Reforming Prorogation:

The Commons doesn't have the authority to regulate the exercise of the prime minister's authority over prorogation — writes

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The federal Liberal Party pledged in their election platform from 2015 that they would never use prorogation for purely political purposes or tactical considerations if they formed government. Instead, they would use prorogation in a perfunctory way and end a session once Parliament had passed their legislative commitments that flowed from the Speech from the Throne. They added: "Harper has used prorogation to avoid difficult political circumstances. We will not."

After being sworn in on Nov. 4, 2015 Prime Minister Trudeau instructed his House Leader through the mandate letter to "Change the House of Commons *Standing Orders* to end the improper use of omnibus bills and prorogation." On the afternoon of Friday, Mar. 10, 2017 Bardish Chagger, the Government House Leader, released a paper entitled "Reforming the *Standing Orders* of the House of Commons: Modernization of the *Standing Orders* of the House of Commons," which includes a proposal on "discouraging governments from abusing prorogation." Finally, on Mar. 21, 2017 the Trudeau government moved, over the objections of the opposition, that the Standing Committee on Procedure and House Affairs study its proposed amendments to the *Standing Orders* and report back to the House by June.

While the House of Commons could undoubtedly amend its *Standing Orders* on matters like the structure of Question Period, electronic voting, or limiting the use of omnibus bills, the House of Commons alone does not possess the authority to regulate the exercise of the prime minister's authority over prorogation.

Regulating Prorogation

Prorogation ends a session of Parliament and thereby clears all business from the *Order Paper* as if it never existed (apart, since 2003, from Private Members' Bills) and terminates all committee business. The period between sessions of Parliament, the duration of the prorogation, is called the intersession. The executive authority over prorogation ultimately flows from the *Constitution Act*, 1867; section 9 vests the general "executive authority in and over Canada" in the Queen, and section 38 vests in the Governor General the authority to summon, and therefore by necessity, to prorogue, Parliament. The Prime Minister alone advises the Governor General to prorogue a session of Parliament, either through an instrument of advice or by telephone. The prorogation is promulgated into force either by a set of two proclamations published in the *Canada Gazette* or by the Governor General's speech in the Senate. The first proclamation, or the speech in the Senate, prorogues the session of parliament, and the second proclamation summons the next session of parliament for "dispatch of business", usually within 40 days, at a date named therein. The prime minister may, however, advise the Governor General to issue additional proclamations extending the intersession, normally in increments of 40 days. In theory, the only hard limit to the duration of an intersession is section 5 of the *Constitution Act*, 1982, which states that parliament must meet at least once every 12 months, but the practical constraints of the budgetary cycle and government legislation flowing from the Speech from the Throne render this maximum intersession of 364 days a logistical impossibility. So, too, does the fact that since 1997, the Financial Administration Act has limited the issuance of Special Warrants to when Parliament is dissolved and only for up to 60 days.

The *Standing Orders* currently contain a few provisions that describe how a prorogation affects the business of the House of Commons, but they do not attempt to regulate in any way how the Prime Minister exercises his authority over prorogation. For instance, Standing Order 49 states, "A prorogation of the House shall not have the effect of nullifying an Order of Address of the House for returns or papers …" Standing Order 55 pertains to how the Speaker of the House deals with preparing the *Order Paper* when Parliament is prorogued or dissolved and about to be summoned back. Finally, *Standing Orders* 81.6 and 86.2 declare that private members' bills now survive prorogation intact, unlike government bills (and presumably also private bills), which die on the *Order Paper*. These provisions, which the House of Commons adopted in 2003, represent the most significant shift in practice on prorogation of recent years. Interestingly, the Rules of the Senate do not mention prorogation at all, except in the glossary's entry for "Royal Prerogative."

Depending on precisely how the Trudeau government words its proposed amendments to the *Standing Orders*, such changes would either be ineffectual or unconstitutional as a means of regulating how the Prime Minister exercises his authority over prorogation. Relating the exercise of prorogation is simply beyond the authority of the House of Commons.

