the arguments 24 before us, those wider political questions are not the 25 subject of this appeal. This appeal is concerned with</p> <p style="text-align: center;">Page 3</p>
<p>1 parties involved in these proceedings whether they wish 2 to ask any of the justices to stand down. All parties 3 to the appeal have stated that they have no objection to 4 any of us sitting on this appeal. 5 Third, these proceedings involve a large number of 6 parties and a great deal of legal submissions and 7 supporting material, and the proceedings have come to 8 this court very quickly. That this has occurred in 9 an orderly fashion is entirely thanks to a lot of hard 10 work done by and cooperation between the parties, their 11 lawyers and the court staff. The justices would like to 12 thank all those involved. 13 There are an unprecedented number of lawyers and 14 party representatives. We are grateful to them for 15 agreeing seating arrangements which involve many of them 16 sitting in less convenient places than they may have 17 expected. We have been keen to ensure that members of 18 the public can be here and given the limited space, this 19 has meant that not all members of the legal teams can be 20 accommodated in the courtroom. 21 All parties have filed written submissions which we 22 have carefully read. Because of the limited time 23 available for the hearing, we have had to ask some 24 advocates to confine their submissions to their written 25 argument, and others to spend less time developing their</p> <p style="text-align: center;">Page 2</p>	<p>1 legal issues, and as judges, our duty is to consider 2 those issues impartially and to decide the case 3 according to the law. 4 That is what we will do. 5 Mr Attorney. 6 Submissions by THE ATTORNEY GENERAL 7 THE ATTORNEY GENERAL: My Lady and my Lords, good morning. 8 I appear on behalf of the appellant in this matter, and 9 I know that the court has seen a list of other 10 representation in this case. In the interests of time, 11 I will not, unless the court wishes me to, take you 12 through that. 13 THE PRESIDENT: Very sensible. 14 THE ATTORNEY GENERAL: I am grateful. 15 I note the court also has a timetable as to the 16 submissions that will be made, and I know that all 17 counsel will do their best to keep to that. 18 There are, if I may, two points I wish to make at 19 the outset on which I believe all parties are agreed, 20 and they follow from what my Lord President has just 21 said. The first is that this is a case of great 22 constitutional significance in which there is 23 understandable and legitimate interest, both inside and 24 outside this courtroom and, second, in light of what 25 followed the divisional court's judgment, it should be</p> <p style="text-align: center;">Page 4</p>

<p>1 said with clarity that this is a case which the 2 claimants brought perfectly properly and which it is now 3 perfectly proper for this court to decide. 4 That is so because there is a clear question of law 5 before the court, namely, whether the Government has the 6 legal power to give notice under Article 50 of the 7 Treaty on European Union to begin negotiations for the 8 UK's withdrawal from the EU, or whether further specific 9 legislative authority is required to do so. 10 That, we submit, is a clear question. But it is not 11 a narrow one. It raises issues going to the very heart 12 of our constitutional settlement. The question arises, 13 of course, because the United Kingdom is about to leave 14 the European Union, as a result of a course of events 15 which I submit is worth restating. 16 At the last general election, the Government was 17 elected with a manifesto commitment to hold an in/out 18 referendum on the UK's membership of the EU. Parliament 19 provided for that referendum through the European Union 20 Referendum Act of 2015. The referendum was conducted, 21 we say, in the universal expectation, including in 22 Parliament, that the Government would implement its 23 result. As the foreign secretary told the House of 24 Commons at second reading of the bill, and I quote: 25 "This is a simple but vital piece of legislation.</p> <p style="text-align: center;">Page 5</p>	<p>1 raised in relation to the Scottish, Northern Irish and 2 Welsh jurisdictions. 3 My three submissions are these. First, that the 4 foreign affairs prerogative is not an ancient relic but 5 a contemporary necessity. Including the powers to make 6 and withdraw from treaties, it is a fundamental pillar 7 of our constitution as a sovereign state and it is 8 essential to the effective conduct of public business. 9 Second, that the prerogative operates as part of 10 a dualist system, including in the EU context. 11 Third, that the prerogative operates wholly in 12 accordance with parliamentary sovereignty. Parliament 13 has a clear understanding of the constitutional function 14 and usefulness of these powers, and where it chooses to 15 limit them, it does so carefully and specifically. 16 So, my first submission is on the importance of the 17 foreign affairs prerogative. The powers to make and 18 unmake treaties, conduct diplomacy and take part in 19 multilateral decision-making do not, we say, reside with 20 the executive as unfinished business or as a result of 21 historical oversight, but because there are good 22 constitutional and practical reasons why they should. 23 The need for the Government to maintain control over 24 strategy, policy and operational matters in conducting 25 our bilateral or multilateral international</p> <p style="text-align: center;">Page 7</p>
<p>1 It has one clear purpose: to deliver on our promise to 2 give the British people the final say on our EU 3 membership in an in/out referendum by the end of 2017." 4 My Lords, I don't propose to ask you to turn to 5 that, but if you wish to find it, it is at volume 18 of 6 the bundles, tab 203. 7 A majority of those who voted in the referendum 8 wanted the UK to leave the European Union, and 9 Article 50 provides the specific legal mechanism to 10 begin doing so. 11 Now, my Lords, the divisional court treated all of 12 that as legally irrelevant and concluded that the 13 process could not lawfully be begun by the Government 14 using prerogative powers but only by further legislation 15 in Parliament. We say, respectfully, that the 16 divisional court was wrong about that. We say that use 17 of the prerogative in these circumstances would not only 18 be lawful but fully supported by our constitutional 19 settlement, in line with parliamentary sovereignty and 20 in accordance with legitimate public expectations. 21 So in opening this appeal, I make three submissions 22 by way of introduction to our case from this fundamental 23 constitutional perspective. My learned friend Mr Eadie 24 will then develop our case and the Advocate General for 25 Scotland will deal with the devolution and other issues</p> <p style="text-align: center;">Page 6</p>	<p>1 relationships is, we say, clear and compelling. 2 That has long been true. I want to read from 3 Blackstone's Commentaries on this matter. Again, 4 I don't invite your Lordships to turn it up for these 5 purposes, but it can be found at volume 27 of the bundle 6 at tab 329. 7 At that point, describing the foreign affairs 8 prerogative as, and I quote "wisely placed in a single 9 hand by the British constitution for the sake of 10 unanimity, strength and dispatch". It goes on to say, 11 and again I quote: 12 "With regard to foreign concerns, the King is the 13 delegate or representative of his people. It is 14 impossible that individuals of a state in their 15 collective capacity can transact the affairs of that 16 state with another community equally numerous as 17 themselves. Unanimity must be wanting to their measures 18 and strength to the execution of their counsels." 19 My Lords, we submit that remains the case. Ours is 20 not the only constitutional system where this is 21 accepted. Other common law jurisdictions recognise 22 similar power for their own governance. In the 23 United States, in Canada and in Australia, the executive 24 branch holds the power to make and unmake treaties, and 25 these are powers that are used often.</p> <p style="text-align: center;">Page 8</p>

<p>1 In the last 12 months the Government has signed 31 2 new treaties on a range of subjects, including 3 transport, mutual legal assistance, defence, prisoner 4 transfer and the environment. 5 They have been used too by the Government in playing 6 our full part as a member state of the European Union, 7 including in the process of shaping the development of 8 the EU legal order, and all the ebb and flow of EU law 9 rights and obligations that that entails. 10 The Government has been doing this since 1972 by 11 participating in Council of Ministers' decision-making 12 as well as in the day-to-day transaction of Commission 13 negotiations in Brussels, and diplomatically with other 14 member states. All this, we say, is done using 15 prerogative powers and with Parliament's acceptance. 16 My second submission is that all this is done as 17 part of the functioning of the UK's dualist legal 18 system. Mr Eadie will develop this submission in more 19 detail, but I want to give the court a flavour of it at 20 this stage. 21 It is common ground that treaties are not 22 self-executing. Prerogative actions of the Government 23 on the international law plane on the one hand, and on 24 the other, Parliament giving effect as necessary to 25 rights and obligations on the domestic plane are legally</p> <p style="text-align: center;">Page 9</p>	<p>1 level. 2 An action which has that effect, an effect which can 3 include the removal of previously existing 4 treaty-dependent rights, is action taken in the exercise 5 of prerogative powers. That, we say, is the logical 6 consequence of the conduit mechanism which Parliament 7 brought into being with the 1972 Act. 8 Which brings me to my third submission. Parliament 9 is sovereign. Parliament can, if it chooses, legislate 10 to limit the prerogative and it has done so, but where 11 it has done so, it has done it sparingly and explicitly, 12 conscious, as it has always been, of the need for 13 prerogative powers and the effective conduct of 14 Government business. 15 So Parliament has considered carefully the proper 16 extent of its involvement in the making of treaties. 17 The provisions in part 2 of the Constitutional Reform 18 and Governance Act 2010 were the culmination of 19 a lengthy process of dialogue between Parliament and the 20 executive and of wider public consultation. 21 That Act introduced a series of controls in relation 22 to the ratification of treaties, but it did not 23 introduce a requirement for primary legislative 24 authority, nor did it seek to control the prerogative 25 power to make or significantly to withdraw from</p> <p style="text-align: center;">Page 11</p>
<p>1 and constitutionally separate. The EU legal order, we 2 say, is not an exception to that dualist system; it is 3 a clear example of it. 4 To implement the UK's original treaty obligations, 5 the 1972 European Communities Act provided for a conduit 6 for the inflow of the EU legal order; that was its 7 purpose. But the existence of a mechanism such as the 8 1972 Act for implementing the consequences of EU 9 membership in domestic law has no bearing, we say, in 10 a dualist system on the existence or use of the foreign 11 affairs prerogative to remove the EU legal order at 12 international level. 13 That is at least in part because the 1972 Act does 14 not and cannot create EU rights and obligations. It 15 says so in terms, and you will be taken to the relevant 16 language. EU rights and obligations are negotiated and 17 agreed by Government and are created and arise on the 18 international law plane. 19 Doing so we say involves and has always involved the 20 use of prerogative powers. The 1972 Act provides for 21 the rights and obligations from time to time existing on 22 the international plane to be part of domestic law. 23 Those rights and obligations in domestic law are 24 therefore inherently liable to change, to be expanded, 25 shrunk or withdrawn altogether by action at the EU</p> <p style="text-align: center;">Page 10</p>	<p>1 treaties. 2 Parliament has also considered, with particular care 3 and in detail, what the balance of legislation and 4 prerogative power should be in the specific context of 5 the European Union. Parliament has done so in a series 6 of acts, beginning with the 1972 European Communities 7 Act and ending with the 2015 European Union Referendum 8 Act. We will take you to the details of that sequence. 9 But I would make two points at this stage: first, 10 there is nothing in the wording of the European 11 Communities Act, or indeed in the later legislation to 12 which Mr Eadie will take you, to inhibit withdrawal from 13 the European Union treaties or subject it to 14 a requirement of prior legislative authority. That 15 therefore remains to be done by the Government in 16 exercise of well-established prerogative powers. It is 17 not as though Parliament has been short of opportunities 18 to impose such restrictions if it had wanted to. 19 There has been legislation in 1978, in 2002, in 20 2008, in 2011 and in 2015, where it could have done so 21 and did not. 22 Secondly, nowhere in the three acts that followed 23 the Lisbon treaty in 2008, 2011 and 2015 is there any 24 basis for inferring a legislative restriction on the 25 prerogative in relation to Article 50, to begin</p> <p style="text-align: center;">Page 12</p>

1 negotiation of withdrawal.  
 2 On the contrary, we say, close attention to the  
 3 respective roles of Government and legislature in this  
 4 context has been given by Parliament in each of these  
 5 acts, and the Government's role on Article 50 has been  
 6 consciously conserved.  
 7 The last of these acts is the 2015 European Union  
 8 Referendum Act. That Act was passed in the clear  
 9 expectation inside and outside Parliament that the final  
 10 decision, made by the people in the referendum it  
 11 provided for, would be implemented by the Government.  
 12 At the heart of the referendum campaign between  
 13 remainers and leavers was the proposition that the  
 14 referendum would provide the definitive answer to the  
 15 question of our future inside or outside the European  
 16 Union, and the assumption that this was so was surely  
 17 clear from the vigour with which the campaign was fought  
 18 by both sides.  
 19 Parliament passed the 2015 Act and provided for the  
 20 referendum, we say, in full knowledge that the  
 21 Government had publicly and repeatedly committed to  
 22 implement the outcome and fully expecting it to do so.  
 23 We say, too, that because implementation of a decision  
 24 by the people to leave the EU would require withdrawal  
 25 from treaty obligations, Parliament expected also that

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1 this would be done in the normal way, by use of  
 2 prerogative powers. We say Parliament definitively and  
 3 deliberately assigned to the public vote and to  
 4 prerogative action, the very question it is said it now  
 5 needs to ask itself again in precisely the same terms.  
 6 Parliament passed the 2015 Act in the clear  
 7 knowledge, and expectation, that the process by which  
 8 the exit from the EU would take place was set out in  
 9 Article 50 of the Treaty on European Union.  
 10 It knew what would happen when that process was  
 11 begun, and it took no step, made no provision, imposed  
 12 no constraint, to prevent the Government giving notice  
 13 to do so in the usual exercise of prerogative power.  
 14 So, my Lords, the triggering of Article 50, we say,  
 15 will not be an exercise of prerogative power on a whim,  
 16 or out of a clear blue sky. It is the logical  
 17 conclusion of a process in which Parliament has been  
 18 fully and consciously involved, a process in which  
 19 Parliament resolved to put a clear and decisive question  
 20 about our nation's future to the British people, and in  
 21 which Parliament expected the Government to act on the  
 22 answer they gave.  
 23 None of this means, of course, that Parliament will  
 24 not be closely involved in the process of the UK's  
 25 withdrawal from the EU over the coming months and years.

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1 Through parliamentary debate and scrutiny, through the  
 2 procedures set out in the Constitutional Reform and  
 3 Governance Act for scrutinising the withdrawal agreement  
 4 which Article 50(2) envisages, and through legislation  
 5 in the form of the Great Repeal Bill to deal to the  
 6 extent necessary with the domestic law consequences for  
 7 former treaty-dependent rights and obligations,  
 8 Parliament will continue to exercise its sovereignty as  
 9 it does these things, both when it legislates and when  
 10 it chooses not to, because Parliament can demonstrate  
 11 its sovereignty, we say, as much when it decides not to  
 12 act as when it acts. Parliament is sovereign to impose  
 13 whatever legal controls it wishes on the prerogative,  
 14 and it is sovereign to choose not to, or to rely on  
 15 political rather than legal controls on the Government.  
 16 That must be what parliamentary sovereignty means.  
 17 The position of the respondents and others in this  
 18 case has always been that they have no interest in  
 19 derailing Brexit but only in defending Parliament's role  
 20 in the process.  
 21 But if this is all about standing up for Parliament,  
 22 I say Parliament can stand up for itself. When it comes  
 23 to leaving the European Union, Parliament has had full  
 24 capacity and multiple opportunities to restrict the  
 25 executive's ordinary ability to begin the Article 50

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1 process and it has not chosen to do so.  
 2 However much they may wish it had, those who support  
 3 parliamentary sovereignty should, we submit, respect  
 4 this exercise of parliamentary sovereignty too.  
 5 So, my final submission, my Lords, is that in the  
 6 context of this case, the imposition of a legislative  
 7 precondition by the courts which Parliament did not  
 8 choose to impose itself, cannot be supportive of  
 9 parliamentary sovereignty, but must be positively  
 10 inconsistent with it. In the delicate balance of our  
 11 constitutional settlement, this court should, we submit,  
 12 resist the invitation to make such an imposition.  
 13 My Lords, as I indicated, there are some further  
 14 submissions that the appellant wishes to make. Mr Eadie  
 15 and Lord Keen will make them. Unless there is anything  
 16 further I can assist with on what I have said, those are  
 17 the submissions I wish to make at this stage.  
 18 THE PRESIDENT: Thank you very much, Mr Attorney, thank you.  
 19 Mr Eadie.  
 20 Submissions by MR EADIE  
 21 MR EADIE: My Lords, my Lady, can I indicate where my  
 22 submissions are going to go and give you an overview, if  
 23 I may.  
 24 THE PRESIDENT: Thank you.  
 25 MR EADIE: I am going to start with three brief submissions

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<p>1 on the nature of the prerogative.</p> <p>2 Then I am going to deal with some basic principles</p> <p>3 relating to dualism and the impact of the prerogative on</p> <p>4 to domestic legal rights and obligations.</p> <p>5 Then I am going to take you briefly, because I know</p> <p>6 you will be well familiar with them, through some of the</p> <p>7 cases dealing with the De Keyser principles.</p> <p>8 Then I am going to have a slightly longer section,</p> <p>9 trying to apply both of those basic sets of principle to</p> <p>10 the concepts that you have before you today, before</p> <p>11 turning finally to two topics, one of which the Attorney</p> <p>12 has already flagged, namely parliamentary sovereignty,</p> <p>13 and secondly asking the direct question which the</p> <p>14 divisional court treated as being in effect dispositive,</p> <p>15 namely is there a background constitutional principle of</p> <p>16 the kind that they described.</p> <p>17 That is the structure, and, even in describing it,</p> <p>18 it appears that my submissions to you are going to be</p> <p>19 longer than they ordinarily would be, but the complex</p> <p>20 issues in this case perhaps lead to that. But I will</p> <p>21 bear clearly in mind what I have been told, which is</p> <p>22 that in order to maintain the broader interest, if there</p> <p>23 is any in the issues in this appeal, these submissions</p> <p>24 have to be marginally more entertaining than the one</p> <p>25 that Serenade the Stars is about to make in the 11.50</p> <p style="text-align: center;">Page 17</p>	<p>1 The conduct of foreign affairs involves myriad</p> <p>2 decisions, a daily exercise of power, a series of</p> <p>3 judgment calls, the negotiations between sovereign</p> <p>4 states on the international plane leading to the</p> <p>5 conclusion, and indeed to the withdrawal from agreements</p> <p>6 that are so made. It was, we respectfully submit,</p> <p>7 properly described by Viscount Radcliffe in the</p> <p>8 <i>Burmah Oil</i> case, core authorities bundle 3, tab 34, MS</p> <p>9 1356 at page 118 as "a power to act according to</p> <p>10 discretion for the public good".</p> <p>11 There has been a recent article exploring the</p> <p>12 question in justificatory terms, good thing or bad</p> <p>13 thing, the prerogative, by the professor of legal</p> <p>14 philosophy at Balliol, Oxford, Professor Endicott, and</p> <p>15 you have that lecture which we recommend as at least</p> <p>16 interesting reading behind tab 11 of the little blue</p> <p>17 file, for which apologies, but the little blue or black</p> <p>18 file on your desk with 11 KBW written on the back.</p> <p>19 THE PRESIDENT: Thank you.</p> <p>20 MR EADIE: That is it. Tab 11 is Professor Endicott if you</p> <p>21 want. I am not going to take you through it now but</p> <p>22 there it is.</p> <p>23 THE PRESIDENT: Thank you.</p> <p>24 MR EADIE: He relies upon, amongst other things, the very</p> <p>25 section from Blackstone's Commentaries that the Attorney</p> <p style="text-align: center;">Page 19</p>
<p>1 Maiden Stakes at Lingfield Park.</p> <p>2 I am not optimistic on that front, but with that</p> <p>3 lead in, could I turn first to the prerogative. Three</p> <p>4 basic points if I may. They are general in nature but</p> <p>5 they are, I would respectfully submit, important to</p> <p>6 emphasise at the outset of this appeal.</p> <p>7 Firstly, the point that the Attorney has already</p> <p>8 flagged, that the prerogative powers are, we submit,</p> <p>9 an essential and fundamental component or pillar of the</p> <p>10 modern British constitution. One only has to list the</p> <p>11 paradigm examples that the courts have given of</p> <p>12 prerogative powers to appreciate that constitutional</p> <p>13 fact. War and peace, the conduct of international</p> <p>14 relations, including the powers to make and unmake</p> <p>15 treaties.</p> <p>16 Those are powers that are exercised today and that</p> <p>17 have, for years, been exercised by the Government. It</p> <p>18 probably matters not whether that is a good thing or</p> <p>19 a bad thing. It is, we submit, a basic constitutional</p> <p>20 fact. If one had to justify that, it is not difficult,</p> <p>21 particularly in the sphere of foreign affairs, to see</p> <p>22 why, under our constitution, such powers continue to be</p> <p>23 exercised by the Government, subject, of course, to the</p> <p>24 limited and specific control that the legislature has</p> <p>25 seen fit to impose upon that exercise.</p> <p style="text-align: center;">Page 18</p>	<p>1 has just taken you to.</p> <p>2 THE PRESIDENT: Yes.</p> <p>3 MR EADIE: I say an essential and fundamental component or</p> <p>4 pillar under our constitution, but we are, as the</p> <p>5 Attorney has already flagged, not alone in having that</p> <p>6 system, in having the system that we do. Other common</p> <p>7 law jurisdictions have exactly or precisely similar</p> <p>8 systems relating to treaty-making, ratification, and</p> <p>9 withdrawal.</p> <p>10 Specifically and for example treaty withdrawal, to</p> <p>11 focus on that for a moment, is a decision taken by the</p> <p>12 executive alone in Australia, in Canada, and we cite the</p> <p>13 <i>Turp</i> case, I am not going to take you to it, authorities</p> <p>14 26, tab 308, 8950 in the electronic -- and New Zealand.</p> <p>15 And the same position exists in --</p> <p>16 LORD CARNWATH: Can I ask, the <i>Turp</i> case does interest me,</p> <p>17 are you going to come back to that at some point? That</p> <p>18 is an unusual example of the prerogative being used in</p> <p>19 fact to go against a specific act of Parliament on one</p> <p>20 view of the matter. I don't know whether you are going</p> <p>21 to come back to it.</p> <p>22 MR EADIE: My Lord, I can come back to it.</p> <p>23 LORD CARNWATH: Perhaps later on.</p> <p>24 MR EADIE: Very well. I was saying that the same position</p> <p>25 exists in relation to the United States where treaty</p> <p style="text-align: center;">Page 20</p>

<p>1 ratification is subject to two-thirds majority Senate                  2 approval; that is ratification; but the power to                  3 withdraw vests exclusively in the executive. You have                  4 got in the bundle, and it is perhaps worth turning this                  5 up very briefly -- I will try and keep the authorities I                  6 take you to to an absolute minimum, given the time, but                  7 this is perhaps of some interest. Authorities bundle 27                  8 tab 27, tab 332, and it is 9367 on the electronic.                  9 THE PRESIDENT: Thank you.                  10 MR EADIE: The passage that it may be worth just inviting                  11 you to side line is the passage that you see on                  12 page 9367 in the left-hand column, halfway down                  13 beginning:                  14 "Termination of a treaty ..."                  15 THE PRESIDENT: Yes.                  16 MR EADIE: Again, with my Lords' permission, could I invite                  17 you to read that, just that paragraph.                  18 THE PRESIDENT: Ending "section 332"?                  19 MR EADIE: Ending "section 332".                  20 THE PRESIDENT: Thank you. We will read that.                  21 (Pause)                  22 Thank you.                  23 MR EADIE: This first statement of basic principle, we                  24 submit is enhanced and supported and not diminished by                  25 the fact that the powers themselves are ancient.</p> <p style="text-align: center;">Page 21</p>	<p>1 Burmah Oil, was in fact made in order to justify the                  2 correct analytical approach in that case to the nature                  3 of the war prerogative, namely, as Lord Reid described                  4 it, a historical one designed to see, in effect, if the                  5 Government had ever taken property in time of conflict                  6 without compensation. So it was a statement for                  7 a purpose, implying no suspicion of the underlying                  8 doctrine by reference to its age.                  9 If describing it as a relic of a past age implies                  10 a long history, we agree. If it implies as a general                  11 proposition that more today is done by statute and there                  12 is less reliance than in Stuart times on the                  13 Government's prerogative, again, we agree, but to the                  14 extent that the description has connotations of                  15 anachronism because the power has existed for many                  16 centuries, we profoundly disagree.                  17 The correct starting point, we submit, is not                  18 suspicion of prerogative powers accompanied by judicial                  19 concern at their exercise; it is quite the opposite. It                  20 is the recognition that the prerogative powers that                  21 remain in the hands of Government are fundamental to our                  22 constitution, and effective government -- are essential                  23 to effective government.                  24 That properly leads to the exacting tests that                  25 I will come to, that the courts have developed before</p> <p style="text-align: center;">Page 23</p>
<p>1 LADY HALE: Could you just tell us what it is that you have                  2 directed us to? You gave us a tab reference and you                  3 didn't actually tell us what it was.                  4 MR EADIE: Sorry, that is the third restatement.                  5 LADY HALE: The third restatement.                  6 THE PRESIDENT: 9364 is the page.                  7 MR EADIE: I am so sorry, I should have introduced it.                  8 THE PRESIDENT: Yes.                  9 LADY HALE: Thank you.                  10 MR EADIE: It is indeed the case that the prerogative powers                  11 in question are ancient. What that implies, we submit,                  12 is that a long-standing, well-recognised set of powers                  13 can properly be recognised as both firmly established in                  14 our constitutional arrangements, and as having real and                  15 continuing value in contributing to effective                  16 government.                  17 Describing a particular prerogative power as a relic                  18 of a past age, a phrase which I know my Lords and my                  19 Lady will be familiar with, needs to be approached with                  20 some little caution. That was the statement or one of                  21 the statements by Lord Reid in Burmah Oil, and which the                  22 divisional court chose as their descriptive quotation,                  23 if I can put it that way, in paragraph 24 of their                  24 judgment.                  25 The statement, if one goes back to Lord Reid in</p> <p style="text-align: center;">Page 22</p>	<p>1 a conclusion can be reached, either that the powers have                  2 been taken away or limited by Parliament, and I will                  3 come back to De Keyser obviously and the rigour of that                  4 test; my submission is going to be that the rigour that                  5 that imposes is sound. Or that the power should be                  6 subjected to a broad general limitation in principle                  7 imposed by the courts. That is the first submission,                  8 therefore, fundamental.                  9 The second submission is that prerogative powers are                  10 by definition those powers that can be exercised by the                  11 Government without statutory authority. They do not                  12 depend for their existence or their source on                  13 legislation. Otherwise, they would be, and become,                  14 statutory powers. So statutory intervention into                  15 a sphere in which prerogative powers are exercised                  16 involves a legislative decision to impose limits or to                  17 abrogate or to remove existing, properly sourced                  18 elsewhere, prerogative powers.                  19 If a limitation on prerogative power is asserted,                  20 such as the interposition of some form of requirement of                  21 parliamentary involvement in decision-making in the                  22 sphere of a prerogative, decisions will necessarily                  23 therefore be necessary as to the precise nature and                  24 effect of any such limitation.                  25 CRAG, the Constitutional Reform and Governance Act</p> <p style="text-align: center;">Page 24</p>

