# Letters

## Prorogation as Constitutional Harm

Sir:

In your spring issue, Nicholas MacDonald and James Bowden offer a novel reply to the numerous constitutional concerns raised by constitutional scholars, political scientists, and parliamentarians regarding the 2008 prorogation of Parliament. They are to be commended for providing a clear argument, calling attention to the troubling case of the 1873 prorogation, and pointing out the distinctions between asking for prorogation and asking for dissolution. Unfortunately, their argument is deficient in several respects.

The authors rely upon the 1873 prorogation of Parliament to suggest the Governor General has no discretion in matters of prorogation. They argue that in 2008, Michaëlle Jean had to follow the advice of Prime Minister Stephen Harper to prorogue Parliament. Yet, as the authors themselves point out, in the 1873 example Prime Minister Sir John A Macdonald requested a prorogation to avoid the release of a committee's report, not to avoid a scheduled confidence vote. Whatever the consequences of releasing the report might have been for the Macdonald government in 1873, the situation in 2008 was quite different. The question before Mme Jean was whether she should prorogue Parliament and thus enable Harper to avoid a duly scheduled confidence vote that he was sure to lose. By agreeing to prorogue, she upended core principles of responsible government, and the legitimacy of Canada's democracy became contested.

While any use of prorogation to avoid responsibility in the House is detestable, the case in 2008 went far beyond what happened in 1873. The authors' argument that the 1873 example shows the Governor General had no discretion in 2008 is fundamentally flawed. Although in normal circumstances the Governor General acts on the advice of the Prime Minister, MacDonald and Bowden fail to properly consider the Governor General's overriding mandate to uphold the basic principle that the government must retain the confidence of the House.

In addition to an over-reliance on the 1873 example, the authors rely upon a largely discredited view of the Crown as little more than a rubber stamp for Cabinet. While they allow that this matter is subject to some debate, they manage to totally ignore the authoritative and extensive work by the late Senator Eugene Forsey in regard to the reserve powers of the monarch and her representatives. The arguments made in Forsey's landmark 1943 book on dissolution are updated in his comprehensive hundred-page Introduction to the 1990 volume Evatt and Forsey on the Reserve Powers. Forsey's position is now widely accepted among serious scholars throughout the Commonwealth. In short: in exceptional circumstances, when the primacy of Parliament is threatened, the Crown has the discretion to refuse the advice of her ministers.

Perhaps the authors' failure in this regard is connected to the widespread ignorance in Canada of the basic principles that underlie our Parliamentary system. In recent years, the sacrosanct proposition that Parliament is supreme has been repeatedly challenged. While the central role of the House has been twice re-affirmed by the Speaker since the constitutional calamity of 2008, media and pundits continue to propagate subversive myths like the idea that Canadians elect their Prime Minister. In actual fact, the government is chosen by the House of Commons which alone represents the will of the Canadian electorate. Any government, in turn, must maintain the confidence of the elected MPs. The first duty of the Governor General is to ensure that Parliament is able to do its job. Allowing a Prime Minister to avoid a confidence vote, whether through prorogation or dissolution, cannot be squared with this clear and unambiguous duty.

In addition to the constitutional limitations of their analysis, the authors also fail to consider the broader social dynamics at play in 2008. One element was the shocking language used by Conservative ministers to attack a political and linguistic minority, suggesting that any governing arrangement requiring the cooperation of the Bloc Quebecois amounted to a "deal with the devil," and a separatist-led "coup d'etat."

We should not ignore the government's willingness in 2008 to stoke nationalistic tensions and manipulate the complicated and often under-appreciated role of English/French relations within our political culture. In a paper so concerned with constitutional practice and precedent, any consideration of how the events surrounding the 2008 prorogation undermined the rights of some Quebecers to be represented in Ottawa and participate in the affairs of the House of Commons is notable by its absence.

Nor do the authors pay enough critical attention to the scholarly work of those who advised the Governor General in 2008. For example, Peter Hogg has argued that the reserve powers provide the Governor General with "personal discretion" not only to determine whether the Prime Minister has the confidence of the House, but also to assess the political desirability of any alternative government that might be formed. This appears to go beyond the requirement to assess whether such an alternative government could gain and hold the confidence of the House, actually suggesting that the decision could legitimately be influenced by the Governor General's personal opinion on the political appropriateness of this alternative and its leadership. It is a shame that MacDonald and Bowden did not address this more far-reaching and less defensible claim.

Finally, while the energy and intelligence of the authors is obvious, there is something unsettling at times about their tone. Too often they dismiss various arguments by noted political scientists and constitutional scholars by describing them as "extreme" or totally ignoring them . While challenging conventional wisdom is praise-worthy in Canada where deference is sometimes overdone, it should always be done with respect and due regard.

Many have concluded that while the 2008 prorogation decision may have strained constitutionality, it was justified given the global economic downturn and the alleged political unacceptability of the proposed coalition between the Liberals and New Democratic Party, supported by the Bloc Quebecois. I have argued that the 2008 prorogation might be better seen as a constitutional harm which prevented Parliament from performing what Eugene Forsey called "its most essential function" – deciding who shall govern. While efforts to excuse the calamity that befell our system of government in 2008 are understandable, we need more analysis of how a pattern of political populism has undermined democratic understanding of responsible government and reduced the central role of the people's Parliament in Canada's democracy. At a time when more detailed discussions about the nature of our parliamentary democracy are needed, MacDonald and Bowden have unfortunately further muddied the waters.

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## The Authors Respond

Sir:

In 1873, then-governor general Lord Dufferin expressed that a governor general should "unflinchingly maintain the principle of ministerial responsibility." Except under the *most* exceptional circumstances, the governor general must accept the advice of the prime minister. As Professor Robert MacGregor Dawson argued in his seminal work *the Government of Canada* later revised by Professor Norman Ward, the decision is not that of a governor general, but that of the government. Dawson emphasized that "eventually the people and their representatives will deal with those who have proffered the advice." Parliament on behalf of the electorate – and not the crown – holds the government to account. While this view seems to have fallen out of fashion in some academic circles, it is also the view supported by a large majority of French-language literature on the matter.

Speaker of the House of Commons, Peter Milliken, declared in his ruling on the provision of documents to the Special Committee on Afganistan (April 27, 2010) that it is not only the fundamental role of the House of