Prorogation Protest Primer: Highlights and Must-Reads

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The prorogation of the Parliament of Canada on December 30, 2009 has prompted a remarkably vigorous internet-based protest. On January 23, 2010, organizers are calling for protest rallies in dozens of cities. Presumably, politicians and commentators will be watching carefully on January 23 and trying to gauge whether public concern about the Prime Minister's relationship with Parliament is going to continue or subside. This article outlines the impact of the latest prorogation and presents highlights of discussion and debate since December 30 in the print media.

Prorogation instead of Adjournment

At the request of Prime Minister Stephen Harper, the Governor General prorogued Parliament on December 30, 2009. Instead of Parliament resuming its current session on January 25, 2010 after its usual winter adjournment, a new session will open with a speech from the throne on March 3, 2010 followed by introduction of the annual budget on March 4. The amount of scheduled parliamentary working time this winter is reduced by 22 days. 36 out of 69government bills introduced in the last session (that is, since January 2009) died on the order paper. If they are to become law before the next election, they will need to be reintroduced, debated or re-debated, and passed by both houses of Parliament. Assuming the prime minister takes the opportunity to appoint five new Conservative senators, the government will by March have the largest party caucus in the Senate.[2] Appointments to fill these vacancies may be made at any time, but the scheduled parliamentary adjournment promises a rearrangement of committee assignments for senators and MPs. Thanks to prorogation and the expected new appointments, Senate committees will have a majority of Conservative members. This change may help the government speed up parts of its legislative agenda. However, the mechanics of the Senate do not explain the length of the pause in parliamentary business: 63 days. As parliamentary expert Thomas Hall notes, "If they wanted to reset the Senate committees … all they had to do was prorogue just before Parliament comes back and then start the new session a day or two later."[3] Accordingly, most explanations of the prime minister's prorogation decision emphasize the conflict between the government and opposition parties over a parliamentary committee's attempt to inquire into the controversy over Canadian handling of Afghan detainees.[4] Unlike an adjournment, prorogation automatically ceases the work of parliamentary committees: in fact, the committees do not have members until they are reconstituted at the start of the new session.

Criticism of the Decision to Prorogue

Errol Mendes, a law professor at the University of Ottawa, emphasized the Afghan detainee

issue – "potentially a war crime" in his view – when he denounced "Harper's second undemocratic prorogation" in the Toronto *Star* on January 5.[5] His article points to a pattern of government tactics in connection with the detainee issue; he sees "a major shift in Canadian constitutional democracy taking shape." He concludes: These are serious examples of abuse of executive power over Parliament, the Governor General, the public service and ultimately the Canadian voters who elected MPs to make Parliament work.... This abuse of executive power is tilting toward totalitarian government and away from the foundations of democracy and the rule of law on which this country was founded.[6] On January 7, *The Economist* criticized Harper for "subjecting Parliament to prime-ministerial whim."[7] Having prorogued Parliament last winter to dodge a confidence vote he seemed set to lose, Mr. Harper has now established a precedent that many constitutionalists consider dangerous. No previous prime minister has prorogued the legislature "in order to avoid the kind of things that Harper apparently wants to avoid," says Ned Franks, a veteran political scientist and historian of Parliament. Although other prime ministers may have had ulterior motives, they were less blatant, he says.[8] *The Economist* goes on to encapsulate the issue: "The danger in allowing the prime minister to end discussion any time he chooses is that it makes Parliament accountable to him rather than the other way around."[9] By January 12, more than 170 concerned academics had signed a petition supporting an op-ed article, written by professors Jeremy Webber, Daniel Weinstock and Charles Taylor, accusing the Prime Minister of "undermining our system of democratic government."[10] While conceding that the prorogation request was not "technically wrong," they call it "improper" – lacking in the prime-ministerial "self-restraint" that responsible government and parliamentary accountability require. The use of the ability to prorogue ... was nakedly partisan when it was invoked to save his government from defeat in a confidence motion in December 2008, and it is nakedly partisan now, when it is being used to short-circuit the work of the parliamentary committee looking into the Afghan detainees question and evade Parliament's request that the government turn over documents pertaining to that question.... [W]e conclude that the prime minister has violated the trust of Parliament and of the Canadian people.[11]

Are the Criticisms Overblown?

Professor Donald Savoie, quoted in the *Globe and Mail* on January 13, took a calmer view: "Everyone should take a valium. It is the fashion of the day to talk about it. The issue is much broader and more serious. Harper did what the Constitution allows him to do and what prime ministers would likely do under similar circumstances." Savoie sees a need for a "fundamental rethink" of the constitutional roles of Parliament, cabinet and the prime minister.[12] Denis Smith agrees that the Prime Minister's lack of "self-restraint" should be criticized, but he joins Christopher Moore in emphasizing that the House of Commons has a role in enforcing self-restraint. [T]he prime minister only acts the way he does because 307 other MPs let him get away with it. But in one crucial vote in December, the House voted 145 to 143 to order release of unredacted documents to the Afghanistan committee, and the opposition indicated that it would pursue the application of that order when the House reconvenes. The government indicated that it would not obey the order. In effect, it gave notice that it would defy the House's demand. It seems to me that it is this