<p>1 is an example of this. Preceding CRAG, and I will come                  2 back to it as you will recall, there was much debate                  3 about the precise extent and nature of the parliamentary                  4 controls that should be imposed on the exercise of the                  5 prerogative, and detailed provisions, a detailed                  6 position was arrived at.                  7 So these two are factors we respectfully suggest                  8 that indicate that clarity of parliamentary intention is                  9 necessarily to be looked for if the assertion is made                  10 that the prerogative has been controlled a fortiori                  11 abrogated.                  12 The third submission in relation to the prerogative                  13 is this. Parliament is of course sovereign. It can                  14 choose to limit, it can choose to control the                  15 prerogative power in any way or ways that it sees fit,                  16 and, of course, ultimately, it can choose to remove such                  17 power in any particular context altogether. So it is                  18 accurate and more accurate, certainly, in the context of                  19 foreign affairs, than using "relic" language, to                  20 describe the prerogative, again Lord Reid in <i>Burmah Oil</i>                  21 as "part of sovereignty which Parliament has chosen to                  22 leave in the Government's hands".                  23 That is 1338 in the MS numbering, core authorities                  24 3, tab 34.                  25 THE PRESIDENT: Thank you.</p> <p style="text-align: center;">Page 25</p>	<p>1 the usual way without further parliamentary                  2 authorisation.                  3 So those are the submissions we make, the basic                  4 submissions we make about the nature of the royal                  5 prerogative.                  6 Can I turn to the second of the topics, which was                  7 basic principles relating to dualism and the impact of                  8 the prerogative on domestic legal rights and                  9 obligations.                  10 LORD CARNWATH: Can I just interrupt again. Will you be                  11 coming back to the extent to which the prerogative is                  12 reviewable by the courts? Because I think this is                  13 an area which is touched on in some of the submissions,                  14 whereas I mean some years ago, it would have been                  15 assumed it was not justiciable at all, whereas more                  16 recently, in cases like <i>Abbasi</i> and <i>Sandiford</i>, we have                  17 accepted the power to review and it is something we                  18 might like to look at a little later.                  19 MR EADIE: My Lord, we have. I was not proposing to devote                  20 a lot of time to that. You will have seen below there                  21 was a flirtation, if I can put it that way, with the                  22 non-justiciability argument, and that is no longer being                  23 mounted before this court. We accept that the                  24 prerogative power, including the prerogative power to                  25 exercise foreign relations, may raise non-justiciability</p> <p style="text-align: center;">Page 27</p>
<p>1 MR EADIE: In the context of foreign affairs and                  2 treaty-making, there has been specific recognition of                  3 that fact, ie that that sort of prerogative power is                  4 left in the hands of the Government by Parliament, in                  5 the Bill of Rights itself, as noted by the court in the                  6 <i>McWhirter</i> case. Again, I don't invite you to take it up                  7 but that was a case in which there was an unsuccessful                  8 challenge made to the Government's signature of the                  9 Treaty of Rome and the relevant reference for your note                  10 is core authorities 3, tab 46, MS 1849, at paragraphs 6                  11 and 8.                  12 Again, what this indicates and emphasises is that                  13 the continued existence and exercise of prerogative                  14 powers, such as in the conduct of international                  15 relations, is constitutionally sound and not suspect and                  16 is in nature subject to parliamentary control when                  17 Parliament chooses to do so.                  18 But the premise or the basic constitutional default                  19 position is the continued existence of these fundamental                  20 powers, and that renders it just as important in the                  21 context of an argument about limitations on prerogative                  22 power to examine and take into account what Parliament                  23 has not done. Legislative intervention is necessary, we                  24 submit, to limit or remove. It is not necessary to                  25 leave the prerogative power in place, to be exercised in</p> <p style="text-align: center;">Page 26</p>	<p>1 issues, but in a context such as this which raises the                  2 fundamental and basic legal question, namely whether the                  3 prerogative exists or has been abrogated, it is                  4 appropriate for the court to rule on that issue --                  5 LORD CARNWATH: Why it may come in, and we can see how this                  6 goes, when one is asking what difference does the                  7 referendum make, then arguably, if the Government said                  8 we are going to get out of Europe without any                  9 parliamentary mandate at all, or indeed in the face of                  10 an adverse referendum, that might well be said to be                  11 an abuse of power which is reviewable on that basis by                  12 the courts; whereas alternatively, when it is doing, as                  13 they say, something which has actually been anticipated                  14 by Parliament, then it is not an abuse of power. It                  15 seems to me that distinction might be worth                  16 investigating.                  17 MR EADIE: Yes, and that is a point I am going to come back                  18 to when I consider the 2015 Act, but the basic                  19 proposition that we accept is that exercise of                  20 prerogative power, subject of course to the                  21 non-justiciability limitations that continue to exist,                  22 the subject matter is open but only to some extent. The                  23 courts have been very, very wary obviously, a series of                  24 cases, Lord Carlisle springs immediately to mind, they                  25 have been wary about second-guessing policy judgments</p> <p style="text-align: center;">Page 28</p>

<p>1 made by the Government; but matters of the kind that 2 my Lord raises particularly in the context of the 3 2015 Act, we respectfully submit that if it has a chime, 4 it is probably there, so that if the Government acted in 5 a way that could properly be described as abusive, at 6 least arguably, that would be a matter competent at 7 least for the courts to consider.</p> <p>8 Basic principles in relation to dualism. Obviously 9 I am going to have to come back and develop some of 10 these themes as I go when we go into the statutory 11 scheme, which is going to occupy a little bit of time 12 later, but I wanted to set the scene first by taking you 13 to some basic constitutional principles on dualism, and 14 then some basic principles on De Keyser, and see how 15 those two marry up, and then go to the statutory scheme 16 and show you how that flows. If that is a convenient 17 course, that seems the logical way of doing it.</p> <p>18 So five, short basic points around dualism and the 19 impact of the prerogative on domestic legal rights and 20 obligations, if I may.</p> <p>21 Firstly, we submit that prerogative powers may be 22 exercised to create international legal effects on the 23 international plane.</p> <p>24 When the Government makes a treaty, it binds the 25 United Kingdom, it acts on behalf of the United Kingdom</p> <p style="text-align: center;">Page 29</p>	<p>1 LORD CLARKE: The tab numbers are the same.</p> <p>2 MR EADIE: The tab numbers are the same, which is why it 3 jumps. If you go to core volume 3 in the hard copy. 4 I should have started with the bewildering nature of the 5 bundles.</p> <p>6 LORD CARNWATH: I don't think we have all caught up with the 7 core authorities.</p> <p>8 MR EADIE: They are quite useful because they are a proper 9 dragging out from a set of other bundles.</p> <p>10 LADY HALE: That is very kind of you, Mr Eadie. I just 11 wanted to reassure myself that I was not looking at the 12 wrong thing. Volume numbers were different but of 13 course it is a very sensible thing to have done, 14 especially for those who are not using the electronic 15 bundles.</p> <p>16 MR EADIE: It means you do not have to lug five boxes 17 around, which I have been doing for most of the weekend. 18 Core authorities 3 in the hard volume, if you will. 19 Just to show you how it works, I will do it once and we 20 can pass on, as it were.</p> <p>21 Tab 43, and you will see in the hard copy it jumps 22 from tab 34 to tab 43. That, however confusing, is 23 deliberate.</p> <p>24 THE PRESIDENT: That is page 1778 that we look at.</p> <p>25 MR EADIE: 1778, but it is the same if you go into volume 5,</p> <p style="text-align: center;">Page 31</p>
<p>1 and it binds the United Kingdom to that agreement on 2 that plane. It does so by exercising prerogative 3 powers, as the famous, the now famous quote from Lord 4 Oliver which I will come back to in the JH Rayner case, 5 core authorities 3, tab 43, 1779 in the electronic 6 numbering is the key page, or 1778 to 1779, now engraved 7 on all of our minds, we have set out the relevant quote 8 in our case at paragraph 41, but as that quote 9 acknowledges --</p> <p>10 LADY HALE: Forgive me, Mr Eadie, I am back at references. 11 Is it 343 or is it 543?</p> <p>12 MR EADIE: It is core authorities 3. Do you have a set of 13 files called CA?</p> <p>14 LADY HALE: On the electronic bundle.</p> <p>15 MR EADIE: On the electronic bundle, it is 1697.</p> <p>16 LADY HALE: It is 543.</p> <p>17 THE PRESIDENT: I think it is bundle 3, tab 5.</p> <p>18 LADY HALE: It is volume 5.</p> <p>19 LORD MANCIE: There is a distinction between core authorities 20 and all the authorities.</p> <p>21 LADY HALE: I am sorry, it is just confusing.</p> <p>22 MR EADIE: It is. It is in many places, I am afraid. 23 I think in the core volumes, at least they have 24 maintained consistently the MS numbering. If you take 25 up the hard copy for the moment.</p> <p style="text-align: center;">Page 30</p>	<p>1 et cetera, et cetera, et cetera, it is exactly the same.</p> <p>2 LADY HALE: Thank you for the explanation. That is very 3 helpful. Now we know where we are, we can carry on.</p> <p>4 MR EADIE: 1778 to 1779, my Lady.</p> <p>5 Creating effects on the international legal plane is 6 really the first point, and that is acknowledged by Lord 7 Oliver in the famous quote.</p> <p>8 THE PRESIDENT: Yes.</p> <p>9 MR EADIE: The royal prerogative embraces the making of 10 treaties, and of course the royal prerogative also means 11 that the Government can withdraw from treaties in 12 accordance with their terms or with general principles 13 of international law in the same way. As Lord Templeman 14 put it also in the Tin Council or the JH Rayner case, 15 this time at 1755 -- I don't invite you to turn it up, 16 for your note it is there. He said: 17 "The Government may negotiate, conclude, construe, 18 observe, breach, repudiate or terminate a treaty." 19 That is the first proposition, effects on the 20 international plane.</p> <p>21 The second that the United Kingdom system is 22 a dualist system. That means that there is 23 a distinction between the ability to create legal rights 24 and obligations on the international plane and the 25 transposition of those rights and obligations into</p> <p style="text-align: center;">Page 32</p>



<p>1 domestic law. Treaties are not in the trite phrase, 2 self-executing. They do not automatically become part 3 of UK domestic law when made. 4 So the Government cannot, without parliamentary 5 intervention, to take that phraseology also from Lord 6 Oliver, alter domestic law by taking steps on the 7 international plane to make treaties. They require 8 instead the intervention of Parliament in order for 9 domestic law to be altered. 10 That position was, we submit, accurately stated, 11 unsurprisingly, by Lord Hope in the Privy Council in the 12 Roberts case which you have in the little black file 13 with 11 KBW written on the back of it, which doesn't 14 have MS numbers, I am afraid, but it is the Roberts case 15 in the Privy Council, and I know my Lady was also 16 a member of that court. Supplemental tab 9. 17 The facts do not terribly matter, but it was in 18 an extradition context in an appeal from the Bahamas, 19 and some people were wanted for suspected drug 20 trafficking by the United States, who made a request for 21 their extradition to the United States from the Bahamas, 22 but the relevant paragraphs for our purposes are 23 paragraph 9 on page 4, page numbering on the top in the 24 middle, just to see the shape of the argument. You see 25 halfway down paragraph 9 it says:</p> <p style="text-align: center;">Page 33</p>	<p>1 new legal rights and obligations in domestic law, has 2 also intended to constrain future Government action on 3 the international plane. 4 Lord Oliver did not state or come close to 5 suggesting otherwise and there are of course, as you 6 will be aware, various ways in which Parliament may 7 choose to transpose from the international to the 8 domestic planes. 9 We give examples in our case, if I just turn that up 10 so I can take this tolerably quickly, at paragraph 43, 11 core volume 2, the first tab, and in the electronic it 12 is page 12342 -- I don't dare say thousands. 13 12342. 14 LADY HALE: I am sure you are right. 15 MR EADIE: We will test the system to destruction by the end 16 of this case. 17 THE PRESIDENT: You are right, Mr Eadie. 18 MR EADIE: Good. At least that is something. 19 THE PRESIDENT: On this point. 20 MR EADIE: I wondered how long it would be before it came. 21 Paragraph 43 is the one I am after. 22 THE PRESIDENT: Yes. 23 MR EADIE: It gives the examples, including -- so the 24 examples of transposition, how that could be done, the 25 various ways, you could make legislation with no</p> <p style="text-align: center;">Page 35</p>
<p>1 "We also submitted that as legislation was necessary 2 to enable effect to be given to a treaty in domestic 3 law, Parliament had to pass an enabling statute before 4 it was ratified." 5 The "it" there being the international agreement 6 between the Bahamas and the United States regulating 7 extradition. 8 That then leads into the statements of general 9 principle which you see recorded by the Privy Council at 10 paragraphs 12 and 13. 11 THE PRESIDENT: Thank you. 12 MR EADIE: Could I just ask you to cast an eye over those, 13 rather than my reading them out. 14 THE PRESIDENT: Yes, of course. 15 (Pause) 16 Yes, thank you. 17 MR EADIE: The third proposition is that consistently with 18 dualism, legislation then creates by whatever means 19 a conduit between international and domestic law, if the 20 international agreement is to sound in domestic law, but 21 the fact that Parliament needs to do that consistently 22 with dualism and has chosen to do that consistently with 23 dualism, tells one nothing beyond that a conduit is 24 required. It does not imply that Parliament, by 25 creating the necessary conduit and recognising thereby</p> <p style="text-align: center;">Page 34</p>	<p>1 reference to the treaty rights and obligations that are 2 being transposed; the Criminal Justice Act of 1988 about 3 compensation for miscarriages of justice is an example 4 of that, no reference to the treaty at all. You can 5 give effect, but effect in the legislation's own words, 6 indicating as you do that you are giving effect to the 7 international agreement or instrument; EU directives are 8 perhaps a paradigm example of that; or, HRA, one can 9 simply schedule the treaty rights in their own terms and 10 then say they are to have effect in domestic law. 11 So there are a variety of different ways in which it 12 can be done. All of those models create domestic legal 13 rights by transposition and none of them, we 14 respectfully submit, does anything to constrain. There 15 is no implication in any of those that in some way, 16 shape or form, Parliament, by having chosen those models 17 or any particular model, has sought to constrain or has 18 impliedly constrained Government action on the 19 international plane thereafter. 20 LORD CLARKE: Is each model a statutory model? 21 MR EADIE: Each model is necessarily a statutory model. 22 LORD MANCE: Does any of your three examples cater for 23 a situation where the continued operation of the 24 domestic legal provisions is affected by whether or not 25 the international position remains the same?</p> <p style="text-align: center;">Page 36</p>

<p>1 MR EADIE: My Lord, none of those three does, and of course                  2 I am going to come to that because that is the basic                  3 1972 model, so I am going to come to that, but the point                  4 that I am on at the moment is the prior point, as it                  5 were, which is that there are various ways in which this                  6 can be done; and the question is whether in relation to                  7 these other models which do not directly create that                  8 sort of situation, whether in relation to any of these                  9 other models, there is some form of implication, that by                  10 having introduced the conduit, there is an implication                  11 that Parliament thereby intended that you could not do                  12 anything on the international plane thereafter. Of                  13 course they do not have a direct impact, and I will come                  14 to that, but we do respectfully submit that it is at                  15 least of some interest to recognise that if another set                  16 of models is used, no implication, as it were, of                  17 continuation of said rights would flow.                  18 LORD MANCE: No implication of continuation ...                  19 MR EADIE: Of the rights thereby transposed. They would                  20 simply exist on the domestic plane because Parliament                  21 has legislated, and the Government could do whatever it                  22 wished on the international plane, but it would not                  23 obviously sound into the domestic scheme. So, for                  24 example, if one takes a directive, a directive imposes                  25 an obligation of result as a matter of international</p> <p style="text-align: center;">Page 37</p>	<p>1 of preventing the creation of legal effects on the                  2 international plane, it does so specifically. Look at                  3 CRAG, look at the bespoke controls under EU law and so                  4 on which I will come back to.                  5 That is the third of the submissions, the third of                  6 five, as it were, on the basic position on dualism.                  7 THE PRESIDENT: Yes.                  8 MR EADIE: The fourth is that the dualist principle is not                  9 that prerogative acts on the international plane can                  10 never create effects in domestic law, including the                  11 removal of rights and the imposition of fresh                  12 obligations, as a result of action on the                  13 international plane by the Government. It is plain that                  14 in a variety of more or less direct ways, such acts can                  15 have an impact into domestic law.                  16 Again, I will come back to it, but we give a series                  17 of examples of that sort of situation, those sorts of                  18 effects, including citing Post Office v Estuary Radio,                  19 which I will come back to in paragraph 40 of our case.                  20 So there are a variety of more or less direct ways,                  21 or indirect ways, that action by the Government can                  22 affect domestic legal rights. Again, just to jump                  23 ahead, Post Office v Radio, I am sure you will have seen                  24 or you will recall, involves someone broadcasting                  25 a radio station from some territorial waters, the</p> <p style="text-align: center;">Page 39</p>
<p>1 law, the usual way of doing that is to introduce                  2 domestic regulations; and the domestic regulations would                  3 continue to sit irrespective of whether or not the                  4 directive formally finishes, begins, is amended or ends.                  5 It would require some other act.                  6 They are of course different from the situation that                  7 we are dealing with, but we respectfully submit that it                  8 is at least of some interest, that is the position in                  9 relation to those sorts of models, and that there is not                  10 any necessary implication to be derived from the mere                  11 fact that a conduit is necessary, consistently with                  12 dualism, and has been created by Parliament.                  13 Of course, I emphasise, to flag submissions that are                  14 yet to come, that this sort of implication or inference                  15 from what Parliament has done is not, we will be                  16 submitting, at large. There are a set of principles                  17 that have been developed by the courts to govern the                  18 nature of any such inference or implication.                  19 My submission is going to be on De Keyser that                  20 before you conclude that a prerogative power has been                  21 taken away, that needs to be done by Parliament either                  22 expressly or by necessary implication. So it is not                  23 just an inference which is at large, and that feeds into                  24 the other point to bear in mind which I will come back                  25 to, which is that if Parliament wants to go to the point</p> <p style="text-align: center;">Page 38</p>	<p>1 Government effectively defined where the territorial                  2 waters begin and end, and those territorial waters were                  3 then extended by prerogative act, the consequence of                  4 which under the relevant legislation was to render                  5 criminal the continued publication of said radio station                  6 from where the boat was located, but -- so more or less                  7 indirect ways, the prerogative can have those effects.                  8 LORD MANCE: That is just another example of your pro tem                  9 argument; the rights under the statute or the                  10 obligations are whatever -- or relate to whatever the                  11 scope of the territorial waters is from time to time.                  12 MR EADIE: It is an example of that, and it is a -- whether                  13 one puts it directly alongside or as a slightly more                  14 indirect version of the next way in which Parliament can                  15 do that, which is parliamentary intervention, the point                  16 my Lord, Lord Mance was raising with me earlier on,                  17 parliamentary intervention can be done so as to make                  18 express provision, the effect of which in domestic law                  19 is without more to give domestic legal force to the                  20 exercise of prerogative powers, and I will of course                  21 come back to the 1972 Act and other similar models, but                  22 that is one of various models of transposition.                  23 The effect of that sort of model, perhaps the                  24 fourth, I gave you three before, this is the fourth, in                  25 other words direct legislative impact and effect to</p> <p style="text-align: center;">Page 40</p>

<p>1 actions by Government on the international plane, but it                  2 gives domestic legal effect to what may be described as                  3 an ambulatory system, created on the international legal                  4 plane; the body of rights and obligations, the entire                  5 legal structure or set of structures on the                  6 international plane, may change from time to time; and                  7 the domestic legislation on this model makes provision                  8 for a transposition into domestic law that is                  9 characterised by the fact that it is both automatic, no                  10 further parliamentary intervention required, and direct,                  11 in terms of impact on or alteration of the scheme's                  12 rights and obligations.                  13 LORD CLARKE: This is your paragraph 44, is it?                  14 MR EADIE: My Lord, this is our paragraph 44, exactly so.                  15 The key points we respectfully submit about this                  16 model are that Parliament thereby creates a system under                  17 which rights and obligations alter and shift. A right,                  18 to focus on that, rather than an obligation, for                  19 a moment, may be amended or changed by prerogative                  20 action. It may be removed altogether by prerogative                  21 action, but all of that is done by the exercise of                  22 prerogative powers without further parliamentary                  23 intervention.                  24 LORD CLARKE: Is it a question of the true construction of                  25 the legislative provision, the relevant legislative</p> <p style="text-align: center;">Page 41</p>	<p>1 The rights are inherently limited. They have no                  2 existence independent of the international legal                  3 position from which they derive. What that means is                  4 that the legislation transposing them from the                  5 international plane into the domestic legal plane is                  6 a necessary but not a sufficient matter for their                  7 existence, and they are also in nature susceptible to                  8 change as a result of the exercise of prerogative                  9 powers, precisely because they are dependent on steps                  10 taken on the international legal plane, where it is the                  11 Government that acts.                  12 So if one jumps forward a bit to the 1972 Act which                  13 I will come to in a moment, they are indeed rights which                  14 are dependent on section 2(1) of the ECA, as we will see                  15 when we come to it, but that is but one of the twin                  16 ingredients necessary to sustain their existence. The                  17 other is dependent on the shifting international legal                  18 picture, shaped as it is by the exercise of prerogative                  19 power.                  20 So section 2 of the ECA does not define the rights                  21 or shape them so as to require alteration by further                  22 legislative intervention, or so as to create                  23 an inconsistency with statutory rights, if the                  24 Government exercises its powers on the                  25 international plane to remodel or reshape EU law.</p> <p style="text-align: center;">Page 43</p>
<p>1 provision? It is?                  2 MR EADIE: It is a question of construction of that, it is.                  3 But it is of the very essence of this model, if this is                  4 the model that you are dealing with, that Government                  5 can, under our constitution, entirely lawfully take                  6 steps without further parliamentary authorisation,                  7 derived, of course, from the initial intention being, as                  8 my Lord has correctly pointed out, that that being the                  9 intention of Parliament, but the Government can entirely                  10 lawfully take steps without further parliamentary                  11 authorisation, which directly alter domestic law,                  12 including by removing rights. The possibility of                  13 subsequent alteration or removal of rights is inherent                  14 in the method of creation of domestic law under this                  15 model.                  16 That is the fourth point.                  17 THE PRESIDENT: Yes.                  18 MR EADIE: The fifth flows from it. It is that the nature                  19 of domestic legal rights recognised under this model of                  20 transposition, is contingent. Such rights are                  21 inherently limited. That was the description of                  22 Lord Millett writing, obviously, extra-judicially, in                  23 a recent article which is bundle 34, tab 471 at                  24 electronic page -- I think it must be supplemental,                  25 1154, so SUP 1154, if the electronics go crazy.</p> <p style="text-align: center;">Page 42</p>	<p>1 Of course the rights are dependent, not merely on                  2 the prerogative acts of the Government, on the                  3 international plane, but also the acts of other                  4 sovereign actors. We give, in our case at paragraph 51,                  5 the example, the hypothetical example of Greece leaving                  6 the EU, with the impact on free movement rights of UK                  7 citizens that that would necessarily have.                  8 A real life example is the departure of Greenland                  9 within which, should they have chosen to do so, UK                  10 citizens could no longer exercise their treaty rights,                  11 and the leaving of which was subject to a withdrawal                  12 treaty given effect to by an order and not by primary                  13 legislation. You have that order, if you want it, in                  14 authorities 19, tab 233, MS 6656.                  15 THE PRESIDENT: Sorry, can you say that again, please.                  16 MR EADIE: The Greenland order is in authorities bundle 19,                  17 tab 233, MS 6656.                  18 LADY HALE: 66?                  19 MR EADIE: 6656.                  20 I think I gave you a wrong reference in relation --                  21 LADY HALE: You did earlier on but we found it out.                  22 THE PRESIDENT: My Lady found it first.                  23 LADY HALE: That is why we need to know how to navigate,                  24 because you cannot get everything right all the time,                  25 Mr Eadie.</p> <p style="text-align: center;">Page 44</p>

<p>1 MR EADIE: Even on some points perhaps.  2 In relation to the hypothetical example of Greece  3 leaving and the real example of Greenland leaving as  4 illustrations of the broader proposition, which is that  5 they are not merely dependent on prerogative exercise,  6 prerogative powers by the UK Government but also other  7 sovereign governments, my learned friend Lord Pannick  8 says: that is irrelevant because our constitutional  9 principles regulate the conduct of the UK Government and  10 not that of other states. Of course he is right, so  11 they do. But that doesn't answer the point, and the  12 point is that the rights are self-evidently of a very  13 special kind, linked to action, not merely of the UK but  14 also of other sovereign states on the  15 international plane, and it is therefore simply  16 inaccurate by way of analogy to treat them as if, in  17 relation to their creation, modification or even  18 removal, as if they were the same as what might be  19 called purely domestic rights.  20 So those are the five points we make.</p> <p>21 LORD MANCIE: Is there a distinction between the scope of the  22 rights under the treaties which, as you point out, is  23 ambulatory, may go up or down, may even be affected by  24 somebody else leaving the treaty, and the existence of  25 the treaties themselves?</p> <p style="text-align: center;">Page 45</p>	<p>1 MR EADIE: I am not sure in quite the order or form I am  2 about to do them, but I will locate the bit in the case  3 if I may, if I can ask someone to find the most directly  4 analogous bit.  5 Firstly, Parliament can, of course, limit, control  6 or remove prerogative powers expressly. It is sovereign  7 to decide whether to do so and if so how.  8 Secondly, whether it has done so outside that  9 express sphere and therefore in other circumstances is  10 a question of statutory interpretation.</p> <p>11 THE PRESIDENT: Yes.</p> <p>12 MR EADIE: I am told that the nearest is 64 in our case  13 where we start dealing with De Keyser, 64 and following.</p> <p>14 THE PRESIDENT: Yes.</p> <p>15 MR EADIE: Thirdly, the starting point is to expect from  16 Parliament and for the courts to require real clarity,  17 to put it neutrally, real clarity before prerogative  18 powers are removed. There is good reason for that. It  19 is no small thing, we submit, to alter the  20 constitutional balance, particularly one that has  21 existed for many years, by abrogating or limiting  22 long-standing powers. All the more so where they are,  23 as the foreign relations powers are, fundamental and  24 essential to effective Government.</p> <p>25 LORD SUMPTION: Most cases in which statutes have been held</p> <p style="text-align: center;">Page 47</p>
<p>1 MR EADIE: Well, my Lord, we know that there are certain  2 provisions in the ECA when we get to it that deal with  3 the treaties themselves, but my respectful submission is  4 that in terms of whether or not the Government can enter  5 into or withdraw from treaties themselves, the position  6 is fundamentally the same. That goes back to  7 Lord Millett's concept of inherency; it is not just  8 dependent upon or contingent upon the methods of  9 creation of EU law; it is dependent upon the  10 continuation of the very structures which govern. So we  11 respectfully submit that it is essentially the same  12 principle that governs.  13 I was going to move to the De Keyser principles, the  14 third of the topics.</p> <p>15 THE PRESIDENT: Yes.</p> <p>16 MR EADIE: The courts have considered, on various different  17 occasions and at the highest level, the correct approach  18 in principle to be applied in considering the question  19 whether Parliament has abrogated or limited prerogative  20 powers or their exercise.  21 Again, to try and identify the core principles if  22 I may before taking you to -- it will probably only be  23 three or four cases, the core principles are we submit  24 as follows.</p> <p>25 LORD CLARKE: Are these summarised in your case?</p> <p style="text-align: center;">Page 46</p>	<p>1 to limit the prerogative have been cases where it has  2 done so implicitly, is that not right, by virtue of the  3 field being at least partly occupied by a statutory  4 scheme; it is never said the prerogative is now  5 abolished, all that has happened is that the subject  6 matter has received legislative treatment.</p> <p>7 MR EADIE: My Lord, that is true. I don't want to quibble  8 at this stage because I am going to develop the  9 principles as we come, but covering the field exactly is  10 going to be the submission, but there are cases,  11 including in the specific context of EU legislation, the  12 Rees-Mogg case being the paradigm example of that, in  13 which the courts, in approaching the concept of  14 necessary implication, have effectively reasoned thus:  15 they say here is Parliament that has intervened  16 expressly to impose a sequence or series of controls on  17 the exercise of prerogative in a particular sphere.  18 So, is the next step of the reasoning, one can fully  19 expect them if they are going to do it in relation to  20 some other matter in the same sort of context to do so  21 equally expressly, and we respectfully submit that is  22 the correct reading of Lord Justice Lloyd's judgment in  23 Rees-Mogg.  24 But my Lord is right, that in the majority of cases  25 where the issue is controversial, the question has been</p> <p style="text-align: center;">Page 48</p>

