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R (on the application of Miller) v The Prime Minister, Cherry and others, Advocate General for Scotland (Scotland)



Positive/Neutral Judicial Consideration

Court

Supreme Court

Judgment Date

24 September 2019

On appeals from: [2019] EWHC 2381 (QB) and [2019] CSIH 49

SC

[2019] UKSC 41, 2019 WL 04600661

before Lady Hale , President Lord Reed , Deputy President Lord Kerr Lord Wilson Lord
Carnwath Lord Hodge Lady Black Lord Lloyd-Jones Lady Arden Lord Kitchin Lord Sales

Judgment Given on 24 September 2019

Heard on 17, 18 and 19 September 2019

Representation

Appellant (Gina Miller) Lord Pannick QC Tom Hickman QC Warren Fitt (Instructed by Mishcon de Reya LLP (London)).
Respondent (The Prime Minister) Sir James Eadie QC David Blundell Christopher Knight Richard Howell (Instructed by
The Government Legal Department).

Appellant (The Advocate General) Lord Keen of Elie QC Andrew Webster QC (Instructed by Office of the Advocate
General for Scotland).

Respondents (Joanna Cherry MP and others) Aidan O'Neill QC David Welsh Sam Fowles (Instructed by Balfour and Manson
LLP (Edinburgh)).

1st Intervener James Wolffe QC , Lord Advocate James Mure QC Christine O'Neill (Instructed by The Legal Department
of the Scottish Government).

2nd Intervener Ronan Lavery QC Conan Fegan BL Richard Smyth (Instructed by McIvor Farrell Solicitors).

3rd Intervener Michael Fordham QC Celia Rooney Hollie Higgins (Instructed by Welsh Government Legal Services
Department).

4th Intervener Lord Garnier QC Tom Cleaver Anna Hoffmann (Instructed by Herbert Smith Freehills LLP (London)).

5th Intervener Deok Joo Rhee QC Catherine Dobson (Instructed by Howe and Co).

6th Intervener Thomas de la Mare QC Daniel Cashman Alison Pickup (Instructed by Public Law Project).

Judgment

Lady Hale and Lord Reed Giving the Judgment of the Court:

1. It is important to emphasise that the issue in these appeals is not when and on what terms the United Kingdom is to leave the European Union. The issue is whether the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued from a date between 9th and 12th September until 14th October was lawful. It arises in circumstances which have never arisen before and are unlikely ever to arise again. It is a "one off". But our law is used to rising to such challenges and supplies us with the legal tools to enable us to reason to a solution.

What is prorogation?

2. Parliamentary sittings are normally divided into sessions, usually lasting for about a year, but sometimes less and sometimes, as with the current session, much longer. Prorogation of Parliament brings the current session to an end. The next session begins, usually a short time later, with the Queen's Speech. While Parliament is prorogued, neither House can meet, debate and pass legislation. Neither House can debate Government policy. Nor may members of either House ask written or oral questions of Ministers. They may not meet and take evidence in committees. In general, Bills which have not yet completed all their stages are lost and will have to start again from scratch in the next session of Parliament. In certain circumstances, individual Bills may be "carried over" into the next session and pick up where they left off. The Government remains in office and can exercise its powers to make delegated legislation and bring it into force. It may also exercise all the other powers which the law permits. It cannot procure the passing of Acts of Parliament or obtain Parliamentary approval for further spending.

3. Parliament does not decide when it should be prorogued. This is a prerogative power exercised by the Crown on the advice of the Privy Council. In practice, as noted in the House of Commons Library Briefing Paper (No 8589, 11th June 2019), "this process has been a formality in the UK for more than a century: the Government of the day advises the Crown to prorogue and that request is acquiesced to". In theory the monarch could attend Parliament and make the proclamation proroguing it in person, but the last monarch to do this was Queen Victoria in 1854. Under current practice, a proclamation is made by Order in Council a few days before the actual prorogation, specifying a range of days within which Parliament may be prorogued and the date on which the prorogation would end. The Lord Chancellor prepares a commission under the great seal instructing the Commissioners accordingly. On the day chosen for the prorogation, the Commissioners enter the House of Lords; the House of Commons is summoned; the command of the monarch appointing the Commission is read; and Parliament is formally prorogued.

4. Prorogation must be distinguished from the dissolution of Parliament. The dissolution of Parliament brings the current Parliament to an end. Members of the House of Commons cease to be Members of Parliament. A general election is then held to elect a new House of Commons. The Government remains in office but there are conventional constraints on what it can do during that period. These days, dissolution is usually preceded by a short period of prorogation.

5. Dissolution used also to be a prerogative power of the Crown but is now governed by the [Fixed-term Parliaments Act 2011](#). This provides for general elections to be held every five years and for an earlier election to be held in only two circumstances: either the House of Commons votes, by a majority of at least two-thirds of the number of seats (including vacant seats) in the House, to hold an early election; or the House of Commons votes that it has no confidence in Her Majesty's Government and no-one is able to form a Government in which the House does have confidence within 14 days. Parliament is dissolved 25 days before polling day and cannot otherwise be dissolved. The Act expressly provides that it does not affect Her Majesty's power to prorogue Parliament ([section 6\(1\)](#)).

