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

Commons to hold the government to account, but a constitutional obligation. Maintaining the principle of ministerial responsibility in our system of responsible government requires that ministers be responsible to *parliament*. They are not responsible to the governor general.

Arguments have been made that social, economic, and other factors should be considered in an assessment of the Harper-Jean prorogation of 2008. However, there are only two constitutional considerations at hand: first, whether prorogation is constitutionally comparable to dissolution. We have concluded that prorogation and dissolution differ sufficiently that they are not constitutionally comparable. The second consideration then, is whether a request for prorogation can ever meet the threshold of the most exceptional circumstances under which a governor general could reject the prime minister's advice. We have concluded that it most certainly does not, since prorogation can be used, at its most controversial, as a mere delaying tactic – and filibusters are hardly "constitutional harms."

The governor general's rejection of the prime minister's advice is the greatest violation of ministerial responsibility. As such, the governor general can only take this drastic action when the prime minister poses a real and undeniably legitimate threat to our very system of government. If the governor general rejects the advice of the prime minister, there are only two outcomes: either the resignation or dismissal of the prime minister, or the dismissal of the governor general. In either case, the result of a conflict of this magnitude would bring our entire political system into disrepute and disarray.

The Harper-Jean prorogation of 2008, if nothing else, demonstrates the necessity of a minimalist interpretation of the governor general's discretionary power. Surely following the controversial prorogation the opposition parties could have formally withdrawn their confidence in the government on any of the numerous opportunities afforded to them – such as the Address in Reply to the Speech from the Throne and the Budget. But did the opposition defeat the government in January 2009? It did not. How, then, can it be argued that the governor general's intervention could be justified? Indeed, during the remainder of the 40th parliament, the House did not take action, beyond a non-binding motion adopted by the House, to curtail the ability of the prime minister to request prorogation. The British Parliament's current *Fixed-Term Parliaments Bill* demonstrates that parliament can, in fact, exercise its sovereignty by stripping the political executive and the Crown of prerogative and vesting it in itself through an act of parliament.

The case of 2008 is nearly identical to that of 1873, when Sir John A. Macdonald conferred with Lord Dufferin. As we demonstrated in "No Discretion", the scheduled tabling of the committee report into allegations that Macdonald acted unethically with respect to the construction of the Canadian Pacific Railway would, without doubt, have been considered a matter of non-confidence. Accordingly, when parliament resumed sitting following prorogation, Macdonald resigned as prime minister because of the report. Prorogation did nothing to upset the intricacies of the system. Responsible government triumphed because the opposition fulfilled its function of holding the government to account.

There are two points made in Professor Wheeldon's assessment that require humble clarification. First is the assertion that the government commands the "confidence of elected MPs." This imprecise interpretation of Westminster has led many scholars astray. The government must command the confidence of the *House of Commons* in formal votes – not the confidence of MPs as individuals outside of the House. It is the House as an institution, and not its individual members, which forms the legitimate democratic authority in Canada. Second, that "the first duty of the Governor General is to ensure that Parliament is able to do its job" is incorrect. In fact, the first duty of the governor general is only to ensure that there is a government. The former requires an active crown, while the latter results in an assertive and dynamic parliament.

In a democratic society, why would the governor general exercise unnecessary discretion? Many have described the prime minister's advice to prorogue parliament in 2008 as detestable. But the aftermath of the prorogation serves to emphasize the constitutional and democratic necessity of according the benefit of the doubt to the prime minister.

Finally, the Supreme Court of Canada in the *Reference re Secession of Quebec, (*1998), has expressed that in a democratic state:

> No one has a monopoly on truth, and our system is predicated on the faith in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of

> government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

More debate is needed on our intricate system of government in Canada – this is undeniable. At stake is the way we govern ourselves. More than ever, all dimensions of the arguments must be taken into account before arriving at a final conclusion – to do otherwise would be grossly irresponsible. But as with any debate, the water often becomes muddy before it clears.

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