<p>1 whether Parliament has, by occupying the field to 2 whatever degree, created the necessary implication. 3 That is why I put as this third proposition, it was 4 neutral, as it were, to the precise nature of the test; 5 it was one can expect clarity because of what is being 6 done; one can expect clarity because it is no small 7 thing to alter that constitutional balance, but one can 8 expect clarity for a slightly different reason, which is 9 that clarity is obviously necessary where there are, or 10 there is, a variety of ways in which the powers could be 11 limited or controlled. 12 LORD MANCE: Mr Eadie, do you say that the European 13 Communities Act 1972 was neutral as to whether the 14 United Kingdom was a member of the European Communities? 15 MR EADIE: We say it proceeded on the fundamental assumption 16 that that ultimate decision on the international plane 17 was a matter for Government, and I am going to come to 18 develop that submission. It was a subject of particular 19 consideration which I am going to take you to by 20 Professor Finnis recently, drawing a comparison 21 between -- in relation to the long title, but equally in 22 relation to the operative provisions of the relevant 23 legislation between the ECA and various bits of 24 legislation that dotted around it temporally, 67, 70, 25 73, to do with the creation of independent status in the</p> <p style="text-align: center;">Page 49</p>	<p>1 imply that matters falling outside such limits and 2 controls remain untouched. That is likely to lead in 3 practice and in principle to a place in which Parliament 4 has evinced an intention in the particular context, if 5 that is so, to control expressly or not at all, to come 6 to the point that my Lord, Lord Sumption was putting to 7 me. That is significant. 8 LORD SUMPTION: This is presumably a harbinger of the point 9 you want to make about the 2008 and 2011 acts. 10 MR EADIE: They are. They are leading towards those. I am 11 going to take you through that statutory scheme. 12 Fifthly, if there is no express control and the 13 context is not as I have just described, in other words 14 Parliament has already intervened to put a series or 15 sequence of controls in place, if there is not express 16 control and you are not in that place, the test 17 developed by the courts is whether legislative 18 intervention in a sphere where prerogative powers exist, 19 creates a necessary implication. That is the test, that 20 the prerogative can no longer be exercised. In other 21 words, that it can no longer be exercised without 22 legislative -- prior legislative authority. 23 A necessary implication is, we submit, the correct 24 test, it is the test that has been regularly applied by 25 the courts, and it imports the stringency of logical</p> <p style="text-align: center;">Page 51</p>
<p>1 Bahamas, Barbados and so on. But I am going to draw 2 that contrast and come back to that if I may in the 3 context of the 1972 Act. 4 THE PRESIDENT: Very well. 5 MR EADIE: I am simply on De Keyser for the moment, if 6 I may. 7 THE PRESIDENT: Yes. 8 MR EADIE: The second reason for expecting clarity and for 9 the courts demanding clarity, because obviously the 10 principles are for you, is obviously necessary to have 11 clarity where there are a variety of ways in which 12 control could be exercised, could be imposed. Various 13 mechanisms of parliamentary control. What is the nature 14 of that control? Is it primary legislation, is it 15 affirmative resolution, is it negative resolution, is 16 it approval by motion; all sorts of questions that would 17 need to be resolved if control is to be imposed. 18 So that the third of the propositions. The starting 19 point is clarity, or the expectation of clarity. 20 THE PRESIDENT: Yes. 21 MR EADIE: The fourth is that it is just as important to 22 have regard to what Parliament has chosen not to do, as 23 it is to have regard to what it has done in the context 24 of a particular legislative scheme. So a limited, 25 carefully considered scheme of limits and controls will</p> <p style="text-align: center;">Page 50</p>	<p>1 imperative from the language used, rather than mere 2 reasonableness. 3 Again, you need no introduction from me to that test 4 first laid down by Lord Hobhouse in Morgan Grenfell but 5 that, we respectfully submit, is the nature of the 6 necessary implication case. The necessary implication 7 flows, again to finish the answer to my Lord, Lord 8 Sumption's point, it flows if at all from the fact that 9 the very thing, the very thing which had been previously 10 done by prerogative has now been, to use the phrase that 11 we will see in the case law when I come to it in 12 a moment, "directly regulated by statute". 13 The sixth of the propositions, before coming to the 14 case law, is that, in approaching the issue of whether 15 or not the prerogative continues to exist at the point 16 at which the power is to be exercised or is proposed to 17 be exercised, it is necessary to consider the scheme of 18 the legislation as it exists at that time. Because 19 legislative schemes can change from time to time and the 20 question is a current one. 21 That is the conventional approach, the set of 22 principles that I have just outlined, we respectfully 23 submit is the conventional approach that the courts have 24 developed over the years for asking the question whether 25 fundamental prerogative powers existing under our</p> <p style="text-align: center;">Page 52</p>

<p>1 constitution have or have not been abrogated. It is to                  2 be acknowledged as such, in other words, it is to be                  3 acknowledged as the conventional approach directly                  4 relating and directly addressing the principles that                  5 apply in answering that question.                  6 I fully appreciate and I will come back to it, that                  7 the key focus of the respondents' case is whether there                  8 is another principle or set of principles in play in the                  9 present context to do with affecting statutory rights as                  10 a result of the exercise of prerogative powers, but the                  11 conventional approach remains, we submit, of critical                  12 importance, as the correct approach, and in any event in                  13 testing whether a principle of such clarity and such                  14 weight of the kind for which the respondents contend, is                  15 properly applicable in our context. In effect, to                  16 reverse that conventional approach. In effect to say it                  17 is no longer a question of asking whether Parliament has                  18 expressly or by necessary implication removed the                  19 prerogative; now if this other principle is in play,                  20 that test is in effect reversed and it is said you have                  21 to ask the question the other way round and point to or                  22 be able to point to express powers and legislation                  23 permitting you to interfere with rights.                  24 So it does involve a pretty much direct reversal of                  25 the conventional approach set out in De Keyser.</p> <p style="text-align: center;">Page 53</p>	<p>1 purpose any Act which followed the 1972 Act, and we                  2 submit that that is fundamentally wrong as an approach,                  3 but I will come back to develop that submission, if                  4 I may.                  5 I was going to take you to De Keyser, it is in core                  6 authorities bundle 2, tab 10, MS 228.                  7 The essence we submit is in, just for my Lord, Lord                  8 Clarke's note, the quote from Lord Parmoor which we have                  9 set out in our case at paragraph 66.                  10 THE PRESIDENT: Thank you.                  11 MR EADIE: The basic points we get from it, I have already                  12 summarised, if the statute directly regulates, directly                  13 regulates, the source of the authority becomes                  14 statutory, it ceases to be the prerogative, and then is                  15 subject to such controls as Parliament has specified,                  16 but it is the direct regulation of the very thing which                  17 creates the necessary implication of legislative                  18 abrogation or control. So it requires, as essential to                  19 this approach, a precise identification of the                  20 Government activity, and then asks the question: has                  21 that very activity been subject to new statutory                  22 conditions, governing its exercise so as to lead to that                  23 implication. Of course, so as to avoid having to repeat                  24 it as we go through, the precise activity in question is                  25 the withdrawal from the treaties on the</p> <p style="text-align: center;">Page 55</p>
<p>1 LORD KERR: If there was a real circumscription of the                  2 prerogative by implication, and the Act which brings                  3 about that implication is repealed, does the prerogative                  4 power revive? Is it resurrected?                  5 MR EADIE: My Lord, it can do, is I think the logical                  6 consequence of my submission because it is a current                  7 question. If I propose to exercise prerogative power on                  8 behalf of the Government, what the courts need to do is                  9 ask the question: does that prerogative power exist                  10 today? Of course there are some circumstances where                  11 when a prerogative has been put into abeyance, it                  12 doesn't come back, but if it is fundamentally dependent                  13 upon the nature of the legislative scheme, that, we                  14 respectfully answer to my Lord's question, is a current                  15 question.                  16 I will come back, I am going to develop submissions                  17 as to whether or not -- on one view it is fairly                  18 critical, because it is jolly difficult, we will                  19 respectfully submit, for my learned friends to answer                  20 the flow of the legislation that follows the 1972 Act.                  21 The high-water mark of that case is the 1972 Act,                  22 because it does not contain the great scheme of controls                  23 that Parliament subsequently developed. You know from                  24 reading the divisional court's judgment that they                  25 effectively treated as legally irrelevant for this</p> <p style="text-align: center;">Page 54</p>	<p>1 international plane or more directly, the giving of the                  2 Article 50 notice.                  3 So when we come to our legislation, that is going to                  4 be the key focus.                  5 You know, I hope, and think, and if not, someone                  6 better shout, but you know the background and the nature                  7 of the facts. The army council requisitioned a hotel                  8 for the use of the Royal Flying Corps and it denied the                  9 hotel owners a right to compensation, compensation which                  10 the claimant said was due to them and the Crown, in the                  11 House of Lords, claimed that the right to requisition                  12 was a right to be found and sourced in the prerogative,                  13 and the prerogative did not carry with it the burden of                  14 compensation. So a critical question was whether or not                  15 the requisition was entitled to be done in exercise of                  16 that prerogative, for which no compensation was payable                  17 at all.                  18 The speeches are interesting because they indicate                  19 the test which is to be applied in answering the                  20 question whether the prerogative has been abrogated or                  21 supplanted.                  22 LADY HALE: Do the speeches proceed on the assumption that                  23 that was correct, that the royal prerogative existed to                  24 requisition property in the UK in wartime without paying                  25 compensation? Do they proceed on the assumption that</p> <p style="text-align: center;">Page 56</p>

<p>1 that is correct, or do they discuss that?</p> <p>2 MR EADIE: Well I think they do a bit of discussion of that.</p> <p>3 My Lady is right to draw me up. They do a bit of</p> <p>4 discussion on that, as it were, in phase 1 of the</p> <p>5 analysis, and then phase 2 says assume for the sake of</p> <p>6 argument that that is so, that the prerogative would</p> <p>7 otherwise exist, and it is the sort of question that was</p> <p>8 discussed in the context of foreign requisitions in</p> <p>9 Burmah Oil, as you will recall.</p> <p>10 LADY HALE: That is why I am asking.</p> <p>11 MR EADIE: Quite, but in relation to this, they do discuss</p> <p>12 that question, but then go on to consider, assume even,</p> <p>13 that the prerogative was ever of a nature that allowed</p> <p>14 requisitioning without compensation, has that now been</p> <p>15 subjected to conditions as a result of the introduction</p> <p>16 of legislation?</p> <p>17 So my Lady is right to draw me up on that, but the</p> <p>18 key part for our purposes is perhaps the second phase of</p> <p>19 that analysis.</p> <p>20 In the first of the speeches by Lord Dunedin, and</p> <p>21 the key passage, or passages, I am going to go on the MS</p> <p>22 numbering, if I may, bottom of the page, 246, and you</p> <p>23 will see about five or six lines up from the bottom of</p> <p>24 the first full paragraph, a line beginning "equally</p> <p>25 certain", just to pick up that sentence there:</p> <p style="text-align: center;">Page 57</p>	<p>1 the whole ground. It allowed the requisitioning to take</p> <p>2 place. It effectively said: if you are going to</p> <p>3 requisition you had better pay, and you cannot get round</p> <p>4 that statutory regime by relying on prerogative power.</p> <p>5 You see his conclusion most clearly expressed on</p> <p>6 this point at page 248, just before the end of the long</p> <p>7 paragraph occupying most of that page, about seven lines</p> <p>8 up:</p> <p>9 "It is therefore impossible in my opinion ..."</p> <p>10 THE PRESIDENT: Yes.</p> <p>11 MR EADIE: Could I invite you to read from there to the end</p> <p>12 of that paragraph:</p> <p>13 (Pause)</p> <p>14 That was Lord Dunedin. Lord Atkinson, if you want</p> <p>15 it there is a little bit explaining why the 1914 Act</p> <p>16 does not alter that, but that is on the next page, about</p> <p>17 a third of the way down, but not central to the</p> <p>18 reasoning. Lord Atkinson is next and the relevant parts</p> <p>19 of his speech are really on page 259 to 260.</p> <p>20 THE PRESIDENT: Thank you.</p> <p>21 MR EADIE: Can I invite you to read again rather than my</p> <p>22 reading them out, sorry, it may be difficult to follow</p> <p>23 for those just listening but it is about a page worth.</p> <p>24 If you go to 259, if you go to the first full paragraph:</p> <p>25 "I further concur with him ..."</p> <p style="text-align: center;">Page 59</p>
<p>1 "Nonetheless it is equally certain that if the whole</p> <p>2 ground ..."</p> <p>3 I have circled "whole ground".</p> <p>4 "... was something which could be done by the</p> <p>5 prerogative is covered by statute, it is the statute</p> <p>6 that rules. On this point I think the observation of</p> <p>7 the learned Master of the Rolls is unanswerable."</p> <p>8 Then you see the question that was unanswerable</p> <p>9 towards the end of that paragraph. Then there is</p> <p>10 a definition of the prerogative and then you see picking</p> <p>11 it up again three lines up from the bottom -- perhaps</p> <p>12 you could read that sentence about five lines up from</p> <p>13 the bottom of that page:</p> <p>14 "In as much as the Crown is a party to every Act of</p> <p>15 Parliament, it is logical enough to consider that when</p> <p>16 the Act deals with something which before the Act could</p> <p>17 be ... by the prerogative [my Lady's question] and</p> <p>18 specifically empowers the Crown to do the same thing,</p> <p>19 but subject to conditions, the Crown assents to that and</p> <p>20 by that act to the prerogative being curtailed."</p> <p>21 It is direct overlap, the concentric circles, the</p> <p>22 whole ground, the same thing, and that leads Lord</p> <p>23 Dunedin to his conclusion which is that the Act of 1842</p> <p>24 which provided for compensation and indeed the Act of</p> <p>25 1914, which was neutral on the point, did indeed cover</p> <p style="text-align: center;">Page 58</p>	<p>1 Could you read from there to the end of the full</p> <p>2 paragraph on the next page.</p> <p>3 THE PRESIDENT: If you want to sit down while we do that,</p> <p>4 you are welcome.</p> <p>5 (Pause)</p> <p>6 Thank you, so we have something on answer to Lord</p> <p>7 Kerr's point there about while it is still in force.</p> <p>8 MR EADIE: My Lord, yes, and the bits I was going to</p> <p>9 particularly invite you to circle as it were, and the</p> <p>10 only thing that changes is the precise description and</p> <p>11 the fact it is sometimes plural and sometimes singular,</p> <p>12 the first of the paragraphs, I invited you to read the</p> <p>13 one beginning:</p> <p>14 "I further concur ..."</p> <p>15 Three lines up from the bottom of that, "the very</p> <p>16 things". Next paragraph, six lines down, of the line</p> <p>17 beginning:</p> <p>18 "Of its prerogative to do the very thing ..."</p> <p>19 Two lines up from the bottom of the page,</p> <p>20 "particular thing", which becomes plural in the second</p> <p>21 line of the first paragraph on the next page,</p> <p>22 "particular things", but it is all the same point.</p> <p>23 THE PRESIDENT: All the same thing.</p> <p>24 MR EADIE: It is. That is Lord Atkinson. Lord Milton(?),</p> <p>25 274, again a similar analysis, 274, the key bit is</p> <p style="text-align: center;">Page 60</p>

<p>1 probably the second full paragraph on page 274, asking 2 the question that it does in the final sentence, and 3 then essentially the same reasoning that we have just 4 seen in the remaining paragraph on that page. 5 THE PRESIDENT: Thank you. 6 MR EADIE: That is the relevant bit in him. Lord Sumner, 7 281, and again could I invite you just to read down the 8 first full paragraph, the only full paragraph, on that 9 page, 281, could you just cast an eye down to -- you can 10 stop at the word "speed", three lines up from the bottom 11 of the page. 12 THE PRESIDENT: Right, thank you. 13 (Pause) 14 It is subject matter rather than thing. 15 MR EADIE: It is subject matter rather than thing, but it is 16 still directly deal. 17 THE PRESIDENT: Thank you. 18 MR EADIE: It is essentially the same reasoning. And Lord 19 Parmoor, 295 to 296. 20 THE PRESIDENT: This is the passage you quoted in your case. 21 MR EADIE: This is the passage we quoted in our case, you 22 perhaps don't need it, but just for your note, there it 23 is. 24 LORD WILSON: Endless concurring speeches. 25 MR EADIE: All expressed in subtly different ways but</p> <p style="text-align: center;">Page 61</p>	<p>1 E, what he describes as "the relevant principles": 2 "The relevant principles upon which the courts have 3 to determine when a prerogative power has been fettered 4 by statute were exhaustively considered by the House of 5 Lords." 6 He sets out lots of quotes which you have now seen. 7 THE PRESIDENT: We have read, yes, thank you. 8 MR EADIE: Principles to be applied plain, 385 at F, and 9 then he proceeds to analyse on the particular facts of 10 that case why it is that the necessary implication 11 arises, to preclude the exercise of statutory power. 12 The key reason that it might be thought is 386 between 13 F: 14 "In short I do not think the Attorney General's 15 argument ... prerogative power and the power ... 16 municipal law can march side by side each operating in 17 its own field is right ..." 18 Can I just ask you to read from there to the bottom 19 of the page. 20 (Pause) 21 THE PRESIDENT: Yes. 22 MR EADIE: So it is simply an application of the principles 23 that he has taken and considers to be plain from the 24 House of Lords speeches in De Keyser, but you will see, 25 and it is not very difficult to understand, how the</p> <p style="text-align: center;">Page 63</p>
<p>1 substantively the same, is the submission. 2 That is therefore De Keyser. Laker Airways is in 3 the same volume of authorities behind tab 12, starting 4 at MS 307. 5 THE PRESIDENT: Thank you. 6 MR EADIE: Again, the facts will be very familiar to 7 my Lords. This involved the Government effectively 8 trying to use the prerogative to give in effect 9 a direction to the Civil Aviation Authority to frustrate 10 or terminate the ability of Freddie Laker to run 11 Skytrain between Stansted and New York, in circumstances 12 in which there was an express legislative power, which 13 was subject to conditions which could have been used. 14 That is the summary of the facts. Can I take it first 15 try and deal with it quickly, take it first in the 16 judgment of Lord Justice Roskill. 307 is the first of 17 the pages, Lord Justice Roskill at page 382. 18 THE PRESIDENT: Thank you. 19 MR EADIE: Where he identifies the issue. The letter G. 20 "The sole question", do you see that by the letter G. 21 THE PRESIDENT: Yes. 22 MR EADIE: So that just frames the issue. Just that 23 sentence will do for that purpose. 24 THE PRESIDENT: Thank you. 25 MR EADIE: Then he sets out on the next page, 383, at letter</p> <p style="text-align: center;">Page 62</p>	<p>1 direct regulation, the same thing, all of those 2 principles, all of that approach is applying -- 3 LORD MANCE: Is it quite on those lines? I thought that 4 this was a slightly different application or possibly 5 principle. The fundamental reasoning was that, having 6 gone through all the necessary statutory hoops, the 7 airline had received a licence, and this was then being 8 nullified by the Government, by using a power which it 9 had to withdraw designation under a Bermuda agreement 10 with the United States, thereby, by the back door, 11 undermining what it wasn't -- what it had done by the 12 front door. 13 MR EADIE: My Lord, it is in part that, you are right. It 14 is a slightly more subtle, as it were, application of 15 the same thing. But it also had an element of direct 16 De Keyser, if I can put it that way, as you see on 386 17 between B and C, because the relevant legislation did 18 indeed provide for power under the Secretary of State to 19 revoke the licence. 20 THE PRESIDENT: Under section 4, yes. 21 MR EADIE: Under section 4 and what was being done was the 22 power to exercise the prerogative power -- 23 LORD MANCE: Only in certain circumstances. 24 MR EADIE: Exactly, subject to the limitations that 25 Parliament has imposed, so there is a bit of direct</p> <p style="text-align: center;">Page 64</p>



<p>1 De Keyser in that way, and there is a bit of the point 2 that my Lord put to me between F and G. I perhaps took 3 it a bit quickly, I should have taken you to between B 4 and C as well but you have a bit of both in there, and 5 then Lord Justice Lawton, to similar effect, and you 6 probably ought to read between H on page 391 down to D 7 on page 392, just to get the essence of his reasoning. 8 (Pause) 9 You see in particular that between C and D, he 10 essentially focused on what I call straight De Keyser. 11 THE PRESIDENT: Necessary implication, yes. 12 MR EADIE: Necessary implication, but also reliance 13 particularly, focus particularly on section 4. 14 THE PRESIDENT: I understand. 15 MR EADIE: Lord Denning, I don't know why I have come to him 16 last but I have. 17 LORD CARNWATH: I think A, of the passage on which the 18 respondents rely. 19 MR EADIE: Quite, that is why I invited you to read the 20 whole passage. It has to be read in context. 21 LORD CARNWATH: You cannot use the Crown powers to take away 22 the rights of citizens. 23 MR EADIE: In circumstances in which, as we then see, 24 section 4 provides the right to revoke the licence, and 25 Parliament has subjected any such deprivation to</p> <p style="text-align: center;">Page 65</p>	<p>1 an attractive submission. 2 THE PRESIDENT: Yes. 3 MR EADIE: It might be thought to echo strongly in Lord 4 Denning's mind, but one also has -- could he disclose 5 the statute by invoking a prerogative. 6 Ex parte Fire Brigades Union, same bundle, tab 15, 7 MS 444. This also is subtly different in terms of the 8 facts, because you will recall the way in which the 9 issue arose. It is really De Keyser by analogy rather 10 than directly, because the legislation in question was 11 not in force. But the court was concerned with 12 a situation where Parliament had legislated for the way 13 in which the Secretary of State was to act in order to 14 achieve a particular objective, there setting up the 15 criminal injuries compensation scheme; but the Secretary 16 of State had sought to achieve different results through 17 the exercise of the prerogative and setting up 18 an ex gratia or slightly different tariff form of 19 scheme, and had then deliberately, as it were, decided 20 not to bring in the relevant legislative provisions. 21 I perhaps only need a custom short bits from 22 Fire Brigades, 483, using the MS numbering in the speech 23 of Lord Browne-Wilkinson, 483, it is really the bit 24 between D -- that paragraph beginning by the letter D on 25 page 483, culminating in the citation of De Keyser.</p> <p style="text-align: center;">Page 67</p>
<p>1 statutory control. 2 LORD MANCE: Presumably the same reasoning would apply, even 3 if there had not been a statutory right to revoke. 4 MR EADIE: You would be frustrating, cutting across. 5 LORD MANCE: You would be cutting across, so that is 6 an independent line of reasoning to the one you have 7 referred to under article 4. 8 MR EADIE: My Lord, it is, but we respectfully submit it has 9 effectively the same source and drive which is 10 parliamentary intervention in the field of scheme of 11 regulation, and so on. It is not, and I should have 12 picked up directly, my Lord is right, it is not simply, 13 as it were, and as a freestanding principle, the point 14 between A and B. That needs to be read properly in its 15 context, is our submission about that. 16 THE PRESIDENT: You were going to take us to Lord Denning. 17 MR EADIE: I was going to take you to Lord Denning. 18 LORD CARNWATH: Lord Denning was perhaps not in the majority 19 on this one. 20 MR EADIE: That may explain why I am taking you to him last. 21 I can't remember if it was quite on this point, but the 22 essence of his reasoning was similar at least. 370 at 23 H, over to C on the next page. 24 (Pause) 25 We have back door and front door which is always</p> <p style="text-align: center;">Page 66</p>	<p>1 (Pause) 2 THE PRESIDENT: Yes. 3 LORD MANCE: Again, it is a different principle, or 4 certainly a different ambit to De Keyser's principle. 5 They actually say, don't they, two of the majority, Lord 6 Browne-Wilkinson and Lord Lloyd, that De Keyser's Royal 7 Hotel does not help in this case. The case has been 8 decided on a different principle, if you look at 553 G 9 and 573 C. 573 C. 10 MR EADIE: My Lord, yes, but that is because the statutory 11 provisions are not at that point in force, so it is by 12 necessity, as it were, De Keyser by analogy, but the 13 reason I took you to the passage between D and F on 483 14 is because he is there citing the basic approach in 15 De Keyser and setting out the principle that applies. 16 Of course the position is here that the legislation 17 is not in force. 18 LORD MANCE: The principle being implied is that you cannot 19 use the prerogative power to undermine a right or 20 an obligation, isn't it? In this case it was 21 an obligation to consider bringing into force the 22 legislation. 23 MR EADIE: My Lord, ultimately, if the legislation had been 24 in force, or if the legislation was in force, it would 25 be direct De Keyser, so you cannot undermine -- you</p> <p style="text-align: center;">Page 68</p>