6. Prorogation must also be distinguished from the House adjourning or going into recess. This is decided, not by the Crown acting on the advice of the Prime Minister, but by each House passing a motion to that effect. The Houses might go into recess at different times from one another. In the House of Commons, the motion is moved by the Prime Minister. In the House of Lords, it is moved by the Lord Speaker. During a recess, the House does not sit but Parliamentary business can otherwise continue as usual. Committees may meet, written Parliamentary questions can be asked and must be answered.

The run-up to this prorogation

7. As everyone knows, a referendum was held (pursuant to the [European Union Referendum Act 2015](#)) on 23rd June 2016. The majority of those voting voted to leave the European Union. Technically, the result was not legally binding. But

the Government had pledged to honour the result and it has since been treated as politically and democratically binding. Successive Governments and Parliament have acted on that basis. Immediately after the referendum, Mr David Cameron resigned as Prime Minister. Mrs Theresa May was chosen as leader of the Conservative party and took his place.

8. The machinery for leaving the European Union is contained in [article 50 of the Treaty on European Union](#) . This provides that any member state may decide to withdraw from the Union "in accordance with its own constitutional requirements". That member state is to notify the European Council of its intention. The Union must then negotiate and conclude an agreement with that member state, "setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". The European Union treaties will cease to apply to that state when the withdrawal agreement comes into force or, failing that, two years after the notification unless the European Council, in agreement with the member state, unanimously decides to extend this period.

9. On 2nd October 2016, Mrs May announced her intention to give notice under [article 50](#) before the end of March 2017. Mrs Gina Miller and others challenged her power to do so without the authority of an Act of Parliament. That challenge succeeded: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 . Parliament responded by passing the [European Union \(Notification of Withdrawal\) Act 2017](#) , which received royal assent on 16th March 2017 and authorised the Prime Minister to give the notification. Mrs May did so on 29th March 2017.

10. That Parliament was dissolved on 3rd May 2017 and a general election was held on 8th June 2017. The result was that Mrs May no longer had an overall majority in the House of Commons, but she was able to form a Government because of a "confidence and supply" agreement with the Democratic Unionist Party of Northern Ireland. Negotiations for a withdrawal agreement with the European Council proceeded.

11. Meanwhile, Parliament proceeded with some of the legislative steps needed to prepare United Kingdom law for leaving the Union. The [European Union \(Withdrawal\) Act 2018](#) came into force on 26th June 2018. In brief, it defined "exit day" as 29th March 2019, but this could be extended by statutory instrument ([section 20](#)). From that day, it repealed the [European Communities Act 1972](#) , the Act which had provided for our entry into what became the European Union, but it preserved much of the existing EU law as the law of the United Kingdom, with provision for exceptions and modifications to be made by delegated legislation. Crucially, [section 13](#) requires Parliamentary approval of any withdrawal agreement reached by the Government. In summary it provides that a withdrawal agreement may only be ratified if (a) a Minister of the Crown has laid before Parliament a statement that political agreement has been reached, a copy of the negotiated withdrawal agreement and a copy of the framework for the future relationship; (b) the House of Commons has approved the withdrawal agreement and future framework; (c) the House of Lords has, in effect, taken note of them both; and (d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

12. A withdrawal agreement, setting out terms for a "smooth and orderly exit from the European Union" and a political declaration, setting out a framework for the future relationship, to be negotiated by the end of 2020, were concluded on 25th November 2018. However, the agreement was rejected three times by the House of Commons, on 15th January 2019 (by 432 to 202 votes), on 12th March 2019 (by 391 to 242 votes) and on 29th March 2019 (by 344 to 286 votes).

13. On 20th March 2019, the Prime Minister had asked the European Council to extend the notification period. This was granted only until 12th April 2019. However, on 8th April 2019, the [European Union \(Withdrawal\) Act 2019](#) was passed. This required a Minister of the Crown to move a motion, that day or the next, that the House of Commons agrees to the Prime Minister seeking an extension to a specified date and, if the motion was passed, required the Prime Minister to seek that extension. Pursuant to that Act, the Prime Minister sought an extension, which on 10th April 2019 was granted until 31st October 2019. The regulation changing the "exit day" was made the next day ([European Union \(Withdrawal\) Act 2018 \(Exit](#)

Day) (Amendment No 2) Regulations 2019 (SI 2019/859)). Thus the current position, under both [article 50 of the Treaty on European Union](#) and the [European Union \(Withdrawal\) Act 2018](#) is that the United Kingdom will leave the Union on 31st October 2019 whether or not there is a withdrawal agreement (but this is now subject to the European Union (Withdrawal) (No 2) Act 2019 : see para 22 below).

14. Mrs May resigned as leader of the Conservative party on 7th June 2019 and stood down as Prime Minister on 24th July, after the Conservative party had chosen Mr Boris Johnson as its leader. Mr Johnson has on many occasions made it clear that he believes that the European Council will only agree to changes in the withdrawal agreement if they think that there is a genuine risk that the United Kingdom will leave without any such agreement. He appointed Mr Michael Gove Cabinet Office Minister with a view to preparing for a "no deal" exit. Yet it was also clear that a majority of the House of Commons would not support withdrawal without an agreement.

