



House of Commons
CANADA

Standing Committee on Procedure and House Affairs

PROC • NUMBER 020 • 3rd SESSION • 40th PARLIAMENT

EVIDENCE

Thursday, June 10, 2010

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Chair

Mr. Joe Preston

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• (1035)

[English]

The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)): This is meeting number 20 of the Standing Committee on Procedure and House Affairs on our study of prorogation.

We have with us today Patrick Monahan from York University.

Professor, I learned this morning what a provost does. I was told that the president of the university collects the money and the provost spends it. Is that correct?

Professor Patrick Monahan (Vice-President, Academic and Provost, York University, As an Individual): That's not quite the way I would have characterized it, but it's not far off.

The Chair: Welcome. I didn't mean to start off with humour, but thank you for coming this morning. We recognize you have another appointment later on, and we've made some accommodation for you to come and talk to us about prorogation.

I had a chance to share with Professor Monahan a bit of where we are and who we've heard from, but he's got a fairly lengthy opening statement, so we're going to let him get right to it.

As I've already said, some of the members will eat while you give your presentation and some of the members will be on their BlackBerrys. It's not rude; it's just the nature of the work around here, it seems.

We'll turn the floor over to you, and let's see if we can get started.

Prof. Patrick Monahan: Thank you, Mr. Chair and members of the committee.

Let me thank the committee in particular for accommodating my schedule. I have another engagement at a conference in the West Block here at 12:15 p.m., so I very much appreciate the opportunity to appear before this committee to share with you some views and perhaps some advice on this important study in which you are engaged.

I have some remarks and a PowerPoint presentation that I was not able to prepare sufficiently in advance to make available to you. Perhaps members would like me to send it to them later. I don't know if that is permitted, Mr. Chair, but I'd be more than happy to do that if it's appropriate. If not, forget it.

Let me begin by indicating that I've been authorized to disclose that I was retained by the Clerk of the Privy Council at the time of the December 2008 prorogation and I provided advice. But my presentation today will not deal with any of the aspects of that

advice. It will be based entirely on matters of public record, and I will provide comments in that context.

I want to make two general comments that I think need to be kept in mind. I would articulate them as principles that are often noted and commented on, but often not followed in matters of affairs of state. First there is what is often described as a law of unintended consequences in changes we make to fundamental principles of governance. That is to say, because of the imperfections of human nature and our inability to understand the future and how certain changes will affect others, the changes we make with perfectly good intentions to improve our functioning often have an impact in an entirely different way, and perhaps even a negative way. I want to talk about that this morning.

My second general comment—and I come to this as a lawyer—is that the maxim “hard cases make bad law” is often followed as well. That is to say, we take a difficult case and say, “We have to solve this difficult case and change the outcome in a particular way, so we will make a new rule to deal with that case.” But that change has other impacts in other areas. It's an illustration perhaps of this concept of unintended consequences.

With that as a preface, I want to address four questions here this morning. I want to talk first about first principles: what is the scope of what we would call the reserve power of the Governor General? And I'll define what I mean by that in a moment.

Second, have the recent decisions on prorogation in December 2008 and December 2009 been consistent with established constitutional principles?

Third—which is the question I think this committee is engaged in—should there be new limits or restrictions imposed, either directly or indirectly, on the power of the Prime Minister to seek prorogation?

Fourth, if the answer to that is no—which is generally the observation I'm going to make—what other change or changes ought to be contemplated that would improve the functioning and the relationship between the crown and the executive of government?

I am going to deal with each of those questions in turn.

Let me briefly talk about the reserve powers. I know you've heard from many witnesses, so I won't dwell on this, other than to say that the concept of a reserve power is a power that is to be exercised by the exercise of personal discretion on the part of the Governor General, rather than on the advice of the Prime Minister.

Because the Governor General is an unelected official, of necessity the exercise of personal discretion by the Governor General must be extremely rare. It must be exceptional circumstances. But there are such circumstances, which is demonstrated by the fact that in December 2008, when the Prime Minister and the clerk visited Rideau Hall and requested prorogation, the discussion or the meeting took place over two and a half hours. In the course of that meeting, the Governor General retired from the meeting room to consult with Professor Hogg, her constitutional advisor, which indicates that the only reason she would have done that is if she had a personal discretion, a decision to make herself.

That then gives rise to this question. In what circumstances does this reserve power arise? The answer can be derived from the following simple proposition. The Governor General must always follow the advice of a Prime Minister who enjoys the confidence of the House of Commons, and I say there are no exceptions to that principle. If the Prime Minister enjoys the confidence of the House, then the Governor General must accept the advice and has no discretion or decision to make. However, if there is doubt as to whether the Prime Minister does enjoy the confidence of the House, then a situation may arise in which the Governor General may have to exercise some discretion. In this sense, doubt is not an absolute.