<p>1 cannot use the prerogative to undermine the law of the 2 land. That is the general principle, and everyone 3 accepts that, that is uncontroversial, but the question 4 is how it applies. You can do, see Lord Oliver, if 5 there is parliamentary intervention as he put it. 6 But the reason I keep going back to 483 D to F is 7 because it sets out what De Keyser does stand for, which 8 is where you have got reputation in play, the test is 9 expressly or, as he puts it here, by implication. 10 LORD WILSON: Are these three cases anything more than 11 interesting examples of the application of the necessary 12 implication test? 13 MR EADIE: My Lord, I respectfully submit not. I am sorry 14 it has taken a long while to get to that point, but I 15 did want to drive home the idea that it is expressly or 16 by necessary implication as -- the scheme and then 17 everything else flows from that. You can take it by 18 analogy from that stage on, or you can apply it 19 directly, but in the end it is the same thing, it is the 20 same beast, the same principle. 21 The vice, it might be thought, in Fire Brigades 22 Union, and we will come to its specific facts as an 23 example, and the reason Lord Browne-Wilkinson ultimately 24 decides as he does, one sees from 485 between G and H. 25 That is really the nub of the objection, the last two</p> <p style="text-align: center;">Page 69</p>	<p>1 MR EADIE: So we respectfully submit that the key paragraph 2 for present purposes, which is the primary basis for 3 rejecting the argument is the paragraph at the bottom of 4 page 439. They were unable to accept the argument that 5 Lord Pannick was mounting. 6 LORD SUMPTION: Do you submit that means there is 7 a difference between the test to be applied, depending 8 on whether we are talking about the prerogative to make 9 treaties or unmake them, or other aspects of the 10 prerogative, as we have seen in the cases you have just 11 cited? In general, it is an implicit displacement by 12 statutory intervention in the relevant field, but is it 13 your submission that there is a tougher test to be 14 applied for this particular prerogative power? 15 MR EADIE: My Lord, there is a tougher test to be applied in 16 accordance with this reasoning, not so much because it 17 is treaty power, although it was treaty power there, but 18 because Parliament had intervened in the area in which 19 the prerogative was exercised, to impose a whole series 20 of controls already. And that carried with it, as it 21 were, the implication that if it was going to intervene 22 to control that sort of action, it would do so 23 expressly, so it is almost an aspect -- 24 LORD SUMPTION: It is a sort of exclusio -- 25 MR EADIE: Exactly. It is almost that. It does say you</p> <p style="text-align: center;">Page 71</p>
<p>1 sentences of that paragraph, by introducing the tariff 2 scheme he debars himself and so on, that is the essence 3 of it. 4 We see that also, in terms of the final reference 5 here, from Lord Nicholls at 509, between E and F. 6 Perhaps we could pick it up at the line beginning: 7 "The inescapable conclusion is that the home 8 secretary has effectively written off ..." 9 (Pause). 10 Ex parte Rees-Mogg then if I may, same bundle, 11 tab 14, MS 424. You see the context from the headnote, 12 I would just invite you to cast an eye down there to 13 get -- this is all about Maastricht and whether or not 14 there was powers to sign up to various protocols that 15 were part of the Maastricht treaty and the key passages 16 for our purposes are on -- start on page 439. 17 THE PRESIDENT: 439. 18 MR EADIE: 439 electronic, under the second issue. 19 THE PRESIDENT: Yes. 20 MR EADIE: Just so you see it, can I invite you to read that 21 page and a half, or a bit more than a page and a half 22 under the second issue before you get to the third issue 23 on the next page. 24 (Pause) 25 THE PRESIDENT: Thank you. Yes.</p> <p style="text-align: center;">Page 70</p>	<p>1 have gone in there, you have designed the scheme of 2 control; having gone there and designed the scheme of 3 control, you can draw the inference if you will that if 4 Parliament is going to control, it is going to do so 5 expressly and that is the sort of thing one would 6 expect, if what you are dealing with is a beast that 7 requires decisions to be made of a legislative kind 8 around things as basic as what should the mechanisms of 9 control be; should there be primary legislation, should 10 there be affirmative resolution, should there be motions 11 to which Parliament consents and so on. That is the 12 point that is being made. 13 My learned friend below, and I think the divisional 14 court accepted this, said no, no, you can pretty much 15 bypass that paragraph with that reasoning in it, because 16 as they ultimately go on to conclude, the protocol on 17 social policy, and this is the remaining part of the 18 analysis under the second issue, they then conclude that 19 that protocol would not in any event become part of 20 domestic law, so where is the worry? 21 But my respectful submission is that is a second 22 strand, a distinct strand of reasoning and it doesn't 23 touch, because it provides simply a distinct reason for 24 reaching the same conclusion, it doesn't touch the 25 reasoning that one sees in the final -- which it might</p> <p style="text-align: center;">Page 72</p>

<p>1 be thought is self-evident -- one sees in the final 2 paragraph on page 439. 3 LORD CARNWATH: Just to clarify, it is not your case that 4 the treaty-making prerogative is subject to a different 5 principle? 6 MR EADIE: It is not my case that treaty-making prerogative, 7 just because it is treaty-making prerogative, is subject 8 to different rules on the back of this paragraph -- 9 LORD CARNWATH: Generally. 10 MR EADIE: Generally, and I will come to develop that 11 argument -- well, I will come to develop that argument, 12 but the point that is being made here is not dependent 13 upon it being a treaty, but is dependent upon the fact 14 that Parliament has chosen to intervene in the way that 15 it already has. It is that that creates the inference 16 that if it is going to do so again, it will do so 17 expressly because it will be altering the nuanced scheme 18 that it has already designed. 19 LORD SUMPTION: Can I just ask you where this fits into the 20 scheme of your submissions as a whole? Does one not 21 have to ask first what is the nature of the prerogative 22 power? Is it a prerogative power which authorises one 23 to do things on the international plane which do not 24 have the effect of altering domestic law, or is it 25 a general prerogative power? The reason why that</p> <p style="text-align: center;">Page 73</p>	<p>1 arrive at a situation in which you just never get to the 2 question of what the statute says, unless it is being 3 suggested that it actually confers a prerogative right 4 to change the law which would not otherwise exist. 5 MR EADIE: My Lord, I see that as a prior question, but we 6 respectfully submit that the prerogative power in the 7 field of making of treaties, ratification of treaties 8 and withdrawal from treaties, is and always has been 9 a general power, untrammelled by any such implication 10 which can have, and I will develop this in a variety of 11 ways, impacts into domestic law through any or all of 12 the various models that we have analysed our in our 13 cases. 14 So although I see the force of asking that as 15 the prior question, as it were, as a prior question, we 16 respectfully submit that is a question that has to be 17 answered, recognising that (a) it is a general and 18 untrammelled power ordinarily, and so if you get to the 19 stage where you are saying: is there a freestanding 20 principle that would control it in limine; you have to 21 answer that question or ask that question in the context 22 in which it arises; and recognising that exercises of 23 prerogative power can and do have impacts into domestic 24 law. That is not to say you don't still go back to the 25 statutory scheme to see whether there are limits on that</p> <p style="text-align: center;">Page 75</p>
<p>1 matters is that, if the prerogative power never did 2 extend to doing something that altered the domestic law, 3 then no question of abrogation arises. You arrive at 4 a situation where its exercise would alter domestic law, 5 and you cannot do it, not by virtue of any implied 6 statute or express statutory provision, but simply 7 because of the conditionality of the prerogative right 8 one is talking about. 9 MR EADIE: My Lord, yes. I think the way I would answer 10 that is that there are two different beasts in play in 11 our particular context. The first of them asks what is 12 the usual way in which the courts and what are the 13 principles on the basis of which the courts seek to 14 answer the question whether or not the prerogative power 15 has been abrogated; and the second of them asks what is 16 the nature of the 1972 Act to which I will come, and the 17 way in which it has set matters up, so that effects on 18 the international plane are directly and automatically 19 introduced into domestic law. 20 LORD SUMPTION: Before you get to that, you surely have to 21 ask: what are the limits if any of the prerogative power 22 to make and unmake treaties? If the position is that 23 the prerogative power is only as broad as it is, because 24 the assumption is being made that it does not alter 25 domestic legal rights, then, you know, one may well</p> <p style="text-align: center;">Page 74</p>	<p>1 that Parliament has imposed. 2 LORD SUMPTION: What do you mean by impacts on domestic law? 3 Do you mean actually changing the content of domestic 4 law, or do you mean simply altering the facts to which 5 an existing principle of domestic law applies? 6 MR EADIE: It could be either or both -- 7 LORD SUMPTION: They are very different things. 8 MR EADIE: They are very different things, but they could be 9 either or both, which is why the ambulatory scheme and 10 how the 1972 Act works and all of that is important. 11 I accept that one is not necessarily dealing with the 12 same beast when one is considering Post Office v Radio 13 or matters of that kind, or even in the argument that 14 my Lord advanced in JH Rayner, which was fundamentally 15 premised on drawing that distinction between factual 16 matters that sound in international -- or international 17 legal facts, as it were, and other matters. 18 LORD CARNWATH: This is the fundamental distinction between 19 you and the other side, isn't it? Do you start from the 20 proposition that there is a well-recognised power to 21 make and unmake treaties, and the only questions are, is 22 it subject to any statutory restriction, express or 23 implied, or subject to some common law principle such as 24 abuse of power. Alternatively, as my Lord puts to you, 25 you ask: is there actually such a power at all if it has</p> <p style="text-align: center;">Page 76</p>

1 the effects on domestic rights?  
 2 MR EADIE: One answers that question by looking at the way  
 3 in which prerogative power has operated in --  
 4 LORD CARNWATH: I understand how you answer it. But there  
 5 is obviously an alternative view which is diametrically  
 6 opposed.  
 7 MR EADIE: My Lord, that is Rees-Mogg, unless anyone wants  
 8 more on Rees-Mogg. Just before the short adjournment,  
 9 can I deal with, just by way of mention only, I am not  
 10 going to take you to them, but if you still have the  
 11 will to look at other authorities on the basic approach  
 12 to abrogation of the prerogative, Northumbria Police  
 13 Authority, which you will recall is all about police  
 14 ordering various bits of equipment, that is perhaps  
 15 worth a read; it is in authorities bundle 8, tab 77 at  
 16 MS 3059; and a recent case which involves the exercise  
 17 of prerogative powers by the home secretary to remove  
 18 people's passports, cancel or withdraw passports, Ex H.  
 19 Currently we only have the judgment in the divisional  
 20 court, and I am threatened with the Court of Appeal next  
 21 week comprising inter alia the Master of the Rolls and  
 22 Lord Justice Sales, who will no doubt be familiar with  
 23 the basic De Keyser principles, but that also is of some  
 24 interest at least in analysing that.  
 25 THE PRESIDENT: Where is that?

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1 MR EADIE: Core authorities, bundle 4, tab 66, 2781.  
 2 THE PRESIDENT: You say it is of some interest; do they take  
 3 this any further forward or are they more of the same?  
 4 MR EADIE: They are really an application. It is  
 5 an application in a different context, I hesitate to  
 6 take you to it because my Lord, Lord Wilson raises a  
 7 fair point. One can go to all these cases, and they  
 8 are different illustrations of the same basic approach  
 9 and principle. It is an interesting analysis there and  
 10 it contains, if you want it in a convenient place, Lord  
 11 Hobhouse in Morgan Grenfell, but the relevant paragraphs  
 12 for present purposes are really from 39 to the early  
 13 50s.  
 14 52, I think.  
 15 THE PRESIDENT: Do I get the impression this is a convenient  
 16 moment, Mr Eadie.  
 17 MR EADIE: My Lord, it may be a convenient moment. I was  
 18 going to go to a principle of the legality.  
 19 THE PRESIDENT: Let's leave the principle of legality for  
 20 2.00.  
 21 We will rise now and we will resume at 2.00. The  
 22 court is now adjourned.  
 23 (1.00 pm)  
 24 (The Luncheon Adjournment)  
 25 (2.00 pm)

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1 THE PRESIDENT: Mr Eadie, a word about timetabling before  
 2 you start. We are due to start at 10.15 tomorrow. One  
 3 of us has a medical appointment which means it is  
 4 possible we will start a bit late. If we do,  
 5 I apologise in advance, and if you have until 1.00 and  
 6 if you lose 10 minutes at the beginning we will sit into  
 7 lunch to make up the 10 minutes if you need it.  
 8 MR EADIE: I am very grateful. I will try and avoid that  
 9 disaster if humanly possible.  
 10 THE PRESIDENT: Disaster may be a little bit high, but it  
 11 depends how much you care for your lunch.  
 12 MR EADIE: The principle of legality, and still under the  
 13 broad heading of the De Keyser principles and how the  
 14 two marry up, we respectfully submit that the approach  
 15 in De Keyser has at least some similarities to the  
 16 principle of legality, but what the De Keyser principle  
 17 does is to focus on the fundamental importance of the  
 18 rights of Government to act in the public interest for  
 19 the overall good in exercising prerogative powers such  
 20 as in the foreign affairs context. It requires,  
 21 similarly to the principle of legality, real clarity  
 22 before those powers are taken away.  
 23 In that sphere, in other words considering whether  
 24 or not the prerogative power has been impinged upon, the  
 25 courts do not approach the question of whether the

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1 prerogative power has been interfered with or abrogated,  
 2 by asking simply whether or not that power has the  
 3 capacity to affect rights.  
 4 We know that it does, in a variety of different  
 5 ways, and indeed many of the cases in which the  
 6 De Keyser principles were hammered out involved  
 7 precisely that feature.  
 8 Many of those cases were precisely about the use of  
 9 the prerogative to interfere with rights, including  
 10 common law rights to property, as the paradigm example  
 11 in De Keyser and indeed in *Burmah Oil* itself.  
 12 The principle of legality is also, you will know,  
 13 a rule of statutory interpretation designed essentially  
 14 to control as an aid to interpretation, generally  
 15 expressed powers conferred on Government by statute.  
 16 Here we submit the question is not as to the breadth  
 17 of generally expressed statutory powers; it is  
 18 different. The question is whether or not Parliament  
 19 has abrogated the prerogative which sits alongside the  
 20 legislative schemes impinging, as they sometimes do, and  
 21 to various different extents, on to that territory  
 22 occupied by the prerogative.  
 23 So that question is answered naturally, we submit,  
 24 by examining the legislative scheme as a whole against  
 25 the constitutional backdrop we have described. So it is

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<p>1 fundamentally different, we submit, from the principle 2 of legality. 3 My Lords and my Lady, I was going to take you next 4 to the fourth topic, which is the application of the 5 basic De Keyser and dualist principles in the present 6 context, and that obviously starts with the nature of 7 the statutory scheme. 8 So, apologies, it has taken a bit of a lead-in to 9 get there, but the statutory scheme, if I can start it 10 here, with CRAG itself, the 2010 Act, which is in core 11 authorities volume 1, tab 5, MS 131. 12 LORD HODGE: I am sorry. 13 MR EADIE: 131. 14 LORD MANCE: We start here not with the 1972 Act. 15 MR EADIE: We start here just because this is a general 16 scheme of control, that is the logic of it, by 17 Parliament over treaty-making powers, treaty making and 18 all other things to do with treaties. 19 LORD CLARKE: Was this the first time any such scheme -- 20 general provision had been enacted. 21 MR EADIE: Exactly so. 22 THE PRESIDENT: Basically, to some extent, a statutory 23 codification of the Ponsonby principle. 24 MR EADIE: That was going to be the first point, exactly 25 that, and you have the Ponsonby memo if you want it in</p> <p style="text-align: center;">Page 81</p>	<p>1 So there is a cut-out for treaties to which that 2 applies, and there is detailed provision made for the 3 particular kinds of parliamentary influence over the 4 prerogative powers hitherto untrammelled, as it were, to 5 do with treaties. 6 So in section 20, just to show you very briefly what 7 the scheme involved, subject to what follows, the treaty 8 is not to be ratified, so it is a control over 9 ratification, unless -- and then you see the mechanism 10 of parliamentary control that is imposed, which is the 11 laying before Parliament of a copy of the treaty, 12 20(1)(a), something allowing potentially the public to 13 get engaged in the debate in 20(1)(b), the treaty being 14 published in the way the minister of the Crown thinks 15 appropriate. 16 And then effectively negative resolution, 20(1)(c). 17 THE PRESIDENT: Thank you. 18 MR EADIE: Then period A, so that is 21 days for a negative 19 resolution to be put in place; and the consequence of 20 the House of Commons resolving that it doesn't wish the 21 treaty to be ratified is then dealt with in subsections 22 (4) to (6). 23 THE PRESIDENT: Yes. 24 MR EADIE: But you see from that that you have the negative 25 resolution procedure, then effectively you have a two</p> <p style="text-align: center;">Page 83</p>
<p>1 bundle 15, tab 158, MS 5038, but it does exactly what 2 my Lord the President has just described; it involves in 3 effect Parliament considering, for the first time in 4 relation to 2010, but Parliament considering the 5 controls which it wished to impose generally in the 6 context of treaties. 7 The upshot is as we see, you may have not had 8 a chance to glance at it briefly but it is in 9 effectively part 2, which are the only bits I hope which 10 are in your bundle, of CRAG. I should point out at the 11 outset, there is a cut out from CRAG for treaties to 12 which now the European Union Act of 2011 applies, as you 13 see from 23.1(c), so there is a separate regime 14 governing controls which I am going to come to in a 15 moment. 16 LORD CARNWATH: Can you give me that section again? 17 MR EADIE: 23.1(c). 18 LORD CARNWATH: What did it say originally in section 23? 19 Do you remember which provisions were specified in it? 20 MR EADIE: It probably would have been the 2008 Act. We 21 will get the original for you overnight. 22 LORD CARNWATH: Thank you. 23 MR EADIE: I am pretty sure it would have been the 2008 Act, 24 because the next one in the sequence after that is 2011, 25 which will have postdated this.</p> <p style="text-align: center;">Page 82</p>	<p>1 strikes provision, so that the minister of the Crown can 2 relay, this time explaining why it is that they want the 3 treaty ratified; and then they get another 21 days 4 within which that negative resolution can again be 5 exercised by the House of Commons. 6 Then the clarification in 6 that it can be done, 7 a statement can be laid on more than one occasion. 8 So that is what happens if the Commons votes 9 against, you get another go, and then the Commons can 10 vote against again if they wish. But it is effectively 11 a double negative resolution procedure. 12 Then in 7 and 8, they make specific provision for 13 what happens if the House of Lords resolves that it 14 doesn't want the Government to ratify the treaty, but 15 the House of Commons is content, effectively. 16 THE PRESIDENT: Yes. 17 MR EADIE: On that occasion the consequence is that in sub 18 8, the treaty may be ratified, that is if the House of 19 Lords voted against but the House of Commons -- or are 20 content as it were: 21 "The treaty may be ratified if a minister of Crown 22 has laid before Parliament a statement indicating the 23 minister is of the opinion that the treaty should 24 nevertheless be ratified and explaining why." 25 So there is not a double whammy on that occasion,</p> <p style="text-align: center;">Page 84</p>

1 there is simply a burden of explanation under this.  
 2 So that is what happens in relation to the general  
 3 scheme of ratifying treaties; you don't need to worry  
 4 too much about section 21. All of that, the scheme that  
 5 I have just identified in section 20, is subject to the  
 6 exceptionality provision in section 22.  
 7 Of course the minister of the Crown should  
 8 rationally have to conclude that the matter was  
 9 exceptional, but if he did, then the process is  
 10 a different one. You don't have negative resolution if  
 11 he decides that exceptionally it should be ratified  
 12 without them being met, say, for example on time grounds  
 13 or whatever else it may be, some other exceptional  
 14 reason. You don't have the negative resolution process,  
 15 but you do have the duties that are imposed by 22(3).  
 16 Just for the sake of completeness, there is a burden  
 17 or a duty to produce an explanatory memorandum, 24 --  
 18 THE PRESIDENT: Basically this works on the basis of  
 19 Parliament is given an opportunity to jump in and say:  
 20 don't do it.  
 21 MR EADIE: Exactly so, subject to -- even within section 22,  
 22 it might be thought. They could still say: we insist.  
 23 That would be within their power.  
 24 THE PRESIDENT: 22(2).  
 25 MR EADIE: Yes.

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1 THE PRESIDENT: Thank you.  
 2 MR EADIE: Treaty is defined and ratification is defined in  
 3 the manner that you see in 25, to complete the picture.  
 4 THE PRESIDENT: Yes.  
 5 MR EADIE: So we take three short points from CRAG. It is  
 6 firstly significant, we submit, because Parliament has  
 7 intervened in the area of treaties and decided what  
 8 intervention in this prerogative sphere it wished to  
 9 have. That piece of legislation was the product of  
 10 detailed and careful consideration, with a nuanced set  
 11 of controls, and those are properly judgments for  
 12 Parliament to make, as it has done in this piece of  
 13 legislation.  
 14 Secondly, the intervention by Parliament in general  
 15 terms in relation to this suite of powers that  
 16 accompanies treaties is express and nuanced. It  
 17 reflects precisely the sorts of decisions that one would  
 18 expect Parliament to make and consider, if intervening  
 19 in this sort of context to alter the usual position,  
 20 namely that the Crown exercises those prerogative powers  
 21 as it sees fit in the public interest.  
 22 It applies to ratification of treaties. It leaves  
 23 untouched negotiation or making of treaties. It  
 24 produces a considered system of controls dealing  
 25 precisely and in detail with the form of control that

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1 Parliament wished to exercise, and you have seen the  
 2 layering and the subtleties of all of that, laying  
 3 a copy, subjecting it to negative resolution,  
 4 exceptionality and all of that; there are a series of  
 5 decisions about the nature of the parliamentary control  
 6 that Parliament wishes to impose.  
 7 The third point is the obvious one, that it includes  
 8 no requirement, even for limited forms of parliamentary  
 9 involvement in decisions by governments to withdraw or  
 10 commence the process of withdrawal from treaties.  
 11 That is so, we add in brackets, even though  
 12 withdrawal might have impact on rights and obligations,  
 13 on the international and domestic legal planes. So  
 14 there is therefore, we submit, a considered decision by  
 15 Parliament to leave withdrawal to the Government in the  
 16 usual exercise --  
 17 LORD CLARKE: What was the origin of this? Is there some  
 18 sort of paper behind all this?  
 19 MR EADIE: Behind CRAG?  
 20 LORD CLARKE: Yes.  
 21 MR EADIE: I am sure there will have been a White Paper and  
 22 there will have been debate in the usual way.  
 23 LADY HALE: It was all carefully considered, you have told  
 24 us, so presumably you have evidence for that.  
 25 MR EADIE: My Lady, we will check overnight to make sure you

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1 have the White or the Green Papers, whatever there was.  
 2 LORD CARNWATH: It doesn't say anything about domestic  
 3 rights, does it; the ratification leaves completely  
 4 unaffected how the treaty will take effect, if at all,  
 5 in domestic law.  
 6 MR EADIE: That is true. It is fundamentally a control of  
 7 the exercise of the prerogative powers on the  
 8 international plane.  
 9 LORD CARNWATH: But (Inaudible) legislation, and by the same  
 10 token it doesn't deal at all with what the withdrawal  
 11 from a treaty, what the effect of that would be on  
 12 domestic rights.  
 13 MR EADIE: It doesn't deal with transposition at all. If  
 14 one examines these as two separate elements involving on  
 15 the one hand, as it were, the exercise of prerogative  
 16 power on the international plane, giving of notice,  
 17 whatever it may be, the withdrawal from the treaty, the  
 18 ratification of the treaty, and there is a separate set  
 19 of questions around transposition and impact into  
 20 domestic law.  
 21 LORD CARNWATH: Were these issues discussed, do we know, in  
 22 a White Paper of any sort?  
 23 MR EADIE: In terms of transposition? I doubt it, because  
 24 this is simply designed to control the exercise of those  
 25 prerogative powers in that way on the

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<p>1 international plane. 2 But we will check. 3 LORD MANCE: Going back to your ambulatory rights, there is 4 a whole framework which I think is not reflected in the 5 papers at the moment, involving liaison between the 6 Government and Parliament, and involving parliamentary 7 scrutiny by the European committees, both of the House 8 of Commons and the House of Lords. That is subject to 9 the now published Cabinet Office guidelines. Now, that 10 enables parliamentary input into changes in the rights 11 and obligations which you describe rightly as 12 ambulatory. 13 Is there any equivalent system of liaison and 14 supervision in relation to a decision to withdraw from 15 a treaty or to exercise the royal prerogative in any 16 other respect? 17 MR EADIE: Not as far as I am aware. 18 But we will, again, if we need to, we can pull 19 together that raft of documentation and just double 20 check; so not as far as I am aware is the answer to that 21 but I will check. 22 But that is CRAG and my Lord, Lord Carnwath is 23 right, it goes to the exercise of these prerogative 24 powers on the international plane. It doesn't deal with 25 or purport to deal with transposition or effects into</p> <p style="text-align: center;">Page 89</p>	<p>1 5213. 2 LORD SUMPTION: What was the first reference. 3 MR EADIE: 5189 and then 5213, and 166 and 167 within 4 bundle 15. 5 THE PRESIDENT: Thank you. 6 MR EADIE: The European Communities Act 1972, to go back in 7 time, tab 1, within the core authorities of volume 1 and 8 that is at page 17, as originally enacted. 9 You have the current version if you want it in the 10 next tab but for present purposes it may be sensible to 11 view it as enacted. 12 THE PRESIDENT: Yes. 13 LORD CLARKE: Sorry, which one is as enacted? 14 MR EADIE: As enacted is tab 1, MS 17, and then MS 54 behind 15 tab 2 is current. 16 THE PRESIDENT: Very well. Yes. 17 MR EADIE: I make a general and overarching point first of 18 all in relation to the 1972 Act which I know you will 19 have read, which is that it made no provision whatever 20 regulating any future decision to withdraw from the EEC 21 treaties. That was so, even though withdrawal was well 22 within the contemplation of Parliament at the time of 23 the passing of the ECA, as the divisional court 24 correctly acknowledged. There was debate in the 25 divisional court around how that might occur, but at</p> <p style="text-align: center;">Page 91</p>
<p>1 domestic law or anything of that kind, but it is 2 nonetheless significant, because it is the act which 3 controls and exercises parliamentary regulation over 4 those sorts of powers, so it is parliamentary 5 intervention into the field. And you have my submission 6 already, the basic submission, which is that the 7 prerogative power is a freestanding source of power, so 8 if Parliament is going to be intervening into that 9 field, it does so expressly, deliberately and in this 10 sort of nuanced way. 11 LORD CARNWATH: It also helps you to reject the suggestion 12 that the exercise of these powers on the foreign plane 13 were somehow a hangover from medieval times. 14 MR EADIE: Quite so, because this is the 2010 piece of 15 legislation. 16 LORD CLARKE: We know it has some introductory notes, 17 because the note said, but we haven't got them, I don't 18 think. 19 MR EADIE: We haven't got that. We will check if there is 20 anything relevant in that. 21 I am told we have the Green Papers and the White 22 Papers in the bundles. It tells you all you need to 23 know about the weight of preparation. The Green Paper 24 is in bundle 15, tab 166, MS 5189; and the consultation 25 paper is at tab 167 in the same bundle, bundle 15, MS</p> <p style="text-align: center;">Page 90</p>	<p>1 least if all parties consented, it was plain that 2 withdrawal could occur, as the divisional court accepted 3 correctly at paragraph 56 of their judgment. 4 Indeed, it is notable that the European Communities 5 Act 1972 places no restrictions at all on the treaty 6 prerogative in the EU context. There is a real and 7 serious contrast between that fact and what Parliament 8 chooses to do when it wishes to assert control over the 9 exercise of prerogative powers in this sphere, see CRAG. 10 Start with the long title, "An act to make provision 11 in connection with the enlargement of European 12 Communities to include the United Kingdom", and so on. 13 We submit in relation to the long title, perhaps if 14 I could break this down into the submissions we will 15 make about each of the sections, I know you will be 16 familiar with them and will have read them, but that may 17 be a convenient way to do it, but in relation to the 18 long title we make these submissions. 19 It is, we submit, accurate as a general summary of 20 what the Act does. But it will be accurate in that way 21 whether the Government retained its long established 22 power to withdraw from the treaties or it did not. 23 There is nothing in the wording of the long title -- to 24 put a point negatively, there is nothing in that wording 25 to support the significance that was attached to it by</p> <p style="text-align: center;">Page 92</p>