This prorogation

15. On 28th August 2019, Mr Jacob Rees-Mogg, Lord President of the (Privy) Council and Leader of the House of Commons, Baroness Evans of Bowes Park, Leader of the House of Lords, and Mr Mark Spencer, Chief Whip, attended a meeting of the Privy Council held by the Queen at Balmoral Castle. An Order in Council was made ordering that "the Parliament be prorogued on a day no earlier than Monday the 9th day of September and no later than Thursday the 12th day of September 2019 to Monday the 14th day of October 2019" and that the Lord Chancellor "do cause a Commission to be prepared and issued in the usual manner for proroguing the Parliament accordingly". We know that in approving the prorogation, Her Majesty was acting on the advice of the Prime Minister. We do not know what conversation passed between them when he gave her that advice. We do not know what conversation, if any, passed between the assembled Privy Counsellors before or after the meeting. We do not know what the Queen was told and cannot draw any conclusions about it.

16. We do know the contents of three documents leading up to that advice, annexed to a witness statement from Jonathan Jones, Treasury Solicitor and Head of the Government Legal Department. His evidence is that his department had made clear to all relevant departments, including the Prime Minister's Office, the requirement to make thorough searches for and to produce all information relevant to Mrs Miller's claim.

17. The first document is a Memorandum dated 15th August 2019 from Nikki da Costa, Director of Legislative Affairs in the Prime Minister's Office, to the Prime Minister and copied to seven other people, including Sir Mark Sedwill, Cabinet Secretary, and Dominic Cummings, Special Adviser. The key points made in the Memorandum are:

- This had been the longest session since records began. Because of this, they were at the very end of the legislative programme of the previous administration. Commons and Lords business managers were asking for new Bills to ensure that Parliament was using its time gainfully. But if new Bills were introduced, the session would have to continue for another four to six months, or the Bills would fall at the end of the session.
- Choosing when to end the session - ie prorogue - was a balance between "wash up" - completing the Bills which were close to Royal Assent - and "not wasting time that could be used for new measures in a fresh session". There were very few Bills suitable for "wash-up", so this pointed to bringing the session to a close in September. Asking for prorogation to commence within the period 9th to 12th September was recommended.
- To start the new session with a Queen's Speech would be achievable in the week beginning 14th October but any earlier "is extremely pressured".
- Politically, it was essential that Parliament was sitting before and after the EU Council meeting (which is scheduled for 17th - 18th October). If the Queen's Speech were on 14th October, the usual six-day debate would culminate in key votes on 21st and 22nd October. Parliament would have the opportunity to debate the Government's overall approach to Brexit in the run up to the EU Council and then vote on it once the outcome of the Council was known.
- It must be recognised that "prorogation, on its own and separate of a Queen's Speech, has been portrayed as a potential tool to prevent MPs intervening prior to the UK's departure from the EU on 31st October". The dates proposed sought to provide reassurance by ensuring that Parliament would sit for three weeks before exit and that a maximum of seven days were lost apart from the time usually set aside for the conference recess.

- The usual length of a prorogation was under ten days, though there had been longer ones. The present proposal would mean that Parliament stood prorogued for up to 34 calendar days but, given the conference recess, the number of sitting days lost would be far less than that.
- The Prime Minister ticked "Yes" to the recommendation that his PPS approach the Palace with a request for prorogation to begin within the period Monday 9th September to Thursday 12th September and for a Queen's Speech on Monday 14th October.

18. The second document is the Prime Minister's handwritten comments on the Memorandum, dated 16th August. They read:

- "(1) The whole September session is a rigmarole introduced [words redacted] t [sic] show the public that MPs were earning their crust.
- (2) So I don't see anything especially shocking about this prorogation.
- (3) As Nikki notes [sic], it is OVER THE CONFERENCE SEASON so that the sitting days lost are actually very few."

19. The third document is another Memorandum from Nikki da Costa, dated 23rd August, again to the Prime Minister and copied to five people, including Sir Mark Sedwill and Dominic Cummings. This sets out the proposed arrangements, including a telephone call between the Prime Minister and Her Majesty at 6.00 pm on Tuesday 27th August, formally to advise prorogation, the Privy Council meeting the next day, a cabinet meeting by conference call after that, and a press notice after that. Draft remarks for the Cabinet meeting and a draft letter to MPs (approved by the Chief Whip) were annexed.

20. We also have the Minutes of the Cabinet meeting held by conference call at 10.05 am on Wednesday 28th August, after the advice had been given. The Prime Minister explained that it was important that they were "brought up to speed" on the decisions which had been taken. It was also "important to emphasise that this decision to prorogue Parliament for a Queen's Speech was not driven by Brexit considerations: it was about pursuing an exciting and dynamic legislative programme to take forward the Government's agenda". He also explained that the timetable did not conflict with the statutory responsibilities under the [Northern Ireland \(Executive Formation etc\) Act 2019](#) (as it happens, the timetable for Parliamentary sittings laid down in [section 3](#) of that Act requires that Parliament sit on 9th September and, on one interpretation, no later than 14th October). He acknowledged that the new timetable would impact on the sitting days available to pass the Northern Ireland Budget Bill and "potentially put at risk the ability to pass the necessary legislation relating to decision-making powers in a no deal scenario". In discussion at the Cabinet meeting, among the points made was that "any messaging should emphasise that the plan for a Queen's Speech was not intended to reduce parliamentary scrutiny or minimise Parliament's opportunity to make clear its views on Brexit. ... Any suggestion that the Government was using this as a tactic to frustrate Parliament should be rebutted." In conclusion, the Prime Minister said that "there were no plans for an early General Election. This would not be right for the British people: they had faced an awful lot of electoral events in recent years".