defiance, plus the prorogation, that turned the affair into a parliamentary crisis. The House's way to resolve the crisis, obviously, is to defeat the government in a confidence vote, and it will be in a position to do so on March 3 or 4.[13] Professor Peter Hogg, a leading constitutional lawyer, emphasized that the Governor General had no discretion to refuse Harper's latest request for prorogation. He also pointed out that "It is quite normal to have several sessions of Parliament in the course of the life of a Parliament."[14] Paul Benoit, a former ministerial advisor to the current government, has offered the most detailed rejoinder to criticisms of Harper. In his reply to the petition/op-ed project, he raises a series of points. Benoit sees a "huge ethical difference" between following (or breaking) flexible unwritten conventions, in contrast with inflexible written rules. He points out that MPs can concentrate on their non-parliamentary duties during a prorogation, and that cabinet is accountable to "other fora" – such as the media. He sees more frequent prorogations as a natural way for minority governments to obtain "flexibility." He claims it is unusual for parliamentary committees to meet during adjournments, so the difference between an adjournment and a prorogation is overstated. He says that if Harper had really "violated the trust of Parliament," he would have faced some form of public protest from the Speaker of the House of Commons.[15] Mr. Benoit also claims that "for some time now, governments, following the speech from the throne, have re-instated legislation that they really wanted at the stage at which it was at [sic] when the session was prorogued." Here, he seems to be referring to several unusual procedures, which are actually at the discretion of the House of Commons, not of the government. They would require either unanimous consent of the House, amendment of the Standing Orders, or a vote on a special government motion. (This last option was used in 1996, in a majority Parliament operating under different standing orders.[16]) It is hard to see how the current government, with command of only a minority of MPs, could use any of these measures to reinstate many of its 36 bills that died on the order paper on December 30.

How Does the Parliament of Canada Measure Up?

Some commentators have taken the opportunity to bemoan the overall state of parliamentary democracy in Canada, raising interesting comparisons with other countries. John Ibbitson of the *Globe and Mail* calls Canada's Parliament "the most dysfunctional in the English-speaking world" – or at least the most willing to be silenced by the government, compared to the United Kingdom, the United States, Australia and New Zealand. Ibbitson quotes Professor Lori Thorlakson, who imagines a similar use of prorogation in Britain would be a "huge" affront to parliamentarians.[17] Richard Foot covers similar ground in another gloomy survey article and quotes more experts. Robert Hazell, director of the Constitution Unit (University College London), agrees that "The Canadian Parliament is more dysfunctional" than its counterparts. Hazell stresses: "No other parliament has been prorogued in recent times to rescue the government from a political difficulty." Like Thorlakson, Ned Franks cannot imagine a British prime minister daring to prorogue Parliament and disrupt its timetable "for purely political reasons."[18]

Room for Improvement?

Professor Andrew Heard sees a way to reassert parliamentary authority. Writing in the *Globe and Mail* on January 10, he conceded that the current government "is certainly not the first in Canada to shut down Parliament to escape embarrassing situations," but saw no precedent for the "repeated abuse" of the past year. His article points out that the British government proposed in 2007 that a vote of the House of Commons could be required for prorogation.[19] Heard concludes: This change could be implemented informally and quickly, with the passage of a resolution in the House of Commons to the effect that the prime minister would be in contempt of Parliament to advise prorogation or dissolution without being authorized to do so by the House.... The decision to shut down Parliament should be made democratically, not autocratically. If public protest continues, federal politicians may come to see an advantage in pursuing Heard's solution or another proposal to limit prime ministerial dominance of Parliament.

Further Reading

Andrew Heard, "The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?" Points of View no. 7, *Centre for Constitutional Studies* (January 2009).

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[1] Ken Dickerson is Program Manager at the Centre for Constitutional Studies. The author's views do not necessarily reflect those of the Management Board and staff of the Centre for Constitutional Studies. [2] David Akin, "Harper says five new senators is enough" *National Post Full Comment* (6 January 2010). [3] Harris McLeod, "Tories to start legislative agenda, again" *The Hill Times* (11 January 2010). [4] Andrew Coyne, "What's at stake" Macleans.ca (31 December 2009). [5] Errol P. Mendes, "Prorogation redux: Harper in contempt of Parliament" *thestar.com* (5 January 2010). [6] *Ibid*. [7] "Harper goes prorogue" *The Economist* (7 January 2010). [8] "Halted in mid-debate" *The Economist* (7 January 2010). [9] *Ibid*. [10] Jeremy Webber, Daniel Weinstock and Charles Taylor, "Proroguing Parliament stifles democracy" *Times Colonist* (12 January 2010). [11] *Ibid*. [12] Lawrence Martin, "A snowballing protest shows democracy matters to Canadians" *The Globe and Mail* (31 January 2010). [13] Denis Smith, quoted in Christopher Moore, "Professor Weinstock asks Mr Harper to be nicer"*Christopher Moore's Canadian History* website (12 January 2010). [14] Glenna Hanley, "Adviser says 2008 prorogation was right move" *The Daily Gleaner* (18 January 2010). [15] Paul Benoit, "The prorogation of Parliament is no threat to democracy" *Ottawa Citizen* (15 January 2010). [16] Daniel Brock and Claudia Feldkamp, "The Prime Minister's prorogation play" *Lexology* (11 January 2010). [17] John Ibbitson, "Few countries can claim such a pathetic Parliament" *The Globe and Mail* (9 January 2010). [18] Richard Foot, "In a (parliamentary) league of our own" *Ottawa Citizen* (17 January 2009). [19] Andrew Heard, "Give the House the authority" *The Globe and Mail* (10 January 2010).