<p>1 the divisional court, we submit.                  2 There may be a positive point to be made in relation                  3 to the long title. That is the first submission.                  4 The second submission is the positive point. It                  5 does not state that it is an act for and in connection                  6 with the UK becoming a member of the EEC. Nor is there                  7 any operative provision in the Act itself authorising                  8 the Government to act on the international plane to make                  9 the UK a member.                  10 The wording used in the long title is not the                  11 wording, "an act to make provision for and in connection                  12 with ..." et cetera. That is not the wording that is                  13 used, and that stands in contrast to precisely that sort                  14 of wording, for and in connection with, that was used                  15 around exactly this time when independence was being                  16 conferred on Barbados, Fiji and the Bahamas. That is of                  17 interest because those pieces of legislation do dot                  18 around 1972.                  19 If you go into the supplemental bundle, the black                  20 11 KBW bundle, you will see the way in which that is                  21 done, at tabs 1, 2 and 3. So 1 is Barbados, 2 is Fiji,                  22 3 is the Bahamas and they all use the same words, the                  23 dates and the significance of the dates because they dot                  24 around 1972, you see; 1966 was Barbados, 1970, two years                  25 before this act, was Fiji, and then the Bahamas was one</p> <p style="text-align: center;">Page 93</p>	<p>1 resolutions, as it were, support motions in the House,                  2 but there wasn't an Act of Parliament. You didn't need                  3 the ECA to ratify feeding the accession treaty to the                  4 EEC.                  5 Can I come to that? I am going to come to it in due                  6 course.                  7 Just to finish this point, we claim no originality                  8 in terms of this point; it is the point that is made and                  9 developed in the recent lecture by Professor Finnis,                  10 which you also have in that supplementary bundle, behind                  11 tab 12. The relevant part is page 11 and following.                  12 But the basic structure of this legislation is therefore                  13 as reflected in its long title, and in the absence of                  14 any equivalent, as it were, to section 1 of the                  15 independence pieces of legislation; the basic structure                  16 of the legislation as reflected there acknowledges that                  17 dualism is in play, and that, consistently with the                  18 Government having constitutional responsibility and the                  19 ability to conduct foreign relations, it is for it to                  20 make and ratify treaties.                  21 So the enlargement referred to in the long title is                  22 achieved by Her Majesty's Government in the usual way,                  23 signing and ratifying the treaty of accession, and you                  24 have that if you need it in authorities 13, tab 141,                  25 page 4658.</p> <p style="text-align: center;">Page 95</p>
<p>1 year afterwards. But you see that their long title is                  2 "An act to make provision for and in connection                  3 with ..."                  4 It all is in the same form, just to look at the                  5 Barbados one, and then you see --                  6 LORD CLARKE: The difference is the absence of "for", is it?                  7 MR EADIE: "for and".                  8 LORD CLARKE: "for and", sorry.                  9 MR EADIE: "for and in connection with". That is leading                  10 one in to the point of substance which is that they then                  11 have an operative provision which is in section 1,                  12 effectively. Her Majesty's Government says: I have no                  13 responsibility for the Government of Barbados and so on;                  14 so they are then setting out the nature and effect of                  15 what legal position is being created, as it were, in                  16 a way.                  17 LORD MANCE: What about the earlier resolution of both                  18 Houses, which effectively gave the green light to the                  19 Government to go ahead with negotiations or -- do we                  20 have that somewhere in the papers?                  21 MR EADIE: You do, and I am going to come to that if I may.                  22 My Lord is right, but it poses the question whether the                  23 Government could have ratified the treaty of accession                  24 unless and until it enacted the ECA, which is what the                  25 divisional court concluded, my Lord is right;</p> <p style="text-align: center;">Page 94</p>	<p>1 So this statute uses and is premised on dualism and                  2 on the constitutional roles of Government and Parliament                  3 sitting alongside each other. So everything in part one                  4 is about giving domestic legal effects to acts taken in                  5 the exercise of prerogative powers on the                  6 international plane. That is what part one is about.                  7 That is what it does.                  8 Its fundamental nature is focused not on actions on                  9 the international plane at all, but on the distinct                  10 aspect of domestic transposition and the creation of                  11 domestic -- the recognition of domestic legal effects.                  12 We do submit that the divisional court was                  13 inaccurate to conclude that the Government could not                  14 have ratified the treaty of accession, unless and until                  15 the ECA was enacted.                  16 LORD SUMPTION: It would have been in breach of a large                  17 number of principles of EU law if they had not done so.                  18 MR EADIE: Because there was no domestic transposition.                  19 LORD SUMPTION: Exactly, that is the sense in which they                  20 suggest that they had to do it, isn't it?                  21 MR EADIE: My Lord may be right; I thought they were making                  22 the rather broader point --                  23 LORD SUMPTION: You couldn't even assume (Inaudible) on an                  24 international plane, is your submission.                  25 MR EADIE: Quite, and my submission is we plainly could;</p> <p style="text-align: center;">Page 96</p>



<p>1 that is the way in which it was going to be done, and                  2 that is entirely clear, that that power was still left                  3 with the Government, because when Parliament truly wants                  4 to impose limits -- well, making the point in two ways,                  5 when it wants to give permission to do something on the                  6 international plane, it is perfectly capable of saying:                  7 I am giving you permission to do this; a bit like the                  8 Bahamas and Barbados situation, creating the legal                  9 effect in that way.                  10 But if it wants to restrict action on the                  11 international plane like ratification, again, we know                  12 that Parliament can do that, and we know it has done                  13 that, and we saw CRAG. Then it has a whole series of                  14 decisions it would have to make around what type of                  15 parliamentary permission should be given and how --                  16 where the balance should lie between the Government on                  17 the one hand and parliamentary control on the other.                  18 We know as a matter of fact, if you go back to the                  19 1972 Act and you see the date on which it was enacted of                  20 17 October 1972, we know that the UK instrument of                  21 ratification was in fact deposited the day after it was                  22 enacted, in other words on 18 October 1972, but that, we                  23 respectfully submit, tells you nothing about whether or                  24 not the ECA was some kind of legal pre-condition to                  25 ratification. We submit plainly not; there is nothing</p> <p style="text-align: center;">Page 97</p>	<p>1 international law to sign a treaty but then not to                  2 ratify it; that is precisely what Norway did. The logic                  3 of the respondents' argument is that the Government                  4 would have been in breach of the ECA, and that plainly                  5 was not the case. Parliament was therefore merely                  6 facilitating the membership, should the Government, in                  7 the exercise of its treaty prerogative, take the                  8 United Kingdom into the EEC.                  9 LORD MANCE: This is potentially a Fire Brigades Union case,                  10 I think it is suggested, against you in that context.                  11 You might test your proposition or put your question in                  12 a slightly more sophisticated way, by asking what if the                  13 Government had announced immediately after the passing                  14 of the ECA that it would never ratify the treaty of                  15 accession; you would give the same answer, I appreciate,                  16 you would say that is their choice.                  17 MR EADIE: That is their choice, and as fundamentally or                  18 more fundamentally perhaps, this is the basic structure                  19 of this Act.                  20 LORD CARNWATH: Why wouldn't that be potentially an abuse of                  21 power --                  22 MR EADIE: It could be. One could have that argument, the                  23 same as the 2015 Act we were discussing earlier. You                  24 could see a claim being mounted of that kind, but the                  25 answer my Lord gives on my behalf, as it were, is one we</p> <p style="text-align: center;">Page 99</p>
<p>1 to authorise ratification in the ECA; how otherwise                  2 could we have committed the United Kingdom on the                  3 international plane, other than by way of the exercise                  4 of the prerogative?                  5 THE PRESIDENT: No authorisation and no "for [comma], and in                  6 connection with", only "in connection with"?                  7 MR EADIE: Exactly so.                  8 THE PRESIDENT: Okay.                  9 MR EADIE: Of course it avoids -- as my Lord, Lord Sumption                  10 pointed out, doing it in this sequence avoids potential                  11 breach of international obligations, because you have                  12 not got the domestic transposition that is required.                  13 So we respectfully do not accept that there was any                  14 need for any of that.                  15 Moreover, that is the ECA, the 1972 Act does not                  16 require the UK to become or indeed remain a member of                  17 the EEC, can be demonstrated perhaps by asking what the                  18 position would have been if the Government had not                  19 ratified the treaty of accession, shortly after the ECA                  20 came into force, or indeed at all; as was the case with                  21 Norway which signed but did not ratify. The treaty of                  22 accession itself set the date for our membership, if                  23 ratified, at 1 January 1973.                  24 Of course it is not a breach of international law to                  25 answer the question posed. It is not a breach of</p> <p style="text-align: center;">Page 98</p>	<p>1 would give.                  2 LORD MANCE: How do you distinguish Fire Brigades Union in                  3 this context?                  4 MR EADIE: We respectfully submit that that requires                  5 an understanding of how this Act is designed to be set                  6 up. It is not, as it were, imposing on the Government                  7 a duty, otherwise it could easily have said so. It is                  8 simply facilitating, and it sits alongside the                  9 recognition that the Government exercises prerogative                  10 powers on the international plane in that way and always                  11 has done.                  12 LORD SUMPTION: Exactly what submission are you making on                  13 the basis of these statutes? Are you saying that if the                  14 Government lacks a suitable prerogative power before                  15 2008, the 2008, 2010, and 2011 Acts implicitly created                  16 one, presumably not?                  17 MR EADIE: No.                  18 LORD SUMPTION: Now, in that case, surely we have to look at                  19 what the position was before these statutes, and if the                  20 position was that the Government did not have the power                  21 then, the statutes do not help us one way or the other                  22 to decide the present issue.                  23 MR EADIE: My Lord, I think that is tolerably close to the                  24 question you asked me before the short adjournment,                  25 which is: are we starting in the right place before we</p> <p style="text-align: center;">Page 100</p>

<p>1 get to any of this legislative scheme?</p> <p>2 LORD SUMPTION: It is another possible instance of your</p> <p>3 starting perhaps in the wrong place.</p> <p>4 MR EADIE: Quite. That was the point I believe you were</p> <p>5 putting to me before the short adjournment, but my</p> <p>6 answer to that is that these prerogative powers to</p> <p>7 exercise international relations powers, to ratify, to</p> <p>8 negotiate, to agree, to withdraw from treaties, they</p> <p>9 have always been expressed as general prerogative</p> <p>10 powers, as it were. They have never been defined by</p> <p>11 potential impact on rights in that way.</p> <p>12 So they have been expressed as general prerogative</p> <p>13 powers, and they have then been regulated by Parliament</p> <p>14 in a variety of ways. So you have all the various</p> <p>15 examples which we will come to, you have seen CRAG</p> <p>16 already; and in the treaties sphere, we know that</p> <p>17 Parliament has regulated those otherwise generally</p> <p>18 expressed powers very specifically. So the nature and</p> <p>19 content of that prerogative from the beginning has been</p> <p>20 a general prerogative power to do these various things,</p> <p>21 and it is then characterised by different forms of</p> <p>22 impingement into those generally expressed powers by</p> <p>23 Parliament, none of which, it may be said, have been</p> <p>24 defined or set by reference to a potential effect on</p> <p>25 rights.</p> <p style="text-align: center;">Page 101</p>	<p>1 is by way of exercise of the prerogative.</p> <p>2 LORD WILSON: Mr Eadie, you have shown very convincingly</p> <p>3 that our entry into the EU was a joint effort, the</p> <p>4 exercise of prerogative power by the executive and the</p> <p>5 exercise of legislative power by Parliament. So, put</p> <p>6 very simply, one of the arguments that you will have to</p> <p>7 deal with is, if our accession was the result of joint</p> <p>8 effort, should our departure not equally be so.</p> <p>9 MR EADIE: My Lord, the submission I make is that the joint</p> <p>10 effort, as it were, in the 1972 Act is a joint effort in</p> <p>11 the sense that it assumes that all the prerogative</p> <p>12 powers continue to exist and be operated. So all that</p> <p>13 this is doing, this Act, is not to -- put it in the</p> <p>14 positive: this Act is designed, and that is all that</p> <p>15 part 1 does, to deal with transposition.</p> <p>16 It doesn't authorise, it doesn't purport to be</p> <p>17 a joint effort in relation to the going in. It simply</p> <p>18 assumes and is premised on the continued existence of</p> <p>19 that power, and withdrawal, therefore, is entirely</p> <p>20 consistent, to put it in my Lord's helpful way, is</p> <p>21 entirely consistent with that framework. Because when</p> <p>22 you withdraw, you withdraw on that basis. You withdraw</p> <p>23 in exercising the prerogative powers that sit in</p> <p>24 parallel to and are the premise for the 1972 Act.</p> <p>25 THE PRESIDENT: I see the force of that but it is not quite</p> <p style="text-align: center;">Page 103</p>
<p>1 We know that the exercises of the prerogative in</p> <p>2 this sphere, and I will come back to this because I am</p> <p>3 going to have to develop this principally in answer to</p> <p>4 is there a background constitutional principle, of the</p> <p>5 kind the provisional court identified, we know that</p> <p>6 prerogative powers can be and are exercised to have</p> <p>7 serious impacts, potentially, sometimes, into domestic</p> <p>8 law rights.</p> <p>9 The 1972 Act, as I will develop in a moment, is</p> <p>10 a paradigm example but we have, and I will develop this,</p> <p>11 a similar position created when we left EFTA, before we</p> <p>12 joined the EEC, so we have an example in this Act of</p> <p>13 that sort of process happening, and we know that double</p> <p>14 taxation treaties similarly, but I will come back</p> <p>15 probably to all of that tomorrow now but those matters</p> <p>16 are all there.</p> <p>17 It does therefore depend fundamentally on analysing</p> <p>18 what -- we entirely agree, what the nature of the</p> <p>19 prerogative is, if the prerogative starts as generally</p> <p>20 expressed, which is our case, and is then impinged upon,</p> <p>21 then that is the correct starting point. The correct</p> <p>22 question becomes what species of control, what forms of</p> <p>23 control has Parliament chosen to impose upon this</p> <p>24 exercise; and we know that in relation to leaving, for</p> <p>25 example, the EU, the only way in which that can be done</p> <p style="text-align: center;">Page 102</p>	<p>1 an answer to Lord Wilson's question, is it, because the</p> <p>2 way the treaty was signed and then not ratified until</p> <p>3 Parliament had done its bit in passing the 1972 Act</p> <p>4 meant that it was very much of a joint effort, to use</p> <p>5 Lord Wilson's expression, whereas on your analysis,</p> <p>6 pulling out would not be a joint exercise.</p> <p>7 MR EADIE: Pulling out would not be a joint effort.</p> <p>8 THE PRESIDENT: That is the point.</p> <p>9 MR EADIE: But the fact that it is ratified the day after</p> <p>10 this Act is enacted, for the reasons I have given, is</p> <p>11 significant only because it avoids, as it were, the</p> <p>12 Government being in breach of its international</p> <p>13 obligations once it decides to go in. That is the true</p> <p>14 significance of it. That is what it has done.</p> <p>15 As I say, when we get to EFTA, I don't want to get</p> <p>16 too far ahead, because EFTA is quite complicated and we</p> <p>17 will try to simplify it overnight, but we get to EFTA</p> <p>18 and you see that that is how they do it there, as it</p> <p>19 were. They leave in the exercise of the prerogative and</p> <p>20 then some time later Parliament comes in but I will show</p> <p>21 you that tomorrow. But of course it depends, I suppose,</p> <p>22 how one defines joint effort, but joint effort there</p> <p>23 undoubtedly was, but only because in part 1, they are</p> <p>24 transposing, they are giving domestic legal effect to</p> <p>25 the rights that are created on the international plane.</p> <p style="text-align: center;">Page 104</p>

<p>1 LORD CLARKE: As a result of a joint effort between 2 Parliament on the one hand and Government on the other. 3 MR EADIE: That is the answer my Lord, Lord Wilson has put 4 to me. 5 LORD CLARKE: What is the answer to it? 6 MR EADIE: The joint effort involves assuming, and this 7 whole Act is premised on, the prerogative powers 8 continuing to exist. This does not purport to authorise 9 us to ratify. It would not place us in breach if we 10 didn't ratify. It simply says, once on the 11 international plane, you have entered into the treaty, 12 which was signed some time before, once you have 13 ratified, then these are going to be the domestic legal 14 effects. 15 LORD KERR: Your argument really is you needed a joint 16 effort to go in in order to get the powers transferred 17 to the (Inaudible) UK, but you don't need it to come 18 out. 19 MR EADIE: We don't need it to come out, because we can 20 withdraw, and again, I don't want to get too political 21 about it, but if joint effort is what is required, then 22 joint effort you have. Parliament decided to set up the 23 referendum. To ask the very question -- again I don't 24 want to get too far ahead of myself because I am going 25 to come to the 2015 Act in due course, and it does not</p> <p style="text-align: center;">Page 105</p>	<p>1 isn't it, to do whatever the Government decides without 2 actually expressing a view itself. Is that realistic? 3 MR EADIE: The significance of those motions is one, they 4 are not primary legislation. 5 LORD MANCE: Of course not. 6 MR EADIE: They are not primary legislative authority, and 7 you do not remove or abrogate the prerogative by passing 8 a motion of that kind in Parliament anyway. 9 LORD MANCE: But they are background, aren't they? That is 10 what the 1972 Act is doing. 11 MR EADIE: They are background but the true significance of 12 that, my Lord is right to draw attention to the fact of 13 it, the true significance of that, it might be thought, 14 is that there are myriad ways in which Parliament, if I 15 use the word neutrally, politically, as it were, can 16 exercise control and give consent, can recognise the 17 significance of an issue. 18 So what is not being done is to say: we need primary 19 legislative authority for you to go and ratify this 20 treaty. This Act is not in any shape or form that sort 21 of beast. My Lord is right to say there were some 22 motions beforehand, but all that demonstrates is that 23 under our constitution, there is flexibility as to how 24 Parliament chooses to get engaged in a particular issue, 25 what steps it wishes to set out beforehand, what matters</p> <p style="text-align: center;">Page 107</p>
<p>1 precisely deal with the legal point that my Lord is 2 making but there is, as it were, constitutionally the 3 joint effort that is provided by that. 4 But I think my fundamental legal answer to the point 5 my Lord puts to me is this Act is not saying, it doesn't 6 say in section 1: thank you very much, you are now 7 authorised to ratify; PS, section 2, here is the effect 8 in terms of transposition into domestic law. 9 LORD MANCE: Isn't this to some extent, because we are just 10 looking at 17 and 18 October 1972, and if you look back 11 at the history, before the treaty of accession was ever 12 negotiated or signed, both Houses considered the matter, 13 and in October a year before, 1971, they separately 14 resolved that: 15 "This House approves Her Majesty's Government's 16 decision of principle to join the European Communities 17 on the basis of the arrangements which have been 18 negotiated." 19 Possibly not even that is the starting point, but 20 that is a relevant starting point when you consider this 21 statute. They are hardly going to repeat anything like 22 that in the statute, because it is a given. What they 23 are doing is taking the final step to implement quite 24 major changes in rights and obligations domestically. 25 On your analysis, Parliament is effectively prepared,</p> <p style="text-align: center;">Page 106</p>	<p>1 it wants to debate and how it wants to go about doing 2 that. 3 The true parallel, if there is one, once you 4 recognise that it is not primary legislative authority 5 to do the thing on the international plane, the true 6 parallel between the motions that you identify and the 7 present situation involving withdrawal is that here we 8 had the referendum, and Parliament got involved 9 beforehand to set up the referendum, to ask the very 10 question: should we leave? 11 So as a matter of law, I quite understand why 12 my Lord, Lord Wilson asked the question that he does, 13 and I have given the answer that I have -- I have tried 14 on a couple of occasions to give the answer that I have 15 to that question, but in answer to my Lord, Lord Mance, 16 yes, there may be significance to that in the sense that 17 it continues to be a joint effort in a broad sense, 18 because Parliament has chosen to get involved. But 19 nothing in those motions by the Houses of Parliament 20 suggest that it was a legal precondition, otherwise it 21 would have been legislation or a legal authorisation. 22 It was simply Parliament expressing its view that this 23 was an appropriate thing to do in the exercise of the 24 prerogative, and the parallel therefore with the 25 2015 Act is exact.</p> <p style="text-align: center;">Page 108</p>

<p>1 LORD CARNWATH: That was an exercise of the Ponsonby 2 convention, wasn't it? 3 MR EADIE: That was an exercise that was pre-CRAG 4 effectively. 5 LORD CARNWATH: Which, as you say, does not apply to 6 withdrawal. The thing that is puzzling me in relation 7 to Lord Wilson's question is that you, in your case, 8 make something of the fact that there will be 9 parliamentary involvement, once the Article 50 notice 10 has been served, and indeed there is something called 11 the Great Repeal Bill, which the Attorney General 12 mentioned. Do we have any evidence about that. 13 MR EADIE: About the Great Repeal Bill? 14 LORD CARNWATH: Yes, about what it is, what it is going to 15 do. It seems to be of some relevance to ask ourselves: 16 what actually is Parliament's role going to be between 17 now and the end of the (Inaudible) period. 18 MR EADIE: Yes, I am sure we do and we will find -- I think 19 currently there has simply been a statement by 20 Government about what is intended to be covered by 21 the -- 22 LORD CARNWATH: I think there has been a statement at the 23 Conservative party conference; has there been anything 24 else? 25 MR EADIE: Pass. We will double check and get you anything</p> <p style="text-align: center;">Page 109</p>	<p>1 the CRAG sense, it could operate in the Ponsonby 2 memorandum sense that preceded CRAG. Or, as 3 significantly, it can operate because Parliament chooses 4 to produce in primary legislation a referendum, and we 5 know when we come to it, 2011 did that in various 6 different respects, in the 2011 Act, and the 2015 Act 7 the same. 8 The difficulty is drawing, as it were, the straight 9 constitutional line. 10 THE PRESIDENT: Because the UK constitution, such that it 11 exists, is not a straight line. 12 Now, we have not got past the long title because of 13 questions from us. Perhaps we should be moving on from 14 the long title. 15 MR EADIE: Yes, it is the long title and what part 1 does. 16 I don't want to rest too much on the long title, because 17 the long title, we know, is a beast of limited 18 assistance in terms of interpreting, or it can be a 19 beast of limited assistance in terms of interpreting, 20 but it is fundamentally what the operative provisions in 21 part 1 are doing, which are all about transposition and 22 not about regulating international plane action. 23 THE PRESIDENT: Yes, we have that, yes. 24 MR EADIE: Section 1, then, steady progress, section 1 sets 25 out the mechanisms by which treaties come to be approved</p> <p style="text-align: center;">Page 111</p>
<p>1 else there has been on that. I think there is no more 2 than that at the moment. I don't think there is a White 3 Paper or anything of that kind. 4 THE PRESIDENT: Can we just go back to this point about the 5 2015 Act. In a way, I suppose, you would say it fits in 6 with the argument that says that if you are right, the 7 day after the treaty had been ratified, on your 8 argument, the Government could have had a change of 9 heart and pulled out. The idea of a partnership with 10 Parliament is that in practice, that would never have 11 happened without either Parliament approving or without 12 the 2015 Act which you say, although not as a matter of 13 strict law, was in practice, Parliament's involvement. 14 MR EADIE: My Lord, yes, and I have hesitated to go back in 15 this case to the quote that you may have seen in our 16 annex from Lord Bingham in the Robinson case about the 17 fluidity of the constitution. I do not rely upon that 18 because we respectfully submit the position is entirely 19 clear in terms of the existence of the prerogative and 20 how this legislation as a matter of strict law is set 21 up, which is the case that I have to meet. But we do 22 submit that there is real significance in the various 23 and myriad ways in which that partnership, that joint 24 effort, if you will, can operate. 25 It can operate by way of motions, it can operate in</p> <p style="text-align: center;">Page 110</p>	<p>1 and put on the list. The significance of section 1 is 2 that the divisional court thought that that was a strong 3 indicator that the treaty prerogative generally, 4 including withdrawal therefore, was controlled by the 5 ECA. But of course we submit that the restriction or 6 any restriction on the exercise of the prerogative power 7 to withdraw or to give Article 50 notice simply cannot 8 be inferred from section 1 of the ECA. 9 By definition, a number of points on that, by 10 definition we submit, the ECA cannot have been intended 11 to abrogate the Article 50 notice power for the simple 12 reason that Article 50 was not even a gleam in someone's 13 eye at that point, and the EEC treaties did not in terms 14 deal with withdrawal at all, so it cannot have been 15 designed to deal with that. But as we have already 16 seen, the Act as a whole in 1972 imposes no restriction 17 of any kind, still less of the sort that we see in CRAG 18 and later piece of legislation. It imposed no 19 restriction at all on action or treaty making or 20 anything else to do with treaties on the 21 international plane. It didn't authorise us to become 22 a member or to ratify. 23 And so we could have, until at least 1978, the next 24 Act I am going to come to, when there was an express 25 restriction introduced into the EU context for the first</p> <p style="text-align: center;">Page 112</p>