21. That same day, the Prime Minister sent a letter to all MPs updating them on the Government's plans for its business in Parliament, stressing his intention to "bring forward a new bold and ambitious domestic legislative agenda for the renewal of our country after Brexit".

22. On 3rd September Parliament returned from its summer recess. The House of Commons passed a motion that MPs should take control of the order paper - in other words decide for themselves what business they would transact. On 4th September what became the European Union (Withdrawal) (No 2) Act 2019 passed all its stages in the House of Commons. On 6th September the House of Lords suspended its usual rules so that the Bill could be passed. It received Royal Assent on Monday 9th September. The import of the Act is to require the Prime Minister on 19th October to seek, by a letter in the

form scheduled to the Act, an extension of three months from the European Council, unless by then Parliament has either approved a withdrawal agreement or approved leaving without one.

These proceedings

23. Meanwhile, on 30th July 2019, prompted by the suggestion made in academic writings in April and also by some backbench MPs, and not denied by members of the Government, that Parliament might be prorogued so as to avoid further debate in the run-up to exit day, a cross party group of 75 MPs and members of the House of Lords, together with one QC, had launched a petition in the Court of Session in Scotland claiming that such a prorogation would be unlawful and seeking a declaration to that effect and an interdict to prevent it. This was met by averments that the petition was hypothetical and premature and that there was no reasonable or even hypothetical apprehension that the UK Government intended to advise the Queen to prorogue the Westminster Parliament with the intention of denying before Exit Day any further Parliamentary consideration of withdrawal from the Union. This denial was repeated in revised Answers dated 23rd and 27th August. On 27th August the Petition was amended to claim that it would be unlawful to prorogue Parliament with the intention to deny "sufficient time for proper consideration" of withdrawal. On 2nd September, the Answers were amended to deny that there was any reasonable apprehension of that.

24. On 30th August, the Lord Ordinary, Lord Doherty, refused an application for an interim interdict to prevent the now very far from hypothetical prorogation and set the date of 3rd September for the substantive hearing: [2019] CSOH 68. On 4th September, he refused the petition, on the ground that the issue was not justiciable in a court of law: [2019] CSOH 70. The Inner House (Lord Carloway, Lord President, Lord Brodie and Lord Drummond Young) heard the appeal later that week, delivered their decision with a summary of their reasons on 11th September, and their full judgments were published on Friday, 13th September: [2019] CSIH 49. They allowed the appeal, holding that the advice given to Her Majesty was justiciable, that it was motivated by the improper purpose of stymying Parliamentary scrutiny of the executive, and that it and the prorogation which followed it were unlawful and thus null and of no effect. They gave permission to appeal to this court.

25. Meanwhile, as soon as the prorogation was announced, Mrs Gina Miller launched proceedings in the High Court in England and Wales, seeking a declaration that the Prime Minister's advice to her Majesty was unlawful. Those proceedings were heard by a Divisional Court (Lord Burnett of Maldon, Lord Chief Justice of England and Wales, Sir Terence Etherton, Master of the Rolls, and Dame Victoria Sharp, President of the Queen's Bench Division) on 5th September and their judgment was delivered on 11th September: [2019] EWHC 2381 (QB). They dismissed the claim on the ground that the issue was not justiciable. They granted a "leap-frog" certificate so that the case could come directly to this court.

26. This Court heard the appeals in *Cherry* and in *Miller* over 17th to 19th September. In addition to the written and oral submissions of the principal parties, we had written and oral submissions from the Lord Advocate, for the Scottish Government; from the Counsel General for Wales, for the Welsh Government; from Mr Raymond McCord, who has brought proceedings in Northern Ireland raising various issues relating to Brexit, but has not been permitted to proceed to challenge the lawfulness of the prorogation given that the Scottish and English challenges were already well-advanced; and from Sir John Major, a former Prime Minister with first-hand experience of prorogation. We have also received written submissions from Baroness Chakrabarti, shadow Attorney General, for Her Majesty's Opposition, and from the Public Law Project. We are grateful to everyone for the speed with which they have produced their submissions and all the other documents in the case. In view of the grave constitutional importance of the matter, and the disagreement between the courts in England and Wales and Scotland, we convened a panel of 11 Justices, the maximum number of serving Justices who are permitted to sit.

27. Both cases raise the same four issues, although there is some overlap between the issues:

- (1) Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?
- (2) If it is, by what standard is its lawfulness to be judged?
- (3) By that standard, was it lawful?

(4) If it was not, what remedy should the court grant?

Is the question of whether the Prime Minister's advice to the Queen was lawful justiciable in a court of law?

28. Counsel for the Prime Minister in the *Miller* proceedings, and the Advocate General as representing the United Kingdom Government in the *Cherry* proceedings, have argued that the court should decline to consider the challenges with which these appeals are concerned, on the basis that they do not raise any legal question on which the courts can properly adjudicate: that is to say, that the matters raised are not justiciable. Instead of the Prime Minister's advice to Her Majesty being reviewable by the courts, they argue that he is accountable only to Parliament. They conclude that the courts should not enter the political arena but should respect the separation of powers.

29. As we have explained, that argument was rejected by the Inner House in the *Cherry* proceedings, but was accepted by the Divisional Court in the *Miller* proceedings. In the view of the Divisional Court, the Prime Minister's decision that Parliament should be prorogued at the time and for the duration chosen, and his advice to Her Majesty to that effect, were inherently political in nature, and there were no legal standards against which to judge their legitimacy.