The discussion paper did not delve into great detail on how it proposes to amend the *Standing Orders* to "discourage governments from abusing prorogation." It defines what prorogation is, admonishes the Harper government by implication for having used prorogation tactically in 2008 and 2009, and then offers two potential solutions to remedy that supposed problem:

> Prorogation signifies the end of a session within a Parliament. At the beginning of a session, the Governor General sets out the Government's agenda for the session in the Speech from the Throne. When the Government has delivered on its commitments in the Speech, the Prime Minister recommends to the Governor General to end the session through prorogation.
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> There have been instances where Governments have prorogued early in the session to avoid politically difficult situations. The Government committed to Canadians to not abuse prorogation in such a manner.
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> One option would be to require that the Government table a document early in the following session that sets out the reasons for proroguing Parliament. The report could be automatically referred to committee for study and could be the subject of debates on Supply Days. Another approach could be to reinstate the prorogation ceremony that would resemble the approach used in the Speech from the Throne but would occur at the end of the session.

The first paragraph presents something of an ideal type of prorogation and does not take into account even prorogation under circumstances that the Liberals do not admonish, such as, for instance, intra-parliamentary changes of government and transition of power from one ministry to another.

The second paragraph seems like an oblique allusion to Harper, but that category should also include Chretien's tactical prorogation of Nov. 12, 2003 which prevented Auditor General Sheila Fraser from tabling her report on the Sponsorship Program until after the intersession. By the time the 3rd session of the 38th Parliament convened on Feb. 2, 2004 Paul Martin had become prime minister. It would defy all credibility to suggest that Prime Minister Chrétien did not know that Auditor General Fraser's report scheduled for November 2003 would reveal what became known as the Sponsorship Scandal. In his memoirs, Chrétien insists:

> Though I had neither seen Sheila Fraser's report nor been briefed about it, I knew, like everyone else in Ottawa, that it was going to be tough. But I didn't prorogue Parliament because I was afraid to face it or wanted to pass it like a kiss of death to my successor.

Curiously, in the preceding paragraph, Chretien explained that he advised Governor General Clarkson to prorogue Parliament in November 2003 precisely because "there was nothing urgent on the agenda, nor was there any point in asking Liberal MPs and senators, most of

whom were heavily involved in the leadership race, to stick around for *routine matters such as the tabling of the auditor general's latest report* on the sponsorship program." So which was it? Was Auditor General Fraser's report going to be nothing more than a "routine matter" or was her report "going to be tough"? In these two passages, Chrétien acknowledges that he made the decision to prorogue knowing full well that the Auditor General was poised to table her report.

As Paul Martin points out in his memoirs, Chrétien's explanation strains credibility to the breaking point. Chrétien insists that his original plan involved staying on as Prime Minister months after he would cease to be leader of the Liberal Party, develop the language for a new Speech from the Throne, present himself as Prime Minister in early 2004 at the start of the 3rd session of the 38th Parliament, and then resign a few weeks later, after he had taken the fall for the very same Auditor General's report whose publication he had delayed by making the decision to prorogue. Martin corroborates Chrétien's account that Fraser's "report was ready for release in November 2003." Irrespective of Chrétien's intent, his decision to prorogue necessarily delayed the tabling of the Auditor General's report until after Martin had succeeded him as Prime Minister. Contemporary reports in the *Globe and Mail* reported on the prorogation matter-of-factly through phrases like, "Mr. Chrétien announced Wednesday that he would prorogue Parliament and that he would not be in office after Jan. 12" and "Mr. Chrétien's announcement that he will prorogue Parliament signals the end of his 10-year regime and is the beginning of the transition process from a Chrétien government to a Martin government." Nowhere did they take any notice of political motivation. Only after Harper's prorogations of 2008 and 2009 did some journalists finally acknowledge the obvious tactical considerations in Chrétien's earlier prorogation.

