The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?

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The Governor General has reached a very difficult and historic decision in agreeing to the Prime Minister's request to prorogue Parliament on December 4, 2008. While there are sound arguments to justify that decision, the balance of arguments reveals this to be a dangerous precedent allowing future prime ministers to justify fundamental abuses of power. This decision also greatly undermined the ability of our newly elected legislators to freely decide who has their confidence to govern following an election. It is important to work through the issues involved in this decision as they relate to fundamental principles that all future governors general must try and balance in a time of constitutional crisis.

A difficult decision implies that there are good reasons to decide in either direction, and there are several to defend the decision to prorogue. First and foremost, the Governor General has a duty to intervene in the political process as little as possible. She is an appointed official, and she must allow ample room to let the elected politicians try and resolve crises between themselves. They alone are directly accountable to the electorate and should be given considerable latitude to resolve a crisis.

Secondly, the governor general is bound to normally act on any constitutional advice offered by a prime minister who commands the confidence of a majority in the House of Commons. Since the Conservative government won the confidence votes held on the speech from the throne in the last week of November, Mr Harper could apparently address the governor general with authority.

We can assume that the governor general based her decision to grant prorogation on these two principles, that she should intervene as little as possible and that she should follow the advice of a prime minister who had won the most recent test of confidence in the Commons.

Judged just on this application of these two principles, her decision appears to be a sound one.

However, a governor general is bound to consider much more in reaching such an important decision. Not only can both of the principles mentioned above also justify refusing prorogation, but the governor general is obliged by other principles that further reinforce a refusal.

First of all, the governor general's decision was actually going to be a substantial intervention in the political process regardless of whether she granted prorogation or not. Indeed her decision to grant Mr Harper's request has in fact prevented our elected members of parliament from resolving the issue in a timely fashion. The governor general was clearly informed by the opposition parties of their desire and intent to vote no confidence in the government on December 8th, and to support an alternative government.

Parliament's ability to vote confidence in a government is all the more important in the early weeks following an election that produced only minority parties. Only the elected members of the House can determine who has the right to govern in a minority situation. The incumbent prime minister has a right to meet parliament after an election, but only that. The prime minister must win and maintain the confidence of parliament in order to continue governing. The governor general has prevented a newly elected parliament from expressing its judgment on the prime minister.

Secondly, the prime minister's request to prorogue parliament to avoid defeat on a vote of confidence is of highly questionable constitutionality. Scholars around the Commonwealth have decried such a possible tactic. Such an event had not happened in modern, stable parliamentary democracies, because prime ministers have understood their duty to face parliament. It is completely unprecedented in Canada in modern times. It does happen in moments of turmoil in unstable political systems, such as occurred in Sri Lanka in 2001.

Other doctrines guiding the work of governors general arise from their duty to ensure that the basic principles of parliamentary democracy are allowed to function. The first and most important principle of parliamentary democracy is that the government of the day must win and maintain the confidence of the House of Commons. Thus a governor general has a central duty to ensure there is a government in office who commands the confidence of Parliament. This duty is particularly important in the early months following elections that return a House of Commons divided among minority parties. By suspending Parliament, the governor general has prevented it from fulfilling that duty.

The particular vote annulled by prorogation was all the more crucial since the government had already delayed it by one week. In the context of the very opening weeks of a new minority parliament, any vote of confidence becomes crucial as the House decides who has their confidence. Furthermore, the opposition parties used this delay to agree to a new government which would be supported by a majority of members. A signed agreement ensured that all of the opposition parties, with a majority of members in the House, would support a coalition government for at least 18 months. A documented, alternative

government reinforced the governor general's duty to ensure that that MPs could vote on the scheduled confidence motion. This impending vote and the existence of an alternative government greatly undermined the prime minister's authority to advise prorogation.

The fact that the government had won its vote of confidence on the speech from the throne did not establish an unquestionable right to govern, especially since the government's motion on the address in reply was successfully amended with very important caveats. The government delivered its economic statement on the very same day that the speech from the throne was approved. This economic address was the first major piece of government business to be proposed in the new Parliament, and it was immediately rejected by all three party leaders in the House. Their instant rejection of the measure and the subsequent agreements they signed demonstrably undermined the authority of the government.