<p>1 time, we could have negotiated, agreed and ratified new 2 treaties, and hence bound the UK to those treaties under 3 international law without the prior authorisation of 4 Parliament. 5 That is not, of course, to say there would not be 6 all sorts of very good practical and political reasons 7 for wanting the prior approval of Parliament, but that 8 is a different matter. That broadens the concept of 9 joint venture, as it were, even though the line may not 10 be straight. 11 So this is all about the imposition of restrictions 12 and giving effect at the level of transposition into 13 domestic law, and so we do submit that standard dualist 14 practice of which this Act is a paradigm example, 15 standard dualist practice simply indicates that there is 16 a need to provide for a mechanism of transposition. 17 That is what this Act does. Once one recognises 18 that as the fundamental nature of it, it becomes 19 entirely clear that it is not to do with or seeking to 20 control the exercise of prerogative powers on the 21 international plane. 22 So you have the mechanism that you see in 23 section 1(1), and section 1(2), with its references to 24 listed treaties, and indeed to ancillary treaties. And 25 then there are mechanisms for introducing new treaties</p> <p style="text-align: center;">Page 113</p>	<p>1 being. 2 Then we come to section 2. And the first point to 3 make in relation to -- sorry, my Lady, I am going to try 4 and speed up a bit, but section 2 you will all have 5 read. The first point to make about it is that it 6 created the conduit. 7 THE PRESIDENT: Yes. 8 MR EADIE: It is the first of four relevant points we want 9 to make on section 2. It creates the conduit. 10 Consistently with dualism, it needed to do so given that 11 the treaties took effect and created rights and 12 obligations only on the international plane, and in that 13 way Parliament, consistently with dualism, enabled the 14 United Kingdom to comply with its international/EU law 15 obligations. 16 THE PRESIDENT: Yes. 17 MR EADIE: The nature of the conduit as we see from 2(1), 18 the transposition model if you will, was direct and 19 automatic. And what that means is that the rights and 20 the obligations that were created on day 1 could be 21 altered, and could be removed by action taken under the 22 prerogative by the Crown. 23 Section 2 simply sets out the basis of 24 transposition, necessary for all the reasons I have 25 given, but the significance of it doing that and of that</p> <p style="text-align: center;">Page 115</p>
<p>1 on to that list in 1(3). In the manner that -- there 2 has been some debate in the past around whether or not 3 1(3) would operate as the legislative mechanism for 4 simply ancillary treaties or other treaties to come. 5 I think the position the court arrived at in Smedley was 6 it applied to the ancillary treaties only. 7 Certainly the position is that subsequently, when 8 treaties have been added to the list, that has been done 9 by primary legislation, but as we see, that may be 10 explained by the fact that specific introduction -- 11 there was specific introduction from the 1978 Act 12 onwards, to require primary legislation whenever the 13 powers of the European Parliament were being expanded, 14 so that might explain why that happened. 15 It may be at least not entirely easy to say, to see, 16 why as a matter of ordinary construction at least, 17 section 1(3) might not be taken as authorising both 18 types of treaty addition, both ancillary and listed. 19 LORD MANCE: Which was the case you said that treated it? 20 MR EADIE: Smedley, I think it is. 21 LORD MANCE: Smedley. 22 MR EADIE: Yes. As a matter of pure interpretation, it is 23 coming at the thing as a matter of straight 24 interpretation, there is at least a question there. 25 But Smedley appears to have resolved it for the time</p> <p style="text-align: center;">Page 114</p>	<p>1 being its nature is that the introduction of a conduit 2 or a transposition model of this kind tells one nothing 3 about the discrete issue of some form of parliamentary 4 control of Government action later on the 5 international plane. It simply is creating the 6 necessary transposition mechanism. 7 THE PRESIDENT: Yes. 8 MR EADIE: The divisional court attached some significance 9 to the title alongside section 2 and we have dealt with 10 that in the annex to our case where we track, as it 11 were, the textual analysis of the divisional court and 12 answer them paragraph by paragraph. I am not going to 13 spend a lot of time on that now, but it might be thought 14 in relation to the heading, the fact of the matter is 15 that that heading is accurate and descriptive and 16 adequate to give a general summary as to what the 17 section is doing. 18 It suggests, if anything, accurately, that section 2 19 is, as it were, a consequence of dualism, but it doesn't 20 do more than that. It doesn't carry some form of 21 implementation, that because this is about general 22 implementation of the treaties, that means the treaties 23 must always stay the same or cannot be withdrawn from. 24 Indeed, we know, when we come to it later as I will 25 do shortly, that when Article 50 does become part of the</p> <p style="text-align: center;">Page 116</p>

<p>1 EU framework in the Lisbon treaty, it is then added to 2 the list in section 1(2), and Article 50 is thereby 3 given effect, as it were; so that these rights and 4 liabilities exist subject to that, but the general 5 title, we submit, the general heading, does not avail 6 one. 7 LORD MANCE: Does that involve the proposition that 8 Article 50 is incorporated in domestic law? 9 MR EADIE: It has become part of the listed treaties. 10 LORD MANCE: But is it incorporated into domestic law by 11 this Act? 12 MR EADIE: My Lord it is not incorporated by this act, it is 13 not? 14 LORD MANCE: No. 15 MR EADIE: I don't make that suggestion. 16 LORD MANCE: No. Because it only operates on 17 an international plane. 18 MR EADIE: It is not directly effective, it operates on the 19 international plane, but it indicates that the rights 20 and liabilities as they exist from time to time are 21 subject on the international plane to that power of 22 withdrawal. 23 LORD WILSON: This phrase "from time to time" that we read 24 twice, "rights from time to time created", "remedies 25 from time to time provided for", is that simply talking</p> <p style="text-align: center;">Page 117</p>	<p>1 MR EADIE: My Lord, that is right in terms, but it doesn't 2 touch, we respectfully submit, our power to withdraw 3 which continues to exist under the prerogative, is the 4 way we put it. 5 LORD CLARKE: (Inaudible) ambulatory, as far as you advance 6 it. 7 MR EADIE: I am not sure it does weaken it, with respect. 8 The way we put the argument is that we have always had 9 the prerogative powers existing. What this does 10 demonstrate most clearly is that by exercise of 11 prerogative power, the Government can affect rights, can 12 withdraw rights, can remove rights in any event. It 13 could remove 99.9 per cent of the rights entirely 14 consistently with 2(2). 15 LORD MANCE: You say by an exercise of the prerogative 16 power. The likelihood of the Council of Ministers and 17 now the European Parliament agreeing to remove 18 99 per cent of EU rights is rather remote, isn't it? 19 MR EADIE: My Lord, it may be rather remote in practice but 20 as a matter of law. 21 LORD MANCE: It is certainly not done by the unilateral 22 exercise of the UK prerogative. 23 MR EADIE: No, and I have made the point already, that it is 24 not only our prerogative powers that are in play. 25 THE PRESIDENT: I think the issue we are trying to focus on</p> <p style="text-align: center;">Page 119</p>
<p>1 about changes in European law, changes from time to time 2 in European law, or do you say that the phrase also 3 encompasses rights being changed and remedies being no 4 longer provided for as a result of withdrawal from the 5 EU? 6 MR EADIE: My Lord, I respectfully submit that it is 7 a recognition that -- and I will come to develop this 8 point -- the rights that are created are inherently 9 susceptible to change. 10 LORD WILSON: But change where? 11 MR EADIE: Change at the EU level, principally by exercise 12 of Government action. 13 LORD HODGE: (Inaudible comment, off microphone). 14 MR EADIE: Exactly. 15 LORD HODGE: (Inaudible) the common law, you have 16 (Inaudible) institutions. 17 MR EADIE: Yes, and my Lord used the word "recognition" 18 which we respectfully agree with, rather than, as it 19 were, creation, so as to create an analogue with other 20 domestic statutory rights, but it is recognising exactly 21 that. 22 LORD SUMPTION: I think the point that is being put to you 23 is that this may be concerned solely with variations in 24 the content of EU law and not with the possibility of 25 withdrawal from the whole scheme of EU law.</p> <p style="text-align: center;">Page 118</p>	<p>1 is whether you rely for your purposes in this appeal on 2 the words "from time to time". 3 MR EADIE: We do. 4 THE PRESIDENT: Because? 5 MR EADIE: Because it demonstrates that rights can be 6 affected directly by the exercise of Government power on 7 the international plane. 8 LORD MANCE: But there is a huge difference between 9 submitting to the rulings of a club committee as to what 10 the club rules are, the dress code or whatever, if you 11 happen to be a member of a club, and not being a member 12 of the club at all, either being expelled or giving 13 notice. Isn't that the point that is being put to you 14 rather? 15 MR EADIE: My Lord, it is a scale point, therefore. We can 16 affect domestic legal rights and obligations in this way 17 through exercise, albeit not on our own because there 18 are other EU actors in play, we can affect domestic 19 rights in this way, by exercising our prerogative powers 20 on the international plane. 21 THE PRESIDENT: Do you say those words really just apply to 22 changes in, as it were, EU rules? 23 MR EADIE: They apply to changes in the corpus of EU law, 24 but what that illustrates is that the powers that exist 25 under the prerogative to engage with Europe in that way</p> <p style="text-align: center;">Page 120</p>

1 to achieve that domestic legal effect continue to inure.  
 2 Of course I accept that there is a difference in the  
 3 scale at least between the withdrawal, a leaving of the  
 4 club and a voting about whether or not you should wear  
 5 a tie in the dining room.  
 6 THE PRESIDENT: This is not really a major point in your  
 7 argument, though.  
 8 MR EADIE: It is a major point -- two major points, one is  
 9 that this is a conduit, and a necessary conduit and  
 10 therefore --  
 11 THE PRESIDENT: This emphasises it is a conduit through  
 12 which water is going to keep on passing.  
 13 MR EADIE: Yes, and therefore you do not imply anything  
 14 about control over exercise of prerogative power on the  
 15 international plane, because this is simply a conduit;  
 16 and the second is that the rights and obligations under  
 17 this provision created into domestic law once  
 18 transposed, are capable of being affected, including  
 19 removed from time to time, by actions which are at least  
 20 in part dependent with(?) other actors, on the exercise  
 21 of prerogative powers.  
 22 THE PRESIDENT: Yes, I see.  
 23 LORD SUMPTION: It may be that the answer to these questions  
 24 is different as you construe the Act with the additions  
 25 made in 2008 by comparison with what it would have been

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1 before. Although Article 50 only operates on the plane  
 2 of international law, from 2008 onwards, it was plain  
 3 that if the object of section 2 was to ensure that the  
 4 domestic law obligations were no wider than the  
 5 international law obligations, that included withdrawal  
 6 after 2008.  
 7 MR EADIE: Everyone knew they could leave, my Lord, yes.  
 8 There is quite a fundamental significance to  
 9 section 2, which is that, as you will recall, the  
 10 divisional court's judgment is fundamentally premised on  
 11 the idea that you cannot affect through the exercise of  
 12 a prerogative, you simply cannot do it. That is the  
 13 background constitutional principle, you cannot affect  
 14 rights in domestic law and here we know you can. The  
 15 rights can be affected, they can be altered, they can be  
 16 amended, they can be removed.  
 17 LORD CLARKE: It is not just a question of scale, as it  
 18 seems to me at the moment. The difficulty you have to  
 19 face up to, I think, is that what is envisaged is not  
 20 merely the size of the stream, as it were, coming down  
 21 the conduit may vary from time to time, and what  
 22 precisely its composition is varies from time to time,  
 23 but you are envisaging making the conduit completely  
 24 redundant by the sound of things.  
 25 MR EADIE: My Lord, if you withdraw, that is the effect.

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1 LORD REED: That is different in nature, one might argue,  
 2 from merely a change in the composition or the quality  
 3 of the water that is flowing down the conduit.  
 4 MR EADIE: My Lord, I accept -- I am not sure much is going  
 5 to turn on whether we characterise it as a difference of  
 6 nature or a difference of scale, it is the same point:  
 7 is there a distinction between withdrawal, complete  
 8 removal of these rights, and not? That has to be  
 9 approached in sequence, as it were. The first point is,  
 10 we know from this, because it is precisely the essence  
 11 of it, that the Government can destroy rights, to use  
 12 the emotive phrase that litters the other side's cases,  
 13 we know they can do that; that is the very essence of  
 14 this model.  
 15 LORD MANCE: When you say we know they can do it, just  
 16 explain in what way do you say that the Government can  
 17 destroy --  
 18 MR EADIE: Because they can operate on the  
 19 international plane in the context of the EU to agree to  
 20 various forms of directly affected measure, regulations,  
 21 matters of that kind, and the consequence of that may  
 22 well be that the rights that exist on day one either are  
 23 altered on day two or cease to exist on day two.  
 24 LORD MANCE: They certainly have no right to do it; they may  
 25 be floated(?) in many contexts.

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1 MR EADIE: They may be. All of that is true, but it all  
 2 depends upon the Government being able to act within  
 3 that partnership, if that is the right way of looking at  
 4 it, on the EU plane.  
 5 LORD MANCE: That is what is contemplated by this Act, that  
 6 the Government will, under the EU law-making  
 7 institutions, play its part and that may lead to changes  
 8 in one direction or another. I think the question is  
 9 whether what is contemplated by this section also  
 10 includes withdrawal from the treaties.  
 11 LORD CARNWATH: Surely dealing with the argument --  
 12 THE PRESIDENT: Let him answer the question.  
 13 LORD CARNWATH: Sorry.  
 14 MR EADIE: My Lord, there are undoubtedly differences  
 15 between withdrawal entirely and the affecting of the  
 16 corpus of rights from time to time, but what it  
 17 illustrates is that the Government can remove rights  
 18 under this basis, and that fundamentally, we  
 19 respectfully submit, causes a problem for the reasoning  
 20 and analysis of the divisional court. When you come to  
 21 ask the bigger question, does this contemplate  
 22 withdrawal, my submission is that it contemplates and is  
 23 premised upon all of the Government's prerogative powers  
 24 on the international plane continuing to exist.  
 25 That is the fundamental premise on which this sits.

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<p>1 I am going to come to develop the submission in                  2 a second, but what that means is that the rights that                  3 are conferred into domestic law by this section are                  4 inherently limited. They are inherently limited by the                  5 ability to act in concert with others on the                  6 international plane, under the EU auspices and all the                  7 various ways that they make and create rights and                  8 obligations from time to time; and it is inherently                  9 limited because at a much more fundamental level, all of                  10 this is premised on the continued existence of that                  11 basic relationship.                  12 LORD CARNWATH: Can I put my point. I don't quite                  13 understand why we are spending so long on the 1972 Act,                  14 because I mean your main point -- you have to address                  15 the divisional court's point that it cannot affect                  16 rights at all, but your main point is that things change                  17 in 2008 --                  18 MR EADIE: 2008, 2011, and 2015.                  19 LORD CARNWATH: -- where you for the first time get                  20 Article 50, and of course the key thing with Article 50                  21 is the two-year automatic exit, which is a completely                  22 new feature.                  23 MR EADIE: My Lord, yes. I agree with all of that. Can                  24 I just finish the answer on scale, if I can call it                  25 that, scale/nature, and the answer, one of the answers</p> <p style="text-align: center;">Page 125</p>	<p>1 MR EADIE: My Lord, that is its core significance,                  2 I entirely agree. That is its core significance, but as                  3 I say, what it does do is to demonstrate that the rights                  4 themselves -- forget about whether or not there is any                  5 implication because it doesn't deal with withdrawal                  6 expressly, of course not. So the question is what                  7 implication is to be derived from it.                  8 THE PRESIDENT: Very well.                  9 MR EADIE: The best implication, or the only real                  10 implication from it, we submit, is not that it controls                  11 the prerogative power which sits alongside, but that                  12 domestic legal rights that are recognised in the way set                  13 out in section 2 can be affected by the Government                  14 acting within those EU constitutions.                  15 THE PRESIDENT: Thank you very much.                  16 LORD MANCE: If the Government were to give notice --                  17 I think that it is accepted that before section 50, the                  18 Government could have extracted the UK internationally                  19 from the European treaties.                  20 MR EADIE: Yes.                  21 LORD MANCE: If it had done so, it would have left a scene                  22 where some European Union obligations disappear, that                  23 once others remained as remnants of membership of the                  24 Community, all those which required specific domestic                  25 implementation, eg obligations to give effect to</p> <p style="text-align: center;">Page 127</p>
<p>1 on scale/nature is -- the twin answers are, nothing                  2 inconsistent with the continued existence of the power                  3 to withdraw in section 2, because it is premised on the                  4 prerogative powers continuing; and if you get to scale,                  5 and you take into account subsequent developments, you                  6 take into account in addition the 2015 Act.                  7 Now, again, the line may not be entirely straight at                  8 that point, but the fact of the matter is that it, like                  9 the rest of the legislation, subject to the controls we                  10 are about to come to, does nothing to take away or seeks                  11 to control the prerogative powers that exist, including                  12 withdrawal.                  13 THE PRESIDENT: As I understand it, sorry to keep on about                  14 section 2, but as I understand it, if it didn't say                  15 "from time to time" in section 2, your basic point would                  16 still hold that nothing in this Act takes away the                  17 fundamental prerogative, either by necessary                  18 implication, let alone expressly, upon which you rely.                  19 All it from time to time does ultimately is merely to                  20 give a bit of support to that argument by the notion                  21 that as a result of the Government's involvement in                  22 decisions in Luxembourg or Brussels, that the laws in                  23 this country will be changed through the exercise of the                  24 prerogative, and that is really as far as it goes, is                  25 that right?</p> <p style="text-align: center;">Page 126</p>	<p>1 directives and so on; is that easy to contemplate in the                  2 context of section 2, which contemplates regulations and                  3 so on to implement -- it doesn't have any provision for                  4 the event of the prerogative being exercised to                  5 disimplement the treaties.                  6 MR EADIE: My Lord, yes, we respectfully submit it is                  7 consistent, because the fundamental premise for                  8 section 2 is we continue to be members and they are --                  9 it is dealing with the transposition of the rights and                  10 obligations such as they are. The points that my Lord                  11 has been putting to me are the mechanics of exit, as it                  12 were. We are in that position now, hence eg the Great                  13 Repeal Bill that is proposed, where you put everything                  14 that used to be EU law on to the domestic statute book,                  15 and it is easier then to pull out and make policy                  16 decisions policy area by policy area.                  17 LORD MANCE: You say again, Parliament's only role is simply                  18 to give effect to whatever the executive decides at the                  19 international level.                  20 MR EADIE: Exactly so, at that stage and at that base level.                  21 If one is worrying about scale, one is saying: what                  22 implications can we draw from this; you don't stop                  23 there, you wind the clock on to the point when the                  24 decision is actually being made and Parliament has at                  25 that point decided that it should submit that very</p> <p style="text-align: center;">Page 128</p>



<p>1 question with all its implications to the people in the 2 referendum. But there is no implication the other way, 3 in section (Inaudible). Indeed the one thing that is 4 clear, we respectfully submit, subject to acting with 5 others, the point my Lord, Lord Mance made, the one 6 thing that it is clear about 2(?), is that the things 7 that the Government does on the international EU plane 8 have, as it were, direct effect into our domestic law, 9 including the removal of rights.</p> <p>10 I suspect the submissions I was going to make on 11 section 2 can now be rather shorter, but can I just run 12 through them anyway just in case.</p> <p>13 The next point I was going to make about section 2, 14 the first one having been conduit, the next one was 15 going to be that section 2 recognises rights and 16 obligations created elsewhere and altered elsewhere, in 17 other words on the international plane. There are 18 therefore two necessary preconditions to the rights and 19 obligations having effect in domestic law. (a), the 20 general conduit that is section 2, and (b), acting under 21 the prerogative by the Government shaping and creating, 22 removing and altering that scheme of rights and 23 obligations.</p> <p>24 So these are, as section 2 expressly recognises, 25 rights and as section 2 puts it, created and arising by</p> <p style="text-align: center;">Page 129</p>	<p>1 respond that the wording and the concept, that 2 definition, was necessary for the structure which 3 transposes rights created on the international plane, as 4 is recognised in that section, and it implies no 5 continuation of those rights.</p> <p>6 That is the second of the points, as it were, so 7 conduit and rights and obligations, secondly created 8 elsewhere and altered elsewhere. And flowing from that, 9 the third point perhaps on 2 is that those rights are in 10 nature inherently limited or contingent as already 11 indicated.</p> <p>12 What that does, once you recognise that they are 13 inherently limited or contingent, is that it serves to 14 undermine, we submit, any statement of principle that is 15 expressed too generally, or that it is taken from one 16 context, where it may remain true, and transplanted into 17 a different context; in other words, if you take the 18 statements in particular, and I will come back to this 19 when I deal directly with the point, take the 20 statements from Lord Oliver about self-executing 21 treaties and prerogative not being capable of being used 22 to alter the law of the land; but we know under this 23 model it can do precisely that.</p> <p>24 It also strikes fundamentally at the proposition 25 that the giving of notice or withdrawal is in some way,</p> <p style="text-align: center;">Page 131</p>
<p>1 or under the treaties.</p> <p>2 THE PRESIDENT: Yes.</p> <p>3 MR EADIE: That is where they are created and/or they arise.</p> <p>4 Those rights are simply then, again, track back to the 5 wording in 2(1), recognised, available in law and 6 enforced and allowed accordingly. The creation is on 7 the international plane. The explanation for that 8 structure is that treaty dependent rights are not and 9 could not be created by Parliament, depending, as they 10 do, on international, including Government prerogative 11 action.</p> <p>12 That point serves to undermine at base, we submit, 13 the truth and force of any analogy with rights properly 14 described as having been created in the sense of defined 15 by Parliament on the domestic plane. Of course, rights 16 and obligations created under the treaties, the wording 17 used, includes all the ways in which EU law is created, 18 so it includes regulations which have directly effective 19 legal impact and where the Government acts representing 20 the UK, negotiating and agreeing those sorts of 21 measures.</p> <p>22 The divisional court also relied upon the concept of 23 an enforceable Community right that you see at the end 24 of 2(1), and they indicate that it implies, as it were, 25 that Community rights would continue. We respectfully</p> <p style="text-align: center;">Page 130</p>	<p>1 shape or form to be regarded as constitutionally 2 objectionable, because the effect would be to remove 3 rights currently enjoyed under the ECA. So ultimately 4 it would, but that is the essence of the rights created 5 by the ECA anyway; they are inherently limited, 6 inherently dependent upon and contingent upon actions 7 occurring on the international plane.</p> <p>8 THE PRESIDENT: Yes.</p> <p>9 MR EADIE: So one can analyse it, as I think Lord Millett 10 does in his article, on the basis that the withdrawal 11 from the EU and the giving of notice by the Government 12 will simply cause those rights to which the ECA gives 13 life in domestic law to expire in the way envisaged by 14 the 1972 Act and in accordance with their terms. It is 15 not therefore accurate to describe the process of 16 withdrawal, the starting of that process, as, in any 17 real sense, revoking or overriding statutory rights.</p> <p>18 LORD CLARKE: You say that Lord Millett's analysis is 19 correct?</p> <p>20 MR EADIE: We do, and we respectfully adopt it and at a more 21 fundamental level, it is a point I made already, at 22 a more fundamental level, we submit that this 23 recognition of their inherently limited nature, their 24 contingent nature indicates that all of the rights and 25 obligations to which section 2 gives effect are</p> <p style="text-align: center;">Page 132</p>

<p>1 dependent upon the continued relationship between the UK 2 and the EU. 3 There is no need to imply anything into section 2 4 for that to be accurate; it is simply inherent in the 5 very nature of the rights and obligations that section 2 6 creates. 7 LORD CLARKE: You did give us the reference to 8 Lord Millett's paper before. Can you remind us where it 9 is. 10 LADY HALE: It is 34, 471. 11 LORD CLARKE: Thank you. 12 MR EADIE: It is inherently dependent, not merely upon 13 action from time to time, but upon more fundamentally 14 the continuation of that basic relationship. 15 THE PRESIDENT: Yes. 16 MR EADIE: It depends upon the maintenance of that 17 relationship. The club's rules apply and the right to 18 elect people to its institutions, for example, are 19 dependent upon the continued membership of the club. 20 THE PRESIDENT: Yes. 21 MR EADIE: It is also to be noted in relation to section 2 22 that its effect is expressly limited to giving effect to 23 treaty rights and obligations in the UK. It gives 24 effect to rights and obligations which are, as it says, 25 without further enactments to be given legal effect or</p> <p style="text-align: center;">Page 133</p>	<p>1 So those are the core provisions of the 1972 Act and 2 just before going to the remainder of the sequence, as 3 it were, there is a question which hangs over the 4 remainder of the EU-based legislation here, which is 5 that if the 1972 Act had the effect of removing 6 prerogative powers to act in a variety of ways in 7 relation to the EU law structures, if that was, as it 8 were, removed or taken away by implication, then it is 9 jolly difficult, it might be thought, to see what the 10 later legislation is doing, with its nuanced scheme of 11 control over that very thing. 12 LORD MANCE: Isn't the point put against you on that that it 13 is dealing or addressing -- dealing with or addressing 14 increases in European competences rather than 15 diminution? 16 MR EADIE: It is in part doing that, but we will see when we 17 get to the scheme of control, that it is actually 18 imposing a whole raft of controls in this entire area. 19 That is maybe the fundamental political driver for some 20 of it, the ever increasing expansion of EU law, but that 21 is a matter of law. It is pretty much a specific aspect 22 of the point I have already made in relation to CRAG. 23 It is Parliament's considered decision-making as to what 24 controls it wishes to impose in this context. 25 The first of the later pieces of legislation is in</p> <p style="text-align: center;">Page 135</p>
<p>1 used in the UK. It doesn't, therefore, give effect to 2 treaty rights which are enforceable in or against other 3 member states. It doesn't create a right of a British 4 citizen to live in France, because it couldn't possibly 5 do that. We could not legislate for their ability to 6 live in France. That would be a matter for France to 7 regulate. 8 What that indicates is that the ECA only intended to 9 regulate the treaties in the UK and didn't have the 10 wider purpose of authorising entry into the treaties, or 11 creating or guaranteeing the full range of rights 12 arising under the treaties. 13 It is a much more limited purpose. That is 14 section 2. 15 Section 3, which deals with the creation in relation 16 to section 3 -- sorry, I am just focusing on the points, 17 trying to focus on the points that the divisional court 18 made about section 3, and we have dealt with that in our 19 annex at paragraph 5(7) -- I don't repeat that. It no 20 doubt does assume the existence of issues of EU law 21 which the CJEU can deal with, but it doesn't imply or 22 state that the rights and obligations under EU law 23 continue to exist. It tells one nothing other than, for 24 as long as we are members of the EU, then there needs to 25 be an institution which resolves issues about rights.</p> <p style="text-align: center;">Page 134</p>	<p>1 the same core volume, but you jump forwards to tab 112, 2 so it is core volume 1, tab 112. 3 THE PRESIDENT: Page? 4 MR EADIE: Page 4218. 5 THE PRESIDENT: Thank you. 6 MR EADIE: It is the 1978 Act. 7 THE PRESIDENT: Yes. 8 MR EADIE: This is an important step, we submit, because for 9 the first time, Parliament decides to control an aspect 10 of the treaty prerogative; in other words it decides to 11 control how the Government is able to act on the 12 international plane, and it does so expressly. If you 13 go to page 4219, section 6 required primary legislation 14 to be passed before any treaty increasing the powers of 15 the European Parliament could be ratified. So that was 16 an express and a specific and limited control of the 17 treaty prerogative. Parliament decides what element of 18 the treaty prerogative it wants to limit and it chose 19 the ratification of particular treaties and it chose the 20 form of control of primary legislation. 21 If the treaty prerogative has been excluded, then 22 this limited form of control -- this very specific form 23 of control becomes difficult indeed to explain. That 24 had two important consequences. The first, and for the 25 first time, the Crown is no longer free to exercise the</p> <p style="text-align: center;">Page 136</p>