The third paragraph in the discussion paper concludes with two "options" to avert a decision to prorogue for tactical reasons. As to the first, the *Standing Orders* probably could compel the government to table a document at the beginning of a new session which outlines the rationale for the Prime Minister's decision to have prorogued in the previous session. The Standing Committee on Procedure and House Affairs could study it. But to what end? The prorogation would already have happened, and it would remain the Prime Minister's decision and responsibility. It would be a waste of House time. Worse still, the discussion paper suggests that the committee's report could then be debated on a Supply Day — in other words that an executive decision which ended the previous session should take up one of the 22 allotted days per calendar year when the Opposition controls the debate. An Opposition motion condemning the decision could be construed as a motion of non-confidence. This policy could therefore have the reverse of the intended effect, making prorogation more political, not less.

Proposed amendments to the Standing Orders would either be ineffectual or unconstitutional as a means of regulating the Prime Minister's prerogative over prorogation

The second approach in the discussion paper is to of restore the prorogation ceremony in Parliament assembled, where the Governor General or Deputy Governor General prorogues the session through a closing speech from the throne. This falls entirely outside of the authority of the *Standing Orders* of the House of Commons. These speeches occur in the Senate chamber and are coordinated by the Privy Council Office and Government House; even the *Rules of the Senate* do not presume to regulate them. The discussion paper implies that the act of proroguing a session of Parliament through a closing speech from the throne would ensure greater accountability or scrutiny on the Prime Minister's decision to prorogue by drawing attention to it. Perhaps it would. This is similar to an argument advanced recently by Lorne Sossin and Adam Dodek that the governors should provide the rationale for the first minister's decision to prorogue or dissolve Parliament or a provincial legislature.

In reality, first ministers, not governors, make the decision to prorogue and therefore take responsibility for it, including any official, public rationale for their decision. The proposed closing speech from the throne could end up derogating from the Prime Minister's responsibility for constitutional advice he tenders to the Governor General and thereby *decreasing* the accountability of the Prime Minister in the media and public discourse. Finally, on a more mundane note, a closing speech from the throne used to serve not only as a means of promulgating the prorogation of a session into force, but also as a means of granting Royal Assent in Parliament assembled to *all* bills that the House of Commons and Senate had passed in the preceeding session. The advent of the *Royal Assent Act* of 2002 and its new procedure of Royal Assent by Written Declaration has made a closing speech from the throne less necessary. The last prorogation by closing speech from the throne occurred in 1983.

In conclusion, restoring the closing speech from the throne as a means of promulgating prorogation is worthy of consideration — but it falls entirely outside the scope of the *Standing Orders* of the House of Commons, not least because the ceremony occurs in the Senate, in Parliament assembled, and has nothing to do with the House of Commons. The *Standing Orders* of the House of Commons cannot regulate the Prime Minister's decision to prorogue, whether by proclamation or by speech from the throne. The Prime Minister would have to consult with the governor general on reinstating the ceremony as the regular procedure, or on organizing such ceremonies *ad hoc*, and the Privy Council Office and Government House would then take the operative steps to coordinate and implement the decision. But reinstituting prorogation by a closing speech from the throne on some occasions would not in any way prevent a Prime Minister from using prorogation as a political tactic, as Chretien did in 2003 or Harper did in 2008 and in 2009. In those instances, a Prime Minister would simply opt for prorogation by proclamation, and nothing could prevent him from doing so.

Feasible Approaches

Devising a practical and constitutionally sound approach to regulating the exercise and effects of prorogation depends upon a firm understanding of the Constitution of Canada and how responsible government works.

At its core, Responsible Government is a trinity (three in one) of responsibilities: ministerial responsibility to the Crown, individual ministerial responsibility before the Commons, and collective ministerial responsibility & solidarity before the Commons. The Government must command the confidence of both the Governor, who grants Ministers the authority to govern under the Crown, and of the legislative assembly, which must pass supply or else force either the Government's resignation or dissolution and fresh elections. And in practice, Responsible Government means that "Minister of the Crown take responsibility for all acts of the Crown" and that the Governor General acts on and in accordance with ministerial advice, save for exceptional circumstances, which in turn ensures the partisan neutrality of the Crown that he represents. The Governor General may reject or act contrary to ministerial advice only under exceptional circumstances precisely because of the exceptional consequence of his exercise of his discretionary authority: he forces the resignation of the Ministry and must appoint another that can subsequently take responsibility for those acts of the Crown. If a Governor General ever attempted to do the unprecedented and take the constitutionally dubious stance of rejecting a prime minister's advice to prorogue, then the Prime Minister would have to resign or worse still, advise the Queen to dismiss the Governor General. Ultimately, the governor's first constitutional duty is to ensure that there is a duly constituted government in office at all times, because the Queen's business must go on.