30. Before considering the question of justiciability, there are four points that we should make clear at the outset. First, the power to order the prorogation of Parliament is a prerogative power: that is to say, a power recognised by the common law and exercised by the Crown, in this instance by the sovereign in person, acting on advice, in accordance with modern constitutional practice. It is not suggested in these appeals that Her Majesty was other than obliged by constitutional convention to accept that advice. In the circumstances, we express no view on that matter. That situation does, however, place on the Prime Minister a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament.

31. Secondly, although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it. As the Divisional Court observed in para 47 of its judgment, almost all important decisions made by the executive have a political hue to them. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries. Many if not most of the constitutional cases in our legal history have been concerned with politics in that sense.

32. Two examples will suffice to illustrate the point. The 17th century was a period of turmoil over the relationship between the Stuart kings and Parliament, which culminated in civil war. That political controversy did not deter the courts from holding, in the *Case of Proclamations (1611) 12 Co Rep 74*, that an attempt to alter the law of the land by the use of the Crown's prerogative powers was unlawful. The court concluded at p 76 that "the King hath no prerogative, but that which the law of the land allows him", indicating that the limits of prerogative powers were set by law and were determined by the courts. The later 18th century was another troubled period in our political history, when the Government was greatly concerned about seditious publications. That did not deter the courts from holding, in *Entick v Carrington (1765) 19 State Tr 1029; 2 Wils KB 275*, that the Secretary of State could not order searches of private property without authority conferred by an Act of Parliament or the common law.

33. Thirdly, the Prime Minister's accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play. That is so for two reasons. The first is that the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed, if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister's being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished. In such circumstances, the most that Parliament could do would amount to closing

the stable door after the horse had bolted. The second reason is that the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts. As Lord Lloyd of Berwick stated in the *Fire Brigades Union* case (*R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 572-573):

"No court would ever depreciate or call in question ministerial responsibility to Parliament. But as Professor Sir William Wade points out in *Wade and Forsyth, Administrative Law*, 7th ed (1994), p 34, ministerial responsibility is no substitute for judicial review. In *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644 Lord Diplock said:

"It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."

34. Fourthly, if the issue before the court is justiciable, deciding it will not offend against the separation of powers. As we have just indicated, the court will be performing its proper function under our constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.

35. Having made those introductory points, we turn to the question whether the issue raised by these appeals is justiciable. How is that question to be answered? In the case of prerogative powers, it is necessary to distinguish between two different issues. The first is whether a prerogative power exists, and if it does exist, its extent. The second is whether, granted that a prerogative power exists, and that it has been exercised within its limits, the exercise of the power is open to legal challenge on some other basis. The first of these issues undoubtedly lies within the jurisdiction of the courts and is justiciable, as all the parties to these proceedings accept. If authority is required, it can be found in the decision of the House of Lords in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. The second of these issues, on the other hand, may raise questions of justiciability. The question then is not whether the power exists, or whether a purported exercise of the power was beyond its legal limits, but whether its exercise within its legal limits is challengeable in the courts on the basis of one or more of the recognised grounds of judicial review. In the *Council of Civil Service Unions* case, the House of Lords concluded that the answer to that question would depend on the nature and subject matter of the particular prerogative power being exercised. In that regard, Lord Roskill mentioned at p 418 the dissolution of Parliament as one of a number of powers whose exercise was in his view non-justiciable.

36. Counsel for the Prime Minister rely on that dictum in the present case, since the dissolution of Parliament under the prerogative, as was possible until the enactment of the *Fixed-term Parliaments Act 2011*, is in their submission analogous to prorogation. They submit that prorogation is in any event another example of what Lord Roskill described as "excluded categories", and refer to later authority which treated questions of "high policy" as forming another such category (*R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Everett* [1989] QB 811, 820). The court has heard careful and detailed submissions on this area of the law, and has been referred to many authorities. It is, however, important to understand that this argument only arises if the issue in these proceedings is properly characterised as one concerning the lawfulness of the exercise of a prerogative power within its lawful limits, rather than as one concerning the lawful limits of the power and whether they have been exceeded. As we have explained, no question of justiciability, whether by reason of subject matter or otherwise, can arise in relation to whether the law recognises the existence of a prerogative power, or in relation to its legal limits. Those are by definition questions of law. Under the separation of powers, it is the function of the courts to determine them.

37. Before reaching a conclusion as to justiciability, the court therefore has to determine whether the present case requires it to determine where a legal limit lies in relation to the power to prorogue Parliament, and whether the Prime Minister's advice trespassed beyond that limit, or whether the present case concerns the lawfulness of a particular exercise of the power within its legal limits. That question is closely related to the identification of the standard by reference to which the lawfulness of the Prime Minister's advice is to be judged. It is to that matter that we turn next.

By what standard is the lawfulness of the advice to be judged?

38. In principle, if not always in practice, it is relatively straightforward to determine the limits of a statutory power, since the power is defined by the text of the statute. Since a prerogative power is not constituted by any document, determining its limits is less straightforward. Nevertheless, every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie. Since the power is recognised by the common law, and has to be compatible with common law principles, those principles may illuminate where its boundaries lie. In particular, the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law.

39. Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.