<p>1 treaty prerogative however it chose. This precedes CRAG                  2 by some years, you will recall. It could not any longer                  3 agree and ratify without prior reference to Parliament                  4 in this specific context.                  5 The second --                  6 THE PRESIDENT: It could agree, it couldn't ratify, is that                  7 right?                  8 MR EADIE: It could agree, it couldn't ratify, exactly.                  9 THE PRESIDENT: I see.                  10 MR EADIE: Secondly, it explains the subsequent chronology                  11 of parliamentary involvement. After this Act Parliament                  12 always passed implementing legislation for the major new                  13 EU treaties before and not after they were ratified, but                  14 the reason for that is because section 6 meant that                  15 Parliament had imposed itself into the process.                  16 THE PRESIDENT: Yes.                  17 MR EADIE: That is the 1978 Act.                  18 THE PRESIDENT: Right.                  19 MR EADIE: Then there is 2002, which is in -- it is actually                  20 in the supplemental bundle, the little black 11 KBW                  21 bundle. It was omitted because it was replaced in the                  22 2011 Act. Just so you see the sequence, it is tab 4.                  23 THE PRESIDENT: Yes, thank you. And that is similar to                  24 section 6.                  25 MR EADIE: Virtually identical. It was re-enacted in</p> <p style="text-align: center;">Page 137</p>	<p>1 with Article 50. Article 50, we know did not pass                  2 unnoticed. If you could keep that open but briefly go                  3 to authorities bundle 30, tab 402, those are the                  4 explanatory notes.                  5 THE PRESIDENT: What is the MS number?                  6 MR EADIE: MS number 10346.                  7 THE PRESIDENT: Thank you. And you see that it didn't pass                  8 unnoticed, Article 50, because if you look on 10346,                  9 just above the bullets in paragraph 5, the principal                  10 changes made by the treaty are as follows, so principal                  11 changes made by the treaty, over the page, 10347, fourth                  12 bullet down.                  13 Of course, just by way of note, that was, and you                  14 can put that bundle away, that was -- that, Article 50,                  15 was a provision that increased the powers of the                  16 European Parliament because they had to be involved in                  17 the Article 50 process, and so Parliament had to grant                  18 specific consent inter alia for that reason. That                  19 explains the content, if you go back to page 119 in                  20 volume 1, that we have just been looking at into the                  21 2008 Act, that explains the content of section 4. So                  22 the 2008 Act adds Lisbon to the list of now renamed EU                  23 treaties designated by the ECA and the effect is that                  24 Parliament is acknowledging that the other rights and                  25 obligations under other parts of the EU treaties, and we</p> <p style="text-align: center;">Page 139</p>
<p>1 section 12 of the 2002 Act, but of course the                  2 significance of it, the added significance potentially                  3 is that the 1978 act was in 1978 and we are now in 2002.                  4 Yes, the assembly had become a Parliament but time                  5 period is of interest because Parliament has now seen                  6 numerous major treaty revisions, negotiated by the Crown                  7 under its prerogative, and has chosen not to implement                  8 any further restrictions on the prerogative treaty                  9 power. This simply replicates section 6 originally                  10 passed with slightly different language in 1978.                  11 So that is the 2002 Act. Back to core volume 1, if                  12 you would, and tab 3. This is the European Union                  13 (Amendment) Act of 2008, MS 117. It incorporated                  14 Lisbon. The features perhaps to note are these. In                  15 section 5 on MS 119, it altered the position we have                  16 just seen in section 12 of the 2002 Act, expanding the                  17 circumstances in which primary legislation was required                  18 before ratification of any amendment to the founding                  19 treaties made by ordinary revision procedure.                  20 THE PRESIDENT: Yes.                  21 MR EADIE: So there is an example of primary legislation,                  22 primary legislative authority being required by express                  23 provision.                  24 But note in relation to a very specific matter.                  25 This piece of legislation also had to consider and deal</p> <p style="text-align: center;">Page 138</p>	<p>1 have touched on this point before in debate, were now                  2 subject to the exercise of the Article 50 withdrawal                  3 right.                  4 So the idea that they could thereafter be regarded                  5 as set in stone or permanent cannot be maintained after                  6 that.                  7 LORD MANCE: The increase in powers of the European                  8 Parliament related to a whole range of things.                  9 MR EADIE: It did, that is why I said inter alia, but                  10 my Lord is right. This is one of them, because you will                  11 remember the European Parliament had some involvement in                  12 the Article 50 process. So that is the second of the                  13 bits of significance as it were. We have gone from 5                  14 back to 4, and then we go forward to section 6,                  15 page 120. This is significant because for the first                  16 time, Parliament passes in section 6 a series of                  17 parliamentary controls over decisions ministers took                  18 under various parts and processes of the treaties.                  19 So this is not control over entering into new                  20 treaties or ratifying new treaties; this is about the                  21 performance by the Government of its functions under the                  22 treaties, prerogative powers being exercised therefore.                  23 THE PRESIDENT: I understand.                  24 MR EADIE: The list is set out in section 6(1) and applied                  25 both to the TEU and the TFEU, and the terms of</p> <p style="text-align: center;">Page 140</p>

<p>1 section 6(1) are restrictive. The minister of the Crown                  2 cannot exercise the prerogative power of the Crown in                  3 respect of specific enumerated decisions, but they are                  4 enumerated, the controls are nuanced; and they are not                  5 merely identified, as it were, the specific things that                  6 now need some form of parliamentary authorisation, but                  7 the mechanism of control is itself nuanced.                  8 You see that the species of control that this                  9 section provides for in section 6(2) is parliamentary                  10 approval of motions. So you have got within the same                  11 Act, the various decisions that we say Parliament would                  12 be expected to make if it entered into the territory of                  13 trying to control the Government's prerogative powers in                  14 the way that it saw fit.                  15 We have the requirements carried over from the                  16 previous legislation for primary legislative authority                  17 in some contexts, see section 5, and now we have got                  18 a different species of parliamentary control, this time                  19 motions, and approval of motions in section 6(2).                  20 LORD SUMPTION: Is it in fact that different? As                  21 I understand it, the 2008 Act extended to a large number                  22 of species of decisions, because the Lisbon treaty had                  23 created a number of procedures for modifying the                  24 operation of the treaty, which would previously have                  25 required a new treaty, but under the terms of in</p> <p style="text-align: center;">Page 141</p>	<p>1 decision, which one should be subjected to any form of                  2 control, and you have decisions about what species of                  3 control, what mechanisms of parliamentary control are                  4 appropriate, demonstrating, we respectfully submit, the                  5 fluidity with which that issue is approached.                  6 LORD MANCE: These are all procedures under which the                  7 competences of the institutions of the EU could be                  8 increased or would be increased.                  9 LORD SUMPTION: Or the voting system.                  10 LORD MANCE: Yes, either that you could have qualified                  11 majority voting and so on, simplified revision                  12 procedure, they are all procedures which would lead to                  13 a expansion of the legislative capacity or activity.                  14 MR EADIE: True. True. But you have my points about the                  15 significance of it, despite the truth of that statement.                  16 THE PRESIDENT: We understand.                  17 MR EADIE: The key point is the obvious, but, we                  18 respectfully submit, thoroughly important one, when you                  19 are trying to assess parliamentary intention, against                  20 this backdrop, a series of decisions, forced however,                  21 based on whatever policy considerations, legislative                  22 policy considerations Parliament saw fit to feed into                  23 the way in which this Act was structured. You have                  24 primary legislative rule, you have a different form of                  25 parliamentary approval, you have specific types of</p> <p style="text-align: center;">Page 143</p>
<p>1 particular article 48, but there are also other                  2 articles, it could be done by inter-governmental                  3 agreement internally.                  4 So effectively, what section 6 is doing is simply                  5 carrying out the policy of section 5, but applying it to                  6 a wider range of decisions which had a similar effect.                  7 MR EADIE: And introducing a different mechanism for                  8 parliamentary control. It doesn't have to be primary                  9 legislative like section 5; it can now be by a motion                  10 and agreeing to a motion, but my Lord is right.                  11 LORD SUMPTION: The reason for that difference is presumably                  12 that the treaty, having been included in the definition                  13 of treaties under the 1972 Act, would otherwise simply                  14 have automatically have carried any changes through into                  15 English domestic law, so you didn't need primary                  16 legislation, resolution (Inaudible).                  17 MR EADIE: Well, I am sure that is right, but whether that                  18 is right or not, you have still got Parliament thinking                  19 about what mechanisms of control it wants to introduce,                  20 and deciding that it is going to do it in this nuanced                  21 way. What the explanation, the base explanation for                  22 that might be, I am sure my Lord is right about that,                  23 the basic structure of it and how it all worked and so                  24 on, but the fact of the matter is you have in this                  25 legislation, consideration of particular types of</p> <p style="text-align: center;">Page 142</p>	<p>1 decision being subjected to either or both of those                  2 features, and you don't have anything at all in relation                  3 to Article 50. Which did not pass unnoticed. Because                  4 it was one of the principal changes introduced by                  5 Lisbon, so they are looking --                  6 THE PRESIDENT: You have drawn us to Parliament's attention                  7 in the notes you took us to. Yes, we have that.                  8 MR EADIE: You are looking at the very power which is now to                  9 be exercised and you are looking at a piece of                  10 legislation which represents Parliament's considered                  11 response to the forms of control it wants to exercise,                  12 in relation to the new powers introduced by Lisbon, and                  13 Article 50 is not one of them.                  14 THE PRESIDENT: Thank you.                  15 MR EADIE: I mean, we pose one question, what species of                  16 control would Parliament have decided in 2008 it wished                  17 to subject Article 50 to? Section 5 or section 6? If                  18 there is not a good answer to that question, then it                  19 perfectly illustrates that Parliament's intention was to                  20 leave Article 50 well alone. It cannot be said it                  21 didn't realise it was there. It specifically identified                  22 it in the explanatory notes and said: here it is, it is                  23 one of the principal changes that has been introduced.                  24 THE PRESIDENT: I understand, thank you.                  25 MR EADIE: Just to finish on section 6, section 6(1)(a), you</p> <p style="text-align: center;">Page 144</p>

<p>1 will note, which precludes a minister voting in favour                  2 of a measure under Article 48(6) of the TEU, the                  3 simplified revision procedure, and that procedure                  4 allowed the European Council to adopt a decision                  5 amending all or part of the provisions of part 3 of                  6 TFEU, and part 3 of the TFEU includes the provisions on                  7 free movement.                  8 No need for a treaty amendment before -- a new                  9 treaty before amendment under this procedure; that                  10 plainly would alter the content or existence of the                  11 rights given under section 2(1) of the ECA, but on their                  12 case, the respondents' case, you could not do that                  13 without an Act of Parliament. How does that square with                  14 section 6 and its requirement not for primary                  15 legislation before a change is made to free movement                  16 rights, but simply a motion of each House. On their                  17 case, that would be a constitutionally retrograde and                  18 inexplicable step, and again, unless there is a good                  19 answer to that, their whole thesis becomes difficult to                  20 maintain, we submit.                  21 That is 2008. 2011, tab 6 in the same bundle,                  22 page 136 in the MS numbering, and again, it is in the                  23 same vein; section 6 of the 2008 Act and section 12 of                  24 the 2002 Act were repealed and replaced in the 2011 Act.                  25 That is 14(3), I think. This piece of legislation</p> <p style="text-align: center;">Page 145</p>	<p>1 controls by Parliament over the exercise of the                  2 prerogative under the EU treaties. Sections 2 to 10                  3 impose a series of different sorts of control, this time                  4 from referenda for some types of decision, through                  5 primary legislation to motions of approval. It imposes                  6 those controls over a series of different types of                  7 action, pursuant to the treaties, all of which would                  8 ordinarily and otherwise have been carried out,                  9 exercising precisely prerogative powers, from agreeing                  10 a new treaty to giving particular notifications under                  11 particular articles of a treaty.                  12 So by way of example, section 2 makes provision that                  13 a treaty which amends the TEU or the TFEU to confer a                  14 new competence on the EU may not be ratified unless                  15 the treaty is approved by an Act of Parliament and                  16 a referendum.                  17 LORD WILSON: Or the extension condition.                  18 MR EADIE: Or the extension condition. I am not going to go                  19 through the detail of it, but the detail is worked out                  20 in sections 3 and 4. But that is the first type as it                  21 were.                  22 Section 6, certain types of decisions of ministers                  23 exercising their treaty functions, as you see, are                  24 subjected to control by primary legislation again and                  25 referendum, including things like adopting the euro or</p> <p style="text-align: center;">Page 147</p>
<p>1 represents again a clear exercise of parliamentary                  2 control and precise parliamentary consideration of the                  3 very question: where should the proper division lie in                  4 relation to matters to do with EU law, between the                  5 prerogative on the one hand and parliamentary control on                  6 the other? What are the nature and types of control                  7 that are to be imposed, how is it all to work, how is                  8 that relationship to work?                  9 We know it started in the 1972 Act with the twin                  10 track, the prerogative continues, and so on. Now we                  11 have Parliament saying: we see how the world is                  12 developing and now we want to exercise very specifically                  13 some controls over the exercise of your powers on the                  14 international plane, forget about transposition, we are                  15 now going to control -- we saw the process starting in                  16 2008 -- we are now going to control the exercise of                  17 certain types of decision-making on the                  18 international plane.                  19 LORD CLARKE: Which section is it?                  20 MR EADIE: We have a few to come to, sections 2, 6, 7, 8, 9,                  21 10. Just by way of summary, and I will take you to some                  22 of them in a second, the result of this legislation is,                  23 we submit, the most significant and extensive set of                  24 legislative controls of the treaty prerogative ever                  25 seen. It represents a series of detailed and focused</p> <p style="text-align: center;">Page 146</p>	<p>1 removing border controls.                  2 LORD CARNWATH: Including article 53, rather oddly, on page                  3 MS 155 in schedule 1, and we heard (Inaudible) a sort of                  4 recognition of Article 50, at the bottom there.                  5 Curiously you seem to need a referendum to decide to                  6 extend --                  7 MR EADIE: I am not sure quite what the explanation for that                  8 is, because one would have thought the bigger beast in                  9 the room was leaving in the first place.                  10 LORD CARNWATH: But certainly I suppose you can say there                  11 was express recognition --                  12 MR EADIE: Of Article 50, my Lord, I am sorry, I had not                  13 picked that up, but you are right. Whatever the                  14 explanation, there it is.                  15 That is section 6. Section 7 deals with types of                  16 decision, again by ministers, exercising their treaty                  17 functions, and this time they are subjected to control                  18 by primary legislation, but not a referendum, and that                  19 includes strengthening the rights of EU citizens,                  20 7(2)(a), by way of example, not weakening or removing,                  21 no control over that; it is not designed in that way,                  22 the prerogative power is not controlled in that way.                  23 Section 8, we are going down, as it were, in terms                  24 of level of control, but the same point remains, these                  25 are nuanced controls, this is a critical Act.</p> <p style="text-align: center;">Page 148</p>

1 Section 8, a minister of the Crown may not vote in  
 2 favour of or otherwise support a decision under article  
 3 3(5)(2) of the TFEU, unless one of sections 8(3) to (5)  
 4 is complied with. That may be primary legislation or  
 5 motions in Parliament.  
 6 Section 9, certain notifications provided for under  
 7 the Lisbon treaties, and under article 3 of protocol 21  
 8 to the TFEU and the TEU on the position of the  
 9 United Kingdom and Ireland in respect of the area of  
 10 freedom, security and justice, cannot be given without  
 11 parliamentary approval. An approval here means motion,  
 12 not legislation.  
 13 Section 10 on the same theme. Again, motion is the  
 14 mechanism, see 10(5), so the point of all of that is  
 15 that Parliament has carefully selected -- these are the  
 16 punch lines -- the areas it wishes to control and it has  
 17 selected the ones about which it wishes to have a say.  
 18 It has done so both by way of identification of the  
 19 particular type of decision, and by setting a detailed,  
 20 careful and varied scheme as to the mechanics of  
 21 parliamentary control that it demands, and the rest, we  
 22 submit, is prerogative as normal. That is the only  
 23 proper inference of all of this, so the UK continues to  
 24 send ministers to council meetings voting on the vast  
 25 majority of the council's work without the 2011 Act

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1 applying to the body of work that they do.  
 2 LORD CLARKE: Am I right in thinking that where these  
 3 sections provided for a referendum, they also provided  
 4 that the referendum -- there should be a majority.  
 5 MR EADIE: In favour.  
 6 LORD CLARKE: In favour.  
 7 MR EADIE: Yes.  
 8 LORD SUMPTION: But they automatically produced the relevant  
 9 consequence, didn't they?  
 10 MR EADIE: They did, unlike the 2015 Act which my Lord has  
 11 in mind.  
 12 LORD SUMPTION: Indeed.  
 13 MR EADIE: That is true.  
 14 That is true.  
 15 My learned friend is pointing out you are not forced  
 16 to do it, you can do it as a precondition, rather than  
 17 a requirement, if it does; so in other words if there is  
 18 a majority, you don't have to do it, it is just  
 19 a necessary precondition if you want to do it.  
 20 The final punch line is the obvious one, that  
 21 despite the fact that it knew full well that Article 50  
 22 was still in play, and despite the fact my Lord, Lord  
 23 Carnwath pointed out that 50(3) is referred to in one of  
 24 the schedules, in schedule 1 on page 155, there is  
 25 nothing to indicate that it is purporting to restrict or

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1 control the Crown's decision-making powers under  
 2 Article 50.  
 3 LORD MANCE: I suppose it can be said again in relation to  
 4 this that these are all restrictions designed to prevent  
 5 a creep in EU competence or an increase, and even the  
 6 restriction relating to section -- to Article 50,  
 7 paragraph 3, is designed to avoid making it more  
 8 comfortable or easier for someone to leave the EU,  
 9 isn't it?  
 10 MR EADIE: My Lord, yes, but the two points that might be  
 11 thought flow from that are firstly that irrespective, as  
 12 it were, of the underlying motivation or themes linking  
 13 these changes, they still represent nuanced  
 14 parliamentary control in the very area; but the second  
 15 and more impertinent thought might be that if that is  
 16 truly the explanation, where is the problem where you  
 17 are not doing that. Of course there is a different set  
 18 of questions around how fundamental or grand that thing  
 19 might be.  
 20 LORD MANCE: You may at the time, I don't know what the  
 21 political thinking was at the time, but you may at the  
 22 time have been happy with what you had, but not wished  
 23 to extend it.  
 24 MR EADIE: You now may not. All that illustrates, it might  
 25 be thought, is that there may be a danger in seeking

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1 delve too far below for a common theme that is said to  
 2 affect the nature of this legislation. What they have  
 3 undoubtedly done is to look at the scheme of powers that  
 4 the Crown or the Government previously exercised on the  
 5 international plane in this sphere and said: we are  
 6 going to control that, that, that, that and that,  
 7 brackets, and not that; and that, we respectfully  
 8 submit, is the key significance of this act.  
 9 THE PRESIDENT: Yes.  
 10 MR EADIE: Before moving to the 2015 Act, it may be worth  
 11 mentioning a point which the divisional court place some  
 12 reliance on, which was that in a case called Thoburn,  
 13 Lord Justice Laws had described the ECA, and I think it  
 14 would follow logically that he is referring, or he can  
 15 be taken as referring to the entire scheme of EU  
 16 legislation, as being constitutional in nature. The  
 17 divisional court placed some reliance upon that, because  
 18 it was thought to suggest that it would make it less  
 19 likely because of that description that Parliament would  
 20 have intended that the rights conferred by the ECA could  
 21 be taken away by prerogative powers.  
 22 However, in relation to that point, firstly,  
 23 constitutional status in that sense entails that  
 24 legislation itself is protected against implied repeal  
 25 by later legislation appearing to be inconsistent with

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1 it. So that was the force of the point, that was the  
 2 point that was really in issue in Thoburn, so it is  
 3 a doctrine which sounds in the principles that are --  
 4 that the courts have decided should govern implied  
 5 repeal, and those are, of course, common law principles  
 6 discovered by the courts as a mechanism for dealing with  
 7 that set of issues. It doesn't tell you anything about  
 8 Parliament's intention or about the interpretation of  
 9 a statutory scheme.  
 10 It cannot therefore, we respectfully submit, be used  
 11 to displace the De Keyser approach or what the scheme,  
 12 read properly as a whole, tells you about parliamentary  
 13 intention.  
 14 LORD WILSON: Mr Eadie, reading your case I wondered exactly  
 15 what your position was on constitutional status.  
 16 I think you have just indicated you accept that common  
 17 law does now have a doctrine of constitutional status,  
 18 and I think you accept that the 1972 Act is a statute of  
 19 constitutional status, but then you say, so what?  
 20 MR EADIE: So what. I do. We certainly have not taken  
 21 issue with that description or indeed the application or  
 22 the consequences of that description --  
 23 LORD WILSON: Very well.  
 24 MR EADIE: -- designation that Lord Justice Laws put on it  
 25 in Thoburn but we do say, careful, it is about implied

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1 repeal and you cannot just say: there is  
 2 a constitutional looking statute and ergo it has some  
 3 enhanced status which renders it less likely that the  
 4 Government could withdraw from the treaties that sit  
 5 alongside.  
 6 In any event, if you are to take that forward, so it  
 7 is a doctrine that sounds in implied repeal, is the  
 8 first point, but if you are taking constitutionality  
 9 rather more broadly as an indication of the importance  
 10 of legislation, then you don't just look at the  
 11 legislation and say: that might fit that sort of  
 12 description. You have to drag in all the other  
 13 essential foundations of the constitution that play into  
 14 the particular area.  
 15 LORD WILSON: But if the common law so far indicates that  
 16 the doctrine is one which, where there is  
 17 a constitutional statute, there cannot be implied  
 18 repeal, namely it cannot be repealed by a side wind,  
 19 I think one of the arguments against you is that for the  
 20 prerogative now to be emptying the 1972 Act of content  
 21 is a different sort of side wind.  
 22 MR EADIE: My Lord, that is one of the arguments put against  
 23 me, and my essential answer to it is that  
 24 constitutionality is to be judged in the round, and it  
 25 includes the prerogative as an essential foundation

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1 constitutionally; it includes the 1972 Act being set up  
 2 at its base on the basis of continued dualist operation;  
 3 and it includes, if ultimately you are searching for  
 4 Parliament's intention which is what this game is all  
 5 about, these are simply aids to working out what  
 6 Parliament has intended by the legislative scheme, it  
 7 includes, we submit, the entirety of the legislative  
 8 scheme. So if the 1972 Act is to be described as  
 9 constitutional, that is a description which cannot be,  
 10 as it were, imposed on the 1972 Act and then forgotten  
 11 about when you look at the later legislation dealing  
 12 with exactly the same sphere or context.  
 13 So if you are looking at the scheme and you are  
 14 saying constitutional, you take into account dualism,  
 15 you take into account the existence of prerogative, and  
 16 most importantly, perhaps, and this is the theme I am  
 17 now on, you take into account the entirety of the  
 18 legislative scheme. What that tells you is that when  
 19 Parliament wants to control the exercise of executive  
 20 power on the international plane, it says so and it does  
 21 so, not merely generally in relation to CRAG, with its,  
 22 as it were, general controls over the treaty  
 23 ratification, but the very specific and nuanced scheme  
 24 that I have just taken you through. That is my answer.  
 25 LORD WILSON: Thank you.