There are degrees of doubt. In law, we have something called "reasonable doubt". We have other concepts of doubt. It is not an absolute. It is not subject to a categorical rule. It requires the exercise of judgment. But we could say that as this doubt about the issue of confidence becomes larger, the potential scope in those circumstances for the Governor General to exercise discretion increases, and that is why in the current circumstance, with minority governments having become the norm in the last six years, the potential situations in which doubt could arise about the confidence may increase. But we do know that if the Prime Minister has confidence, therefore the Governor General must accept the advice, and that is illustrated by the second precedent on prorogation, the precedent of December 30, 2009, because at that time there was no doubt that the Prime Minister did enjoy the confidence of the House of Commons.

How do you assess whether there is in fact doubt? You look to the statements of political parties. You look to the outcome of votes in the House. You look to the positions it has taken. It is not a science; there is some element of art to it. But in December 2009 there was no doubt at that time, in my submission, that the Prime Minister enjoyed the confidence of the House, and therefore his request to prorogue the House to March 4, 2010, was a matter upon which the Governor General ought not to, and did not, exercise personal discretion. Now, the wisdom of whether that should have been requested or not is a matter for political discussion, and indeed has been a matter of political discussion.

So the first proposition, then, is that if there is some doubt, the Governor General will have some discretion to exercise. But a corollary of that is the following. Even in circumstances of doubt, the Governor General should attempt to minimize the impact of her decision on political outcomes; that is to say, the Governor General should strive to make a decision that will not determine political outcomes, or, at least to the extent that it does determine, determine

those outcomes in the smallest possible way. I articulate that as the principle: let the players play.

• (1040)

The Governor General is like a referee in a Stanley Cup final that is in overtime, as we saw last night. In those circumstances, the referee ought not, if at all possible, to determine the outcome of the contest. The referee does have to assess and sometimes will give penalties, sometimes will make decisions, has to make calls, but is guided by that principle. That is the principle that should guide the Governor General.

Let's turn to the December 2008 precedent, with which members of this committee are intimately familiar. I will not rehearse those circumstances, other than simply to note, because I will return to it later, that there was an agreement reached involving the three opposition parties in which two of those parties were to form a coalition government and a third was to support that coalition government for a period of 18 months, although they would not be part of the government. That was an agreement in writing, which was significant. It was also indicated in that agreement that the members of those parties intended to vote non-confidence in the government at the time of the next supply day, I believe it was. I'm not sure what the exact vote was, but there was to be a vote, I believe, on December 8, and they indicated their intention was to vote non-confidence at that time. A motion of non-confidence was going to be or had been introduced by the leader of the opposition at the time, Mr. Dion.

On December 4, the Prime Minister sought prorogation of Parliament from the Governor General until January 26, 2009, and also committed to introduce a budget on January 27, which was a confidence matter. We know from a media account of that meeting, which was published shortly thereafter, that the discussion between the Governor General and the Prime Minister, as well as the clerk, included a discussion of matters such as the economic situation facing the country, the mood of Parliament, and the viability of the alternative coalition government. I want to return to those matters to express a view as to whether and why some parts of that discussion were appropriate.

The government had survived a vote of confidence on the Speech from the Throne the previous week, but it is my view that it was virtually certain that had the House returned on December 8 and a vote been taken on the motion of non-confidence, the motion would have passed. I think there is absolutely no doubt about that. The parties at that time were firmly committed. There were 161 members of Parliament who indicated they were going to support the motion.

The government could not rely on the fact that the previous division, which had not been recorded on the throne speech, had been a motion of confidence. In my view, it was clear there was very significant doubt that the Prime Minister continued to enjoy the confidence of the House at that time. Therefore, consistent with my first principle, the Governor General had an independent judgment to make and independent discretion to approve or to reject the request of the Prime Minister. The question then is, what was the appropriate decision? In my submission, the Governor General made the right decision, but I want to explain some of the factors that might go into a decision by the Governor General.

•(1045)

I would first say that any decision the Governor General would make in these circumstances would not be based on a categorical or absolute rule, but rather on a case-by-case consideration of the particular circumstances facing her at that time.

We now have the benefit of hindsight to say that we know what happened following that decision. After a conference that was held at the time, many commentators said that the Governor General had made the wrong decision, but now, having had the benefit of hindsight, virtually all commentators say she made the right decision. They often point to the fact that the coalition broke apart in the period between December 4 and January 26, and therefore they say, “Well, I guess the Governor General was right.” Ladies and gentlemen, with all due respect, I say that is an incorrect basis for analysis. You cannot judge these events by an *ex post* analysis. You must assess on an *ex ante* analysis.