40. The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law. We have already given two examples of such principles, namely that the law of the land cannot be altered except by or in accordance with an Act of Parliament, and that the Government cannot search private premises without lawful authority. Many more examples could be given. Such principles are not confined to the protection of individual rights, but include principles concerning the conduct of public bodies and the relationships between them. For example, they include the principle that justice must be administered in public (*Scott v Scott* [1913] AC 417), and the principle of the separation of powers between the executive, Parliament and the courts (*Ex p Fire Brigades Union* , pp 567-568). In their application to the exercise of governmental powers, constitutional principles do not apply only to powers conferred by statute, but also extend to prerogative powers. For example, they include the principle that the executive cannot exercise prerogative powers so as to deprive people of their property without the payment of compensation (*Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75).

41. Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply. However, the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law. Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty. To give only a few examples, in the *Case of Proclamations* the court protected Parliamentary sovereignty directly, by holding that prerogative powers could not be used to alter the law of the land. Three centuries later, in the case of *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 , the court prevented the Government of the day from seeking by indirect means to bypass Parliament, in circumventing a statute through the use of the prerogative. More recently, in the *Fire Brigades Union* case, the court again prevented the Government from rendering a statute nugatory through recourse to the prerogative, and was not deflected by the fact that the Government had failed to bring the statute into effect. As Lord Browne-Wilkinson observed in that case at p 552, "the constitutional history of this country

is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body".

42. The sovereignty of Parliament would, however, be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased. That, however, would be the position if there was no legal limit upon the power to prorogue Parliament (subject to a few exceptional circumstances in which, under statute, Parliament can meet while it stands prorogued). An unlimited power of prorogation would therefore be incompatible with the legal principle of Parliamentary sovereignty.

43. In our view, it is no answer to these points to say, as counsel for the Prime Minister argued, that the court should decline to consider extreme hypothetical examples. The court has to address the argument of counsel for the Prime Minister that there are no circumstances whatsoever in which it would be entitled to review a decision that Parliament should be prorogued (or ministerial advice to that effect). In addressing that argument, it is perfectly appropriate, and necessary, to consider its implications. Nor is it any answer to say that there are practical constraints on the length of time for which Parliament might stand prorogued, since the Government would eventually need to raise money in order to fund public services, and would for that purpose require Parliamentary authority, and would also require annual legislation to maintain a standing army. Those practical constraints offer scant reassurance.

44. It must therefore follow, as a concomitant of Parliamentary sovereignty, that the power to prorogue cannot be unlimited. Statutory requirements as to sittings of Parliament have indeed been enacted from time to time, for example by the Statute of 1362 (36 Edward III c 10), the Triennial Acts of 1640 and 1664, the Bill of Rights 1688, the Scottish Claim of Right 1689, the Meeting of Parliament Act 1694, and most recently the [Northern Ireland \(Executive Formation etc\) Act 2019, section 3](#). Their existence confirms the necessity of a legal limit on the power to prorogue, but they do not address the situation with which the present appeals are concerned.

45. On the other hand, Parliament does not remain permanently in session, and it is undoubtedly lawful to prorogue Parliament notwithstanding the fact that, so long as it stands prorogued, Parliament cannot enact laws. In modern practice, Parliament is normally prorogued for only a short time. There can be no question of such a prorogation being incompatible with Parliamentary sovereignty: its effect on Parliament's ability to exercise its legislative powers is relatively minor and uncontroversial. How, then, is the limit upon the power to prorogue to be defined, so as to make it compatible with the principle of Parliamentary sovereignty?

46. The same question arises in relation to a second constitutional principle, that of Parliamentary accountability, described by Lord Carnwath in his judgment in the first *Miller* case as no less fundamental to our constitution than Parliamentary sovereignty (*R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, para 249). As Lord Bingham of Cornhill said in the case of *Bobb v Manning* [2006] UKPC 22, para 13, "the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy". Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power.

47. The principle of Parliamentary accountability has been invoked time and again throughout the development of our constitutional and administrative law, as a justification for judicial restraint as part of a constitutional separation of powers (see, for example, *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240, 250),

and as an explanation for non-justiciability (*Mohammed (Serdar) v Ministry of Defence* [2017] UKSC 1; [2017] AC 649 , para 57). It was also an animating principle of some of the statutes mentioned in para 44, as appears from their references to the redress of grievances. As we have mentioned, its importance as a fundamental constitutional principle has also been recognised by the courts.

48. That principle is not placed in jeopardy if Parliament stands prorogued for the short period which is customary, and as we have explained, Parliament does not in any event expect to be in permanent session. But the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model. So the same question arises as in relation to Parliamentary sovereignty: what is the legal limit upon the power to prorogue which makes it compatible with the ability of Parliament to carry out its constitutional functions?

49. In answering that question, it is of some assistance to consider how the courts have dealt with situations where the exercise of a power conferred by statute, rather than one arising under the prerogative, was liable to affect the operation of a constitutional principle. The approach which they have adopted has concentrated on the effect of the exercise of the power upon the operation of the relevant constitutional principle. Unless the terms of the statute indicate a contrary intention, the courts have set a limit to the lawful exercise of the power by holding that the extent to which the measure impedes or frustrates the operation of the relevant principle must have a reasonable justification. That approach can be seen, for example, in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409 , paras 80-82 and 88-89, where earlier authorities were discussed. A prerogative power is, of course, different from a statutory power: since it is not derived from statute, its limitations cannot be derived from a process of statutory interpretation. However, a prerogative power is only effective to the extent that it is recognised by the common law: as was said in the *Case of Proclamations* , "the King hath no prerogative, but that which the law of the land allows him". A prerogative power is therefore limited by statute and the common law, including, in the present context, the constitutional principles with which it would otherwise conflict.