Where the *Constitution Acts* mention the Governor General, the Prime Minister by convention tenders and takes responsibility for that advice; where they mention the Governor-in-Council, the Cabinet collectively tenders advice and takes responsibility for those acts of the Crown. Combining the written constitution with the conventions of Responsible Government, we derive the following formulation: the Governor General summons, prorogues, and

dissolves the Legislature on and in accordance with the advice of the Prime Minister. The Constitution of Canada includes both the *Constitution Acts* and the constitutional conventions of Responsible Government. Parliament therefore cannot drive a wedge between the Governor General, who carries out advice in the Queen's name, and the Prime Minister, who advises the Governor General and derives his commission of authority to govern from him, or otherwise attempt to draw a false distinction between the two, because under no circumstances could the Governor General act *independently* of ministerial advice on matters of state, and only under the aforementioned exceptional circumstances could the Governor General act contrary to ministerial advice.

If a statute purports to limit how the Prime Minister can exercise the discretion to advise and take responsibility for the summoning and prorogation of Parliament, then it also necessarily limits how the Governor General acts on and promulgates that advice. Such a statute would therefore limit and abridge the authority of the Crown over prorogation, which derives from sections 9 and 38 of the *Constitution Act*, 1867, and would be unconstitutional, because only an amendment under section 41(a) of the *Constitution Act*, 1982 can change anything "in relation to the office of the Governor General."

The best approach would be to regulate the exercise of the executive authority over prorogation, but without substantially restricting it or attempting to abolish it. For instance, Parliament could pass a statute requiring that it must meet at least once every six months. Since this statutory requirement would exceed the minimum standard contained in section 5 of the *Constitution Act*, 1982 that Parliament must meet at least every 12 months, it would not even need to be presented as a constitutional amendment passed under Section 44. Parliament could also require that the first session of a new parliament after an election be summoned within a specific number of days.

Parliament could probably also limit the *duration* of prorogations, within a reasonable timeframe that does not deviate too far from existing practice, without running afoul of section 41(a). Currently, proclamations of prorogation can state that Parliament will reconvene for despatch of business at a *pro forma* date, which the Prime Minister can decide to extend by advising the Governor General to issue a subsequent proclamation that extends the intersession. Such a statute could attempt to limit the intersession to, say, an absolute maximum of 60 or 70 days.

In general, concrete reforms to regulate executive authorities like prorogation are more likely to be enacted in a minority parliament, over the government's initial objections but as part of a grand bargain, than introduced as government legislation in a majority parliament. After all, governments are reticent to relinquish or limit their own authority, especially when it gives them a political or tactical advantage. However, any statute or constitutional amendment designed to regulate the exercise of prorogation would require Royal Consent by Third Reading, since such legislation would directly affect an established executive prerogative authority; and, like Royal Recommendation, the Governor General grants Royal Consent only on and in accordance with the advice of the executive. The most likely scenario for enacting such a statute would be where a minority parliament extracts this concession from a single-party minority government as part of a larger bargain, like support for a supply bill in order to stave off an early dissolution. In other words, the Liberals, New Democrats, and Bloc Quebecois squandered their best chance at enacting this reform from the Harper government at some time between January 2009 and March 2011.

While the House of Commons could undoubtedly adopt British-style, weekly Prime Minister's Questions and restrict the usage of omnibus bills, the *Standing Orders* would not be an effective method of regulating the executive's authority over prorogation because they can only stipulate how the House of Commons reacts to a prorogation that has *already happened*. The House of Commons alone cannot regulate the exercise of executive authority over prorogation itself. Under the current system, only the Prime Minister can.

Source references available from the author.