If the Governor General had not accepted the advice, and if the government had then been defeated on December 4, and if Mr. Dion had then been called upon to be Prime Minister, in all likelihood the course of events would have been significantly different. It's sometimes referred to euphemistically as the “butterfly effect”, meaning that if you change a certain set of prior conditions, you cannot assume that all subsequent conditions will be the same. Therefore, we cannot judge the rightness or wrongness of that decision based on an analysis of subsequent events; we must return to the considerations at that time.

The considerations were as follows: first, if the government had been defeated, the only reasonable alternative would have been to call upon Mr. Dion to form a government. There was a written agreement indicating that there was to be a coalition, supported by a third party, that would command a majority. It was an agreement in writing, and it provided that this government would be supported for a period of 18 months. Second, there had been an election less than two months previously, so there would be absolutely no basis for the Governor General to refuse to call on Mr. Dion. She had received letters from Mr. Dion and the other parties indicating that the other parties intended to support the Dion government.

Therefore, a key consideration at that time must have been the viability and the stability of the alternative government. I say that because if it appeared that the government would not be stable, we know from the 1926 precedent—the so-called King-Byng incident—that the Governor General ought not to call upon an alternative government unless that government has some prospect of surviving for a reasonable period of time. We do not want to have a situation in which we have governments formed and defeated and then other governments formed or elections held. It does not promote stability in government.

The first of the considerations, then, would be the viability and the sustainability of the alternative government, the second consideration would be the nature of the request from the Prime Minister, and the third consideration would be the “let the players play” principle.

Which decision was most consistent with the “let the players play” principle? I would say that discussion of the economic situation would not have been an appropriate matter and not a relevant

consideration. The relevant considerations were those to do with the Constitution and constitutional principles, and not with economic policy.

•(1050)

Looking first at the viability of the alternative government, there were a number of considerations in support of the conclusion that the government was viable and stable. It was an agreement in writing. It was not simply an agreement between the three parties, but rather there were 161 members who had indicated their intention to vote non-confidence and they were supporting the coalition. And the agreement provided for 18 months of stability. Those were considerations in favour of concluding that the government would be stable and therefore ought to be permitted to be formed.

However, there were a number of considerations against the viability and sustainability. First, the coalition had been formed in great haste. It had been formed over a period of three or four days during the previous weekend. It had not been a feature of any electoral campaign.

When you observe agreements and decisions made in haste, you perhaps conclude that not all relevant considerations were taken into account in the formation of such an agreement. We have seen many past examples in political life where this happens and decisions are made that later come back to haunt the authors of those decisions.

So that was the first consideration: it was formed in haste and it was not part of the campaign.

Second, there was the uncertain status of the proposed Prime Minister. It was a very unusual situation in that Mr. Dion had indicated he was resigning; he had previously indicated his intention to resign in May.

We do know that in 1979, the then-opposition leader, Pierre Trudeau, had said he was going to resign as the leader of the Liberal Party. There was an election called and Mr. Trudeau came back and won the election. But in that case Mr. Trudeau said, “I'm not coming back for three or four or five months. I'm coming back for good. If you elect me, I'm going to be the Prime Minister for the next term.”

This was a different situation. This was unprecedented, in that Mr. Dion was saying he was going to continue as party leader for five months, and even though he was going to become the Prime Minister, he was still going to resign in May. That seemed to be a very odd kind of situation—again, an unstable situation. One might have imagined that Mr. Dion might later have changed his mind, because once you're the Prime Minister, it is not easy to voluntarily give up that office. But we don't know what would have happened.

That's again an illustration of the butterfly effect: we should not assume that events would have followed a certain course. But that is the second consideration, the uncertain status of the proposed Prime Minister.

The third consideration is that the agreement appeared to be very unwieldy. We had two parties that were forming a government, to be supported by a third party that was not part of the government. It did not have seats in cabinet, but it would support the government. That is an unwieldy situation because decisions made by the government would be made by members of the government sitting around the cabinet table. Then there would have to have been some negotiation with the third party, the Bloc Québécois—I say the third party in the sense only of the third party to the coalition, not the third party in terms of seats. That is unwieldy.

This was unlike in 1985 in Ontario with the accord between the Liberals and the NDP, where there were only two parties. There was a stable situation of leadership, and it was clear they could make commitments that would be binding.

On balance, the first consideration tends to say there would be serious doubt as to the viability and sustainability of the government. But it was not absolutely clear. It might have sustained itself.

With the second consideration, the nature of the Prime Minister's request, here it was important that the Prime Minister's request was bounded. It was time limited. It was a seven-week request; at least the prorogation was to last for seven weeks. There already had been a scheduled adjournment between December 12...I'm not sure of the exact date, but the following Friday—whatever that date was—and January 26. In effect, the request was only to sacrifice seven days of sitting time. The government committed to a vote of confidence upon resumption by saying it would introduce a budget that would be a matter of confidence.