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1 MR EADIE: Yes but ... is the answer.  
 2 LORD REED: Perhaps in your submissions tomorrow, I would  
 3 certainly be interested in knowing how what you have  
 4 just said about the need for constitutionality to be  
 5 judged in the round, the dictum you have cited from  
 6 Lord Bingham's judgment in Robinson about the need for  
 7 flexibility in applying constitutional principles, the  
 8 whole of that may feed into the approach you take to the  
 9 effect of the -- or relevance of the referendum result  
 10 to these proceedings.  
 11 MR EADIE: Yes.  
 12 My Lord, I am going to turn now to the 2015 Act, and  
 13 if at the end of that I have not answered my Lord's  
 14 question, someone will make a note and nudge me and  
 15 I will do it first thing in the morning.  
 16 The 2015 Act is in the same volume of authorities,  
 17 at tab 7, MS 160, and we don't need to spend long on the  
 18 body of the Act itself. It contains all sorts of  
 19 provisions about all sorts of things and it makes no  
 20 express provision about the legal consequences of the  
 21 referendum.  
 22 So the significance, if any, in our context of the  
 23 Referendum Act is not in relation to what it says, but  
 24 what it doesn't say.  
 25 My fundamental submission on the 2015 Act is that

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<p>1 that absence does not mean that the 2015 Act is legally 2 irrelevant. That is how it was treated by the 3 divisional court.</p> <p>4 Indeed we make the submission that it would be 5 little short of bizarre if that were to be the position. 6 Little short of bizarre, because the 2015 Act posed and 7 put to a vote of all the people of the United Kingdom, 8 the very question which the divisional court and the 9 respondents say has to be refered to Parliament. And that 10 prompts the question: was Parliament really in 2015 in 11 passing that Act, in setting up the referendum, doing no 12 more than simply reserving to itself the right to decide 13 whether to leave or not as it saw fit.</p> <p>14 Not merely is that highly improbable, but it would 15 lead, it would run counter, we respectfully submit, to 16 the repeated statements by ministers and by the 17 Government, both in the debates leading to the Act, in 18 Parliament, and in statements outside Parliament.</p> <p>19 We have, in our case, if you could just find that 20 for a moment, in footnote 4, a characteristic 21 understatement -- a footnote, at the various statements 22 upon which we rely.</p> <p>23 LADY HALE: Page reference? 24 MR EADIE: I am going to give you them 12337. 25 LADY HALE: Thank you.</p> <p style="text-align: center;">Page 157</p>	<p>1 something will continue to exist; but this is a whole 2 different beast. The answer is, to come perhaps 3 immediately and directly to my Lord, Lord Reed's 4 question, that this serves to allay that constitutional 5 concern, and the reason that I think my Lord, Lord Reed 6 reminded me of Lord Bingham in Robinson was because one 7 should not be unduly concerned if one is looking, as it 8 were, for mechanisms of parliamentary control and 9 parliamentary interest, one should not be too concerned 10 about drawing too straight or direct a line.</p> <p>11 You look to see whether, in the real world, 12 Parliament has effectively sanctioned, to put it 13 loosely, rather than legally, that which the Government 14 now proposes to do through the exercise of the 15 prerogative. I make it entirely clear, we do not assert 16 that the 2015 Act provides the source, a statutory 17 source of power; the significance of it is in what it 18 doesn't say.</p> <p>19 THE PRESIDENT: But if you are wrong, standing at 1972, 20 prerogative cannot have been exercised as you argue 21 today, in 1972, how do you say that has changed? Do you 22 say that has changed as a result of subsequent 23 legislation? 24 MR EADIE: We say the legislative scheme has to be looked at 25 as a piece. This is the current issue.</p> <p style="text-align: center;">Page 159</p>
<p>1 MR EADIE: 12337, and you will see that -- I don't think 2 your version of our case probably has MS numbers in it, 3 does it? 4 THE PRESIDENT: Yes. 5 MR EADIE: Have you got MS numbers for footnote 4 -- 6 THE PRESIDENT: We don't have cross-references, if that is 7 what you mean, but this was clearly stated on many 8 occasions, is that what you are -- 9 MR EADIE: Exactly so. 10 THE PRESIDENT: We have that. 11 LORD MANCE: What is the nature of this argument? Is it 12 only relevant if there was up until this moment a -- no 13 right to use the royal prerogative, in which case you 14 are arguing, are you, that the Act reintroduces a right 15 to use the royal prerogative, because if there is 16 already -- or is it just confirmatory -- 17 MR EADIE: Yes, and it is addressing, I am going to tell you 18 this again in a moment if I may, it proceeds on the 19 premise that the prerogative is available, but if the 20 concern is, and some of the questions that have been 21 asked by the court indicate that the concern may be that 22 there is a difference between the ability of Government 23 under section 2 to go all the way back to 1972 to alter 24 the corpus of rights from time to time, brackets, but 25 the implicit assumption underlying it all is that</p> <p style="text-align: center;">Page 158</p>	<p>1 THE PRESIDENT: I know you do, but it is the logic of your 2 argument by saying looked at as a piece -- we could 3 conclude that if we were judging this in 1973, we would 4 be against you, but by judging it in 2016, we could be 5 in your favour. 6 MR EADIE: I am not sure that is the logic of my argument. 7 I am not sure I am asserting that the later legislation 8 provides a statutory authority or basis -- 9 THE PRESIDENT: Why are we looking at it then? 10 MR EADIE: Because all sorts of concerns have been raised 11 inter alia around the scale of the change, and whether 12 or not this is relevant constitutionally, that 13 Parliament has passed this legislation and has set it 14 up. 15 LORD SUMPTION: It is relevant only to this extent, isn't 16 it, that if it is submitted in the 1972 Act nobody 17 contemplated withdrawal, by the time the Act has been 18 amended in 2008, that argument seems no longer 19 available, but it doesn't seem to have any other 20 significance than that. 21 MR EADIE: My Lord, can I develop the core points we make on 22 it, and give you them, just so I don't go off-piste and 23 give the wrong answer -- 24 THE PRESIDENT: Do that, and then we may come back to our 25 questions. That is fair enough.</p> <p style="text-align: center;">Page 160</p>



1 LORD CLARKE: Can I ask one question arising out of the  
 2 material that was available. In paragraph 107 of the  
 3 divisional court judgment, they say that -- they refer  
 4 to a document which they say made it clear to Parliament  
 5 that it was only to be an advisory referendum. Is that  
 6 correct, and if so, where is the document?  
 7 MR EADIE: It is in bundle 18; tab 202, MS 6279. I am  
 8 slightly out of my course because I was going to give  
 9 you another --  
 10 THE PRESIDENT: You were going to come back to this.  
 11 MR EADIE: No, let's deal with it now, because we are there  
 12 but if you still have, just by way of -- let's have them  
 13 both open at the same time, if you still have our case  
 14 footnote 4.  
 15 THE PRESIDENT: Yes, we do.  
 16 MR EADIE: I was going to add in, if I may, one further  
 17 reference to footnote 4.  
 18 THE PRESIDENT: What is that?  
 19 MR EADIE: Which is authorities 39, tab 509, supplemental MS  
 20 981, a statement by the foreign secretary on second  
 21 reading of the bill, effectively saying this is going to  
 22 be decisive, it is a matter for the people to decide,  
 23 and not anyone else.  
 24 So --  
 25 LORD MANCE: What does this go to? Construction of the --

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1 MR EADIE: Well, you will have seen from the Lawyers for  
 2 Britain's written intervention that they do say it goes  
 3 to interpretation of the Act. We don't need I think to  
 4 go that far, or do not go that far, but we do  
 5 respectfully submit that it is relevant, that that was  
 6 the basis on which Parliament was proceeding in passing  
 7 this Act and we say that is confirmatory of our  
 8 position, which is that they left in place, which is the  
 9 only way in which effect could be given to it, which was  
 10 to exercise the prerogative power to withdrawal and to  
 11 give the Article 50 notice. That is the significance,  
 12 but no more than that.  
 13 You have seen a pretty desultory debate as well  
 14 about whether or not this Act is properly to be  
 15 described as advisory, which is the next lead-in point,  
 16 as it were, to the briefing paper that I have just taken  
 17 you to, but again we respectfully submit there is little  
 18 that can sensibly be attached to that characterisation  
 19 because it could be advisory, either as the divisional  
 20 court concluded in 106, for law makers in Parliament, as  
 21 they put it, or it could be advisory for Government, so  
 22 it is entirely neutral to call it advisory.  
 23 Then they say the briefing paper involves in effect  
 24 the Government assuring Parliament, brackets, contrary  
 25 to all the express statements I have just shown you in

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1 footnote 4, that this is a briefing paper in which the  
 2 Government, is the implication, has assured Parliament  
 3 that it is simply going to be advisory in that sense and  
 4 Parliament, the implication being, is going to have  
 5 another go, whatever the outcome.  
 6 LADY HALE: Mr Eadie, before we leave footnote 4, had it  
 7 been your intention to give us the cross-references  
 8 which we don't have?  
 9 THE PRESIDENT: The cross-references within the footnote is  
 10 what my Lady is referring to.  
 11 LADY HALE: It refers to the Conservative manifesto, it  
 12 refers to Hansard and it refers to the leaflet that we  
 13 all got --  
 14 MR EADIE: My Lady, could I give those, if you have not got  
 15 them. The first one, the Conservative manifesto, is  
 16 authorities bundle 16, tab 178.  
 17 LORD CARNWATH: We have got them, further up the page.  
 18 THE PRESIDENT: I think the best thing to do is for you to  
 19 let us have them in a document tomorrow, rather than  
 20 going through all this and taking up court time.  
 21 LORD MANCE: On a different point, in your references to the  
 22 whole scheme, looking at the whole legislative scheme,  
 23 could you give us, if we don't already have it in the  
 24 papers, on authority on the extent to which these  
 25 statutes can be regarded as in pari materia, in other

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1 words dealing with the same subject matter, the whole  
 2 group that you referred to from 72 up to 2015, or any of  
 3 them, and the extent to which we can construe an earlier  
 4 statute by reference to a later in the context of this  
 5 case? I think it would just be helpful to get the  
 6 principles.  
 7 MR EADIE: I will come to that just before I make my four  
 8 principle submissions on the statutory scheme, I have  
 9 a little section that says "Is later legislation after  
 10 the 1972 Act relevant? So you are going to get it.  
 11 LORD MANCE: Good. We are thinking along the same lines.  
 12 MR EADIE: I promise to write it down.  
 13 It is of some significance because the divisional  
 14 court proceeded on the fundamental premise that it was  
 15 not. So I am going to have to address that.  
 16 So advisory I have dealt with -- could be advisory  
 17 for Government as well as law makers; not undermined by  
 18 the briefing paper. We have got to the briefing paper.  
 19 Short points in relation to the briefing paper, the  
 20 first one is that this is a House of Commons Library  
 21 briefing paper. Some concern I think may have been  
 22 expressed by the House of Commons authorities as to the  
 23 appropriateness of referring to it, but it is referred  
 24 to in the divisional court's judgment, so that horse may  
 25 have bolted, but Part 2, Article 9 of the Bill of

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<p>1 Rights. It is a House of Commons Library briefing                  2 paper, not written by Government but by a member of                  3 House of Commons staff. It tells one nothing,                  4 therefore, about the intention of Government. It is not                  5 an assurance to Parliament by Government, it is not                  6 anything that would bear on parliamentary intention. It                  7 is not a legitimate aid to interpretation.                  8 If it is being suggested that this is some form of                  9 Government statement to the House, then it would need to                  10 be set alongside the absolutely clear statements that                  11 are collected in footnote 4 of our case, but we                  12 respectfully submit, at a more fundamental level, it is                  13 unhelpful in terms of assessing whether or not the                  14 2015 Act is to be treated as advisory in the sense that                  15 the divisional court used that term in.                  16 So that is what I say about that document. I hope                  17 that answers my Lord, Lord Clarke's question on that.                  18 Two core points on the 2015 Act, if I may. The                  19 first, and this is its true legal significance, we                  20 respectfully submit, is that it proceeds on precisely                  21 the same footing as the other parts of the scheme of                  22 control over the conduct of international relations by                  23 Government. It makes no provision seeking to control                  24 the prerogative powers that the Government exercises.                  25 It imposes no requirement as other acts had done in the</p> <p style="text-align: center;">Page 165</p>	<p>1 sort of impact on rights and obligations that would flow                  2 from withdrawal. Do we leave the club, is the question                  3 that the referendum posed and, if we do, the processes                  4 of the club necessarily go, the effect on rights                  5 necessarily occurs and Parliament was plainly entirely                  6 alive to that fact. It could not possibly be improper                  7 to use the prerogative to give effect to the results of                  8 the democratic process that Parliament had chosen to set                  9 up.                  10 The counter position, it might be thought, is worth                  11 at least considering. It involves contending that                  12 Parliament had left Article 50 and the giving of                  13 an Article 50 notice within the prerogative sphere in                  14 the earlier legislation, and the 2015 Act in effect and                  15 implicitly reverses that position and now requires that                  16 the giving of such notice should be subjected to primary                  17 legislative authority.                  18 So they have already considered Article 50 in 2008                  19 and in 2011, and the thesis that is now advanced is that                  20 in 2015 --                  21 THE PRESIDENT: I think the point, the way it would be put                  22 against you, I suspect, is that under the 1972 Act it                  23 was not left with the prerogative and no subsequent act                  24 was inconsistent with that, because that was the                  25 position in 1972 and that is what it remains, the</p> <p style="text-align: center;">Page 167</p>
<p>1 same territory as we have seen for primary legislative                  2 authority, before any step is taken in the exercise of                  3 those powers, nor indeed for any of the other nuanced                  4 forms or mechanisms for parliamentary involvement, and                  5 that, no doubt, is because it is itself primary                  6 legislation. Specifically, there is nothing to                  7 constrain the Government giving Article 50 notice. Its                  8 significance in legal terms is precisely that it does                  9 not do so, as it could perfectly well have done, see the                  10 raft of earlier legislation.                  11 The silence, we submit, is compelling and consistent                  12 with the rest of the legislative scheme and that point                  13 is powerfully reinforced by two other facts. Firstly,                  14 in the event of a decision to leave, if that was the                  15 outcome of the referendum that Parliament set up, the                  16 process of withdrawal had to commence in the prescribed                  17 way. Article 50 notice was the only, and under the                  18 Lisbon treaty the mandated, first step and as we already                  19 know from the legislative scheme that we have gone                  20 through, from 2008 and 2011 in particular, Article 50                  21 was already been considered by Parliament and left in                  22 the hands of the Government. So that the first                  23 reinforcement.                  24 The second is, moreover, the 2015 Act represents                  25 specific contemplation by Parliament of precisely the</p> <p style="text-align: center;">Page 166</p>	<p>1 argument --                  2 MR EADIE: That may well be the submission but that is not                  3 the point about the 2015 Act. If they are right at the                  4 base level, then so be it. That was the point you were                  5 putting to me earlier.                  6 THE PRESIDENT: Yes, that is what is put against you.                  7 I don't think it is put that it survived any                  8 differently.                  9 MR EADIE: Quite but there is a jump, we respectfully                  10 submit, between 2011 and 2008.                  11 THE PRESIDENT: I can see that. I can understand what you                  12 say on that point.                  13 MR EADIE: And 2015. That contrast is stark.                  14 The second on core points on the 2015 Act is that it                  15 was passed with Parliament acknowledging at the very                  16 least the political realities associated with the scale                  17 of the decision to stay or leave. We respectfully                  18 submit that the proper implication from that act is that                  19 doing so, Parliament was acknowledging and acknowledging                  20 plainly, consistently with the statements that happened                  21 to have been made, that the vote should decide that                  22 question and that all concerned, including Parliament,                  23 would respect the outcome.                  24 On that basis, it has obvious constitutional                  25 significance. In the Shindler case, which as you will</p> <p style="text-align: center;">Page 168</p>

<p>1 recall, preceded this litigation, the Shindler case,                  2 I am not going to invite you to turn it up now, but it                  3 is in core authorities volumes 3, tab 18, MS627, and                  4 Lord Dyson at paragraph 13 describes the matter thus:                  5 "The referendum (if it supports withdrawal) is                  6 an integral part of the process of deciding to withdraw                  7 from the EU."                  8 We respectfully submit that that is an entirely                  9 correct characterisation of what the 2015 Act was doing.                  10 It ascribes proper constitutional significance to the                  11 fact of the referendum and to the fact that Parliament                  12 has itself decided to put that decision to the people in                  13 the vote.                  14 I add in parenthesis that some of the other parties,                  15 Pigney and Expat respondents, suggest that Lord Dyson                  16 was also indicating that he expected that Parliament                  17 would have a role in that process. We respectfully                  18 submit that, when you actually consider the issues that                  19 were truly being debated in Shindler, that point is not                  20 a good one but the significance, and you see that from                  21 just looking at paragraphs 13 and 19 in their context,                  22 but the true significance of it is in the correct                  23 description, as I have just indicated: the referendum he                  24 said, if it supports withdrawal, is an integral part of                  25 process of deciding to withdraw from the EU.</p> <p style="text-align: center;">Page 169</p>	<p>1 1972 in isolation because of the nature of the question                  2 that you are asking, which is the current state of                  3 prerogative powers. You take the legislative scheme as                  4 it exists in its entirety, as of the date on which you                  5 are asking that question -- in other words today.                  6 In any event, we submit that there is good authority                  7 which, at the very least, implies at a high level,                  8 a high level of judicial decision making, that                  9 constitutional issues of the kind that confront you                  10 today need to be determined in the light of present                  11 constitutional circumstances. That is the true                  12 significance, we submit, of the ECA and that legislative                  13 scheme governing EU matters, EU treaty making, that is                  14 the true significance of describing that legislative                  15 scheme as constitutional.                  16 We do respectfully submit that, in that respect, the                  17 Robinson case to which reference has already been made                  18 is of real interest. We have given you quote from                  19 Lord Bingham in our annex to our case at paragraph 3,                  20 but Robinson itself, which I am not going to take you to                  21 but which I recommend to the court, if I may, core                  22 authorities volume 4, tab 81, MS3272, Lord Bingham.                  23 Can I therefore make four principle summary                  24 submissions --                  25 THE PRESIDENT: Which page is Lord Bingham's observation on,</p> <p style="text-align: center;">Page 171</p>
<p>1 Of course the 2015 Act frames the question, we                  2 submit, now to be asked, and it does so in circumstances                  3 in which Parliament has evidently confronted the                  4 consequences of the binary question that it put to the                  5 people, including, at a basic level, the consequences                  6 that some rights and obligations flowing from membership                  7 of the club would not be available and specifically                  8 contemplating in the leave part of the binary question                  9 the very effect on rights which it is now said is                  10 constitutional anathema.                  11 So we respectfully submit that it is not correct to                  12 treat that as legally irrelevant. The legal effects and                  13 the legal significance may be more or less subtle, but                  14 they are direct in the sense of it leaving the                  15 prerogative power, the Article 50 power, in place, and,                  16 if one chooses to review the matter more broadly                  17 constitutionally, the effect is precisely as                  18 Lord Bingham described it.                  19 Is the later legislation relevant? My Lord,                  20 Lord Mance's question. We respectfully submit that it                  21 is a current question. The legislative impact on                  22 prerogative powers can and does change as the                  23 legislative scheme alters and Article 50 of course does                  24 not arrive until 2008. So you could hardly freeze that                  25 issue in 1972. So you don't grapple, we submit, with</p> <p style="text-align: center;">Page 170</p>	<p>1 sorry? Let us know later, it is all right.                  2 MR EADIE: I think it is paragraph 12. I will just check                  3 that. Paragraph 12 we quote in the annex.                  4 THE PRESIDENT: Okay, we will find it. Thank you.                  5 MR EADIE: In any event, I think this is the point my Lord,                  6 Lord Mance asked expressly, the in pari materia one. I                  7 can't remember if we have got cases in our case to                  8 support that, but, if we do, I think it is our case at                  9 paragraph 76, we respectfully submit in any event on                  10 ordinary principles of interpretation it is legitimate                  11 to rely on later parts of a scheme when considering the                  12 1972 Act, firstly because the 2008 Act amends the                  13 1972 Act -- that is our case at paragraph 75 -- and,                  14 secondly, because we are in in pari materia territory.                  15 That is our case at paragraph 76 and the citation is                  16 there set out.                  17 Four principle summary submissions then on the                  18 statutory scheme, trying to draw the points together if                  19 I may. Submission one is that the shape of the schemes                  20 of control over the exercise of prerogative powers                  21 represent precisely the exercise of parliamentary                  22 sovereignty. Parliament has considered what the nature                  23 of those controls should be. Parliament knows what                  24 prerogative powers in the conduct of international                  25 relations exist in relation to the making of treaties,</p> <p style="text-align: center;">Page 172</p>

<p>1 in relation to the negotiation of treaties, and in                  2 relation to withdrawing from treaties. Those are all                  3 proper parts of the generally expressed, the generally                  4 characterised, prerogative power. That is we submit the                  5 legislative premise or base position on which the scheme                  6 of legislation exists and the prism through which it is                  7 to be viewed.</p> <p>8 So the specific controls that Parliament has seen                  9 fit to enact in the scheme I have taken you through                  10 represent their considered view as to the extent of its                  11 encroachment on to that base position, on to those base                  12 powers, and the base position is otherwise left in                  13 place. That is why it is as significant to examine what                  14 Parliament has not done as to examine what it has done.                  15 That is why I started my submissions in describing the                  16 prerogative by indicating that its source was not                  17 legislative, and that it had its own freestanding common                  18 law source, and it is for Parliament to make those                  19 decisions, we submit, about the extent of encroachment,                  20 to craft the scheme of control, to make the legislative                  21 policy decisions as to when and in what form it wants to                  22 exercise that control. Those are not decisions which we                  23 respectfully submit the court can or should make under                  24 our constitution. So applying the scheme of control                  25 that Parliament has chosen is, we submit, an acceptance</p> <p style="text-align: center;">Page 173</p>	<p>1 MR EADIE: That caveat, the subject two was the next point                  2 -- it was going to be there was no express provision                  3 that Article 50 notice or withdrawal is subjected to                  4 legislative conditions and must thereafter be exercised                  5 accordingly. Of course there are the controls which my                  6 Lady has just reminded me about, but, in relation to the                  7 exercise of our powers, there is no control in that way.                  8 The clear position indeed is directly to the opposite                  9 effect. The controls and the limits of the controls                  10 have been decided upon and made the subject                  11 unsurprisingly of express provision. The rest is                  12 prerogative.</p> <p>13 That was the basis on which the 72 Act proceeded,                  14 that was the basis on which each of the pieces of                  15 legislation thereafter proceeded and that was the basis                  16 on which the 2015 Act proceeded, albeit with its                  17 additional constitutional significance of the kind that                  18 I have indicated and there is therefore, we submit, no                  19 necessary implication, no necessary implication because,                  20 in this sphere, this is the force of the reasoning of                  21 Lord Justice Lloyd in the Rees-Mogg case, Parliament                  22 when it wants to exercise control has done so very                  23 deliberately and very expressly.</p> <p>24 So we are not in the sort of territory that you had                  25 in all of those earlier De Keyser type cases. We are</p> <p style="text-align: center;">Page 175</p>
<p>1 and not an abnegation of parliamentary sovereignty.                  2 That is the first submission.</p> <p>3 The second submission is that Parliament, it is                  4 clear, has legislated expressly, both generally in                  5 relation and in relation to the EU, to establish the                  6 nuanced system of controls you have seen and it has                  7 conspicuously refrained from making any provision to                  8 control the withdrawal from treaties or the steps                  9 commencing a process leading to withdrawal. It has not                  10 done so in CRAG, which is all about ratification. It                  11 has not done so when specifically considering which                  12 types of decision in the EU context our very contexts                  13 should be the subject of what forms of control.</p> <p>14 LADY HALE: I suppose if one is being really technical about                  15 it, it has legislated to control the exercise of the                  16 prerogative in relation to the withdrawal of other                  17 countries from the EU. That is Lord Carnwath's point                  18 about the inclusion of Article 50(3) in schedule 1.</p> <p>19 MR EADIE: My Lady, yes. You are right.</p> <p>20 LADY HALE: If one is being really technical about it.</p> <p>21 MR EADIE: Yes, you are right -- can I add "subject to the                  22 point my Lady's point" then to the point I have just                  23 made then.</p> <p>24 LADY HALE: Forgive me, I didn't mean to put you off your                  25 stride. That was not my intention.</p> <p style="text-align: center;">Page 174</p>	<p>1 not dealing with a situation in which Parliament has                  2 said, "This is the activity that you can do and, if you                  3 are going to do it, these are the controls, these are                  4 the regulations, these are the preconditions, you have                  5 to jump over hurdle A, B and C, and then you can                  6 exercise the power." That is what has created the                  7 necessary implication or something virtually analogous                  8 to that in the past and we are simply not in that                  9 territory. We are nowhere near it, because what that                  10 requires, as we saw from De Keyser, is a very precise                  11 identification of the nature of the act in question.</p> <p>12 What is the act in question here? It is the giving                  13 of Article 50 notice and there has been no control over                  14 that at all. There is no direct regulation, there is no                  15 regulation at all of that activity, and so there is no                  16 necessary implication, (a) for the reason given directly                  17 transposable into our context by Lord Justice Lloyd in                  18 Rees-Mogg, but, (b) and in any event, were one to apply                  19 properly the reasoning and principles laid down by the                  20 House of Lords in De Keyser and subsequent cases, for                  21 the reason I have just identified.</p> <p>22 It is self-evident, we submit, that withdrawal or                  23 revocation of the treaties has the potential to affect                  24 EU related rights and obligations in a very serious way,                  25 and Parliament knew that and yet left that power</p> <p style="text-align: center;">Page 176</p>

1 untouched, that prerogative power untouched.  
 2 No one can pretend they were not fully aware of what  
 3 would happen if Article 50 notice was given, it was one  
 4 of the principal changes made by the Lisbon treaty noted  
 5 in the explanatory notes. If its intention truly had  
 6 been that to subject leaving or withdrawing to  
 7 a requirement for primary legislation, not merely could  
 8 it have said so, but we submit it undoubtedly would have  
 9 said so -- undoubtedly because it is evident that in  
 10 those pieces of legislation I took you to, particularly  
 11 the 2008 Act, it was specifically considering both --  
 12 and they are distinct aspects -- the mechanisms of  
 13 transposition into domestic law and conduit, the stuff  
 14 of the 72 Act part 1, and section 2 in particular, and  
 15 the stuff of the later legislation in particular, the  
 16 controls it wished to impose on the exercise of  
 17 prerogative powers by Government on the  
 18 international plane.  
 19 LORD REED: You take from the authorities you cited this  
 20 morning that the current state of the prerogative in  
 21 relation to this matter depends on the current state of  
 22 the statute book and what the answer might have been in  
 23 1972 is not actually the issue?  
 24 MR EADIE: Yes, and you don't freeze it there. You don't,  
 25 as it were, get to a place where you say "The Act must

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1 have had that meaning then, so it didn't ..." You are  
 2 not in that territory at all. You are in the territory  
 3 of asking a current fundamentally important  
 4 constitutional question. This court in particular,  
 5 I hesitate to say, but this court in particular has  
 6 shown itself to be well aware of the concerns about the  
 7 law reaching conclusions which the ordinary man and  
 8 woman on the street simply would not understand.  
 9 If you said to the ordinary man or woman on the  
 10 street, "Do you regard the fact that a referendum has  
 11 occurred to be remotely relevant to the question of  
 12 whether or not the Government can give Article 50  
 13 notice?" the answer would be, "Of course it is."  
 14 THE PRESIDENT: If you put it as "remotely relevant" --  
 15 MR EADIE: Relevant as a matter of law.  
 16 THE PRESIDENT: As a matter of law, they would probably say  
 17 "I will ask a lawyer".  
 18 MR EADIE: My Lord, certainly, but the divisional court's  
 19 conclusion is that you just exclude that from the  
 20 court's consideration. They say it is legally  
 21 irrelevant.  
 22 LORD HODGE: (Inaudible) as a matter of law, as to what it  
 23 doesn't say, what it assumes. Your position really is  
 24 that the source of the power was and remains the  
 25 prerogative.

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1 MR EADIE: The source of the power was and remains the  
 2 prerogative, that was my first fundamental point about  
 3 it, and my second one was, as it were, the rather looser  
 4 constitutional point designed to scotch concerns about  
 5 scale, if I can put it that way.  
 6 My Lord, that may be a convenient moment to break.  
 7 I think we are on track.  
 8 THE PRESIDENT: Thank you very much for letting us know  
 9 that.  
 10 10.15 tomorrow or as soon as thereafter as we can  
 11 come in. Thank you very much indeed.  
 12 Court is now adjourned.  
 13 (4.31 pm)  
 14 (The court adjourned until 10.15 am the following day)  
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