The existence of an alternative government is also crucial to the governor general's ability to refuse the prime minister's advice, or to insist the prime minister do any specific thing (such as agree to an election). A fundamental constitutional convention requires that a prime minister must accept political responsibility for the governor general's exercise of any of her prerogative powers. Although there are certain circumstances in which the governor general may use her own discretion, there must be a prime minister accountable to the House of Commons in place after that decision to accept political responsibility. If the current prime minister will not agree, then the governor general must appoint another who will.

Since it is an established tradition that a prime minister will resign if the governor general refuses his or her advice, the governor general cannot refuse advice without being certain in advance that another individual will accept appointment as prime minister afterwards. By agreeing to become the new prime minister, that individual must necessarily defend the governor general's decision to the public at large. In this case, the opposition parties had clearly told the governor general that they were prepared to support a new prime minister.

In our parliamentary system, the governor general's position also exists to provide a last bastion against abuses of power by the government. Such protection is all the more important for matters where there is no recourse to the courts. The basic functioning of responsible government and operations of Parliament are not subject to judicial review and, therefore, the governor general stands as the only bulwark against certain constitutional abuses.

The combination of these factors produce a powerful argument that the governor general had a duty to refuse the advice to prorogue parliament. This conclusion is underlined by the following summary of principles and their application to the decision to prorogue:

- The governor general has a broad duty to let the normal political actors and processes resolve political problems. Without the prorogation of Parliament, the normal political actors would have resolved the issue on

December 8. The political resolution of the problems have now been delayed for at least two months. Although the government promised to deliver the budget on January 27, there is no deadline for holding the actual votes on either the budget or the new speech from the throne.

- The governor general has a duty to act on any constitutional advice offered by a prime minister who enjoys the confidence of the House of Commons. But, the advice to prorogue parliament is arguably quite unconstitutional. The prime minister's authority was also greatly undermined by the existence of a signed agreement for an alternative government supported by the majority of MPs only two weeks into a newly elected Parliament.
- The governor general can only refuse advice if she can appoint an alternative government. Opposition leaders had written to the governor general several days ahead of her meeting with the prime minister. She was clearly informed that the majority of MPs intented to vote no confidence in the current government and of their commitment to support an alternative government for a minimum of 18 months.
- The head of state in a parliamentary system exists to protect the state from serious abuses of power by the government for which there is no judicial remedy. It is quite clearly an abuse of power, in principle, for a government to suspend parliament for two months when faced with imminent defeat. The abuse was all the more striking in this case, because Parliament was only 3 weeks old after an election that returned a minority Parliament.

A fundamental litmus test for any important decision by a governor general is what kind of precedent it sets for the future. By granting prorogation, the governor general not only allowed the current prime minister to escape almost certain defeat in a confidence motion, but she also set the stage for every future prime minister to follow suit.

With this precedent, any prime minister can demand that the governor general suspend parliament whenever he or she believes they are certain to lose a vote of confidence. And since the Constitution only requires that Parliament meet once within a 12 month period, the "time out" bought by prorogation can be a significantly long period. This precedent is a damaging and dangerous consequence of the governor general's decision. If this precedent stands, no future House of Commons can dare stand up to a prime minister without danger of being suspended until the prime minister believes the House has been tamed.

Other considerations, such as the need for a prolonged cooling off period, the lack of an electoral mandate for a coalition, or the role of the Bloc Quebecois are absolutely none of

the governor general's concern when making a decision on constitutional grounds. They are purely political matters that must be left to Parliament to sort out in its own time and ways. Indeed, it would be highly improper for her to base the decision on such factors.

The governor general failed to defend Canadian parliamentary democracy and has opened the door to repeated abuses of power by future prime ministers. Our newly elected MPs were about to pronounce authoritatively on who would have their confidence to govern, but they were shut down instead. We elect parliaments not governments in Canada, and Parliament must be free to determine who governs after an election.

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* Prof. Heard's publications on constitutional conventions include the book Canadian Constitutional Conventions: The Marriage of Law and Politics, Toronto: Oxford University Press, 1991 (2nd edition in progress) and several articles: "Just What is a Vote of Confidence? The Curious Case of May 10, 2005" (2007) Canadian Journal of Political Science, 395; "Constitutional Conventions and Parliament,"(2005) 28Canadian Parliamentary Review (2) 7; "Constitutional Conventions and Election Campaigns," (1995) 18Canadian Parliamentary Review (3) 8; "Recognizing the Variety Among Constitutional Conventions," (1989) 22 Canadian Journal of Political Science 63. The author's views do not necessarily reflect those of the Management Board and staff of the Centre for Constitutional Studies.