50. For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course.

51. That standard is one that can be applied in practice. The extent to which prorogation frustrates or prevents Parliament's ability to perform its legislative functions and its supervision of the executive is a question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts. The court then has to decide whether the Prime Minister's explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation having those effects. The Prime Minister's wish to end one session of Parliament and to begin another will normally be enough in itself to justify the short period of prorogation which has been normal in modern practice. It could only be in unusual circumstances that any further justification might be necessary. Even in such a case, when considering the justification put forward, the court would have to bear in mind that the decision whether to advise the monarch to prorogue Parliament falls within the area of responsibility of the Prime Minister, and that it may in some circumstances involve a range of considerations, including matters of political judgment. The court would therefore have to consider any justification that might be advanced with sensitivity to the responsibilities and experience of the Prime Minister, and with a corresponding degree of caution. Nevertheless, it is the court's responsibility to determine whether the Prime Minister has remained within the legal limits of the power. If not, the final question will be whether the consequences are sufficiently serious to call for the court's intervention.

Conclusions on justiciability

52. Returning, then, to the justiciability of the question of whether the Prime Minister's advice to the Queen was lawful, we are firmly of the opinion that it is justiciable. As we have explained, it is well established, and is accepted by counsel for the

Prime Minister, that the courts can rule on the extent of prerogative powers. That is what the court will be doing in this case by applying the legal standard which we have described. That standard is not concerned with the mode of exercise of the prerogative power within its lawful limits. On the contrary, it is a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand. An issue which can be resolved by the application of that standard is by definition one which concerns the extent of the power to prorogue, and is therefore justiciable.

The alternative ground of challenge

53. In addition to challenging the Prime Minister's advice on the basis of the effect of the prorogation which he requested, Mrs Miller and Ms Cherry also seek to challenge it on the basis of the Prime Minister's motive in requesting it. As we have explained, the Prime Minister had made clear his view that it was advantageous, in his negotiations with the EU, for there to be a credible risk that the United Kingdom might withdraw without an agreement unless acceptable terms were offered. Since there was a majority in Parliament opposed to withdrawal without an agreement, there was every possibility that Parliament might legislate to prevent such an outcome. In those circumstances, it is alleged, his purpose in seeking a prorogation of such length at that juncture was to prevent Parliament from exercising its legislative functions, so far as was possible, until the negotiations had been completed.

54. That ground of challenge raises some different questions, in relation to justiciability, from the ground based on the effects of prorogation on Parliament's ability to legislate and to scrutinise governmental action. But it is appropriate first to decide whether the Prime Minister's advice was lawful, considering the effects of the prorogation requested and applying the standard which we have set out. It is only if it was, that the justiciability of the alternative ground of challenge will need to be considered.

Was the advice lawful?

55. Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts. The first question, therefore, is whether the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account.

56. The answer is that of course it did. This was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October. Parliament might have decided to go into recess for the party conferences during some of that period but, given the extraordinary situation in which the United Kingdom finds itself, its members might have thought that parliamentary scrutiny of government activity in the run-up to exit day was more important and declined to do so, or at least they might have curtailed the normal conference season recess because of that. Even if they had agreed to go into recess for the usual three-week period, they would still have been able to perform their function of holding the government to account. Prorogation means that they cannot do that.

57. Such an interruption in the process of responsible government might not matter in some circumstances. But the circumstances here were, as already explained, quite exceptional. A fundamental change was due to take place in the Constitution of the United Kingdom on 31st October 2019. Whether or not this is a good thing is not for this or any other court to judge. The people have decided that. But that Parliament, and in particular the House of Commons as the democratically elected representatives of the people, has a right to have a voice in how that change comes about is indisputable. And the House of Commons has already demonstrated, by its motions against leaving without an agreement and by the European

Union (Withdrawal) (No 2) Act 2019, that it does not support the Prime Minister on the critical issue for his Government at this time and that it is especially important that he be ready to face the House of Commons.

58. The next question is whether there is a reasonable justification for taking action which had such an extreme effect upon the fundamentals of our democracy. Of course, the Government must be accorded a great deal of latitude in making decisions of this nature. We are not concerned with the Prime Minister's *motive* in doing what he did. We are concerned with whether there was a reason for him to do it. It will be apparent from the documents quoted earlier that no reason was given for closing down Parliament for five weeks. Everything was focussed on the need for a new Queen's Speech and the reasons for holding that in the week beginning the 14th October rather than the previous week. But why did that need a prorogation of five weeks?

59. The unchallenged evidence of Sir John Major is clear. The work on the Queen's Speech varies according to the size of the programme. But a typical time is four to six days. Departments bid for the Bills they would like to have in the next session. Government business managers meet to select the Bills to be included, usually after discussion with the Prime Minister, and Cabinet is asked to endorse the decisions. Drafting the speech itself does not take much time once the substance is clear. Sir John's evidence is that he has never known a Government to need as much as five weeks to put together its legislative agenda.

60. Nor does the Memorandum from Nikki da Costa outlined in para 17 above suggest that the Government needed five weeks to put together its legislative agenda. The memorandum has much to say about a new session and Queen's Speech but nothing about why so long was needed to prepare for it. The only reason given for starting so soon was that "wash up" could be concluded within a few days. But that was totally to ignore whatever else Parliament might have wanted to do during the four weeks it might normally have had before a prorogation. The proposal was careful to ensure that there would be some Parliamentary time both before and after the European Council meeting on 17th - 18th October. But it does not explain why it was necessary to curtail what time there would otherwise have been for Brexit related business. It does not discuss what Parliamentary time would be needed to approve any new withdrawal agreement under [section 13 of the European Union \(Withdrawal\) Act 2018](#) and enact the necessary primary and delegated legislation. It does not discuss the impact of prorogation on the special procedures for scrutinising the delegated legislation necessary to make UK law ready for exit day and achieve an orderly withdrawal with or without a withdrawal agreement, which are laid down in the [European Union \(Withdrawal\) Act 2018](#). Scrutiny committees in both the House of Commons and the House of Lords play a vital role in this. There is also consultation with the Scottish Parliament and the Welsh Assembly. Perhaps most tellingly of all, the memorandum does not address the competing merits of going into recess and prorogation. It wrongly gives the impression that they are much the same. The Prime Minister's reaction was to describe the September sitting as a "rigmarole". Nowhere is there a hint that the Prime Minister, in giving advice to Her Majesty, is more than simply the leader of the Government seeking to promote its own policies; he has a constitutional responsibility, as we have explained in para 30 above.

61. It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks, from 9th or 12th September until 14th October. We cannot speculate, in the absence of further evidence, upon what such reasons might have been. It follows that the decision was unlawful.

Remedy

62. Mrs Miller asks us to make a declaration that the advice given to Her Majesty was unlawful and we can certainly do that. The question is whether we should do more than that, in order to make it crystal clear what the legal consequences of that holding are. The Inner House did go further and declared, not only that the advice was unlawful, but that "any prorogation which followed thereon, is unlawful and thus null and of no effect". The essential question is: is Parliament prorogued or is it not?

63. The Government argues that we cannot answer that question, or declare the prorogation null and of no effect, because to do so would be contrary to article 9 of the Bill of Rights of 1688, an Act of the Parliament of England and Wales, or the wider privileges of Parliament, relating to matters within its "exclusive cognisance". The prorogation itself, it is said, was "a proceeding in Parliament" which cannot be impugned or questioned in any court. And reasoning back from that, neither can the Order in Council which led to it.

64. Article 9 provides:

"That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."

The equivalent provision in the Claim of Right of 1689, an Act of the Parliament of Scotland, is this:

"That for redress of all greivances and for the amending strenthneing and preserveing of the lawes Parliaments ought to be frequently called and allowed to sit and the freedom of speech and debate secured to the members."

65. The first point to note is that these are Acts of Parliament. It is one of the principal roles of the courts to interpret Acts of Parliament. A recent example of this Court interpreting article 9 is *R v Chaytor* [2010] UKSC 52; [2011] 1 AC 684. The case concerned the prosecution of several Members of Parliament for allegedly making false expenses claims. They resisted this on the ground that those claims were "proceedings in Parliament" which ought not to be "impeached or questioned" in any court outside Parliament. An enlarged panel of nine Justices held unanimously that MPs' expenses claims were not "proceedings in Parliament" nor were they in the exclusive cognisance of Parliament. There is a very full discussion of the authorities in the judgments of Lord Phillips of Worth Matravers and Lord Rodger of Earlsferry which need not be repeated here.

66. That case clearly establishes: (1) that it is for the court and not for Parliament to determine the scope of Parliamentary privilege, whether under article 9 of the Bill of Rights or matters within the "exclusive cognisance of Parliament"; (2) that the principal matter to which article 9 is directed is "freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place" (para 47). In considering whether actions outside the Houses and committees are also covered, it is necessary to consider the nature of their connection to those and whether denying the actions privilege is likely to impact adversely on the core or essential business of Parliament; (3) that "exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament" (para 63); it was enjoyed by Parliament itself and not by individual members and could be waived or relinquished; and extensive inroads had been made into areas previously within exclusive cognisance.

67. Erskine May, *Parliamentary Practice* (25th ed 2019, para 13.12) is to similar effect:

"The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the 17th century, is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article IX. An individual member takes part in a proceeding usually by speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking."

68. The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a "proceeding in Parliament". It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen's bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end.

69. This court is not, therefore, precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect: see, if authority were needed, *R (UNISON) v Lord Chancellor* [2017] UKSC 51, para 119. It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.

70. It follows that Parliament has not been prorogued and that this court should make declarations to that effect. We have been told by counsel for the Prime Minister that he will "take all necessary steps to comply with the terms of any declaration made by the court" and we expect him to do so. However, it appears to us that, as Parliament is not prorogued, it is for Parliament to decide what to do next. There is no need for Parliament to be recalled under the [Meeting of Parliament Act 1797](#). Nor has Parliament voted to adjourn or go into recess. Unless there is some Parliamentary rule to the contrary of which we are unaware, the Speaker of the House of Commons and the Lord Speaker can take immediate steps to enable each House to meet as soon as possible to decide upon a way forward. That would, of course, be a proceeding in Parliament which could not be called in question in this or any other court.

71. Thus the Advocate General's appeal in the case of *Cherry* is dismissed and Mrs Miller's appeal is allowed. The same declarations and orders should be made in each case.

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