The nature of the request was that it was bounded and that it would be followed by a vote on confidence. That is important because that leads to the third principle: “let the players play” principle.

● (1055)

If the Governor General granted the request, there would be a vote on confidence in seven weeks, whereas if the Governor General did not grant the dissolution, then the effect would have been to force a change in the Office of the Prime Minister, to force a change in the government, and to create a whole series of other events that were uncertain. So on that principle, the “players play” principle, that again tends to favour granting the request in relation to the request that had been made. On balance, my view would be that the Governor General made the right decision, but it is a matter of judgment and is subject to these considerations.

Let me then turn to recent proposals to limit the discretion of the Prime Minister to seek prorogation from the Governor General. For example, there has been a motion, I see, that was passed in the House to require that in any instance in which the Prime Minister were to seek a prorogation of longer than seven days, the House would have to support such a request. My first observation is that I would find it extremely odd if we are to focus on a particular exercise of discretion by the Governor General, a particular power—the power to prorogue—and try to legislate or proclaim a rule in relation to a very specific exercise of power. That seems to me to give rise to a significant fear that this may have unintended consequences—which we do not know. By their very nature, they are unintended.

Whereas it is preferable to focus, in my view, on general principles and articulate a general principle that we would follow, or a general set of arrangements that we would follow, that's not tied to a particular power. So I would make the following observations: there are two possibilities in relation to a request by the Prime Minister to the Governor General. One is that, at the time, the Prime Minister enjoys the confidence of the House and is making this request. In the other, the Prime Minister does not enjoy the confidence of the House, or there is some doubt.

Let's take the first instance. If the Prime Minister enjoys the confidence of the House, in my view, a sitting Prime Minister should have the discretion, and does have the discretion, to request the Governor General to prorogue the House. The first principle of responsible government is that a Prime Minister has the right to advise the Governor General, and any attempt to prevent the Prime Minister who enjoys confidence from advising the Governor General would in fact be indirectly an attempt to limit the powers of the Governor General herself. I think that would give rise to serious constitutional questions, and I think that would require a constitutional amendment. I think that is a matter of very significant consequence.

I would further submit that in such circumstances there are now significant political consequences attached to such a request. In fact, the decision of the Prime Minister, and the advice sought and the granting, has resulted in significant controversy about the use of this power, so that any future request will attract attention—in fact, it is attracting attention. So the political process has already imposed constraints, not in the form of an absolute rule but in the form of criticism through the political process. Again, it is not clear to me that we need to change the situation in which a Prime Minister enjoys the confidence of the House.

Let's take the second situation. What about when the Prime Minister may not enjoy or there is doubt as to whether he enjoys—it's currently a “he”—the confidence of the House? What happens then? In that case, the Governor General has this reserve power, which I've already described. It is not the unilateral power of the Prime Minister in those circumstances, but rather it is the decision to be made by the Governor General to be exercised in accordance with the principles that I have set forth. So I do not think the Governor General's power should be eliminated; indeed, I think it is an important check on the power of the Prime Minister. Again, therefore, in those circumstances I do not think there should be any limit on the request.

● (1100)

In any event, if you are going to make a rule of this kind, do you distinguish between situations when the Prime Minister has confidence and the government has confidence or not? It seems to me it is not as simple as it may at first appear.

If you were to agree with me that there ought not to be any formal change in the power of the Prime Minister to request a dissolution, is the conclusion that the system is working now? I would say, “not necessarily”. I would say the greatest single change, which would benefit the proper functioning of the office of the Governor General and the relationship between the Governor General and the administration and the House, would be to have an accepted practice or convention such that the Governor General would be appointed on the joint recommendation of the leaders of the main parties, however many parties we have—it keeps changing.

The Prime Minister should informally seek, as the Prime Minister does now, I believe, with respect to officers of the House.... I believe it is the practice that the Prime Minister will consult and not appoint someone over the objections of members of the opposition. If that rule were to be adhered to in the appointment of the Governor General, that would be a significant improvement. In fact, that would mean that the person would be someone of stature who was accepted by all members of the House, as indeed now the Speaker is.

We have instituted over the last number of years, of course, a system whereby members of the House vote for the Speaker. The previous situation of many years ago, in which the Prime Minister selected the Speaker, was seen as inappropriate on the basis that one of the teams in the game should not choose the referee. The referee should be chosen by all of the players on the ice or the competing teams on the ice. If one team has the right to choose the referee, that's unfair, even if the referee acts perfectly neutrally and perfectly impartially.

So that, ladies and gentlemen, is what you need here. If the Governor General were seen as being beyond—and I'm not criticizing in any way or saying any governors general have in any way acted in a partisan way or inappropriately. It's a question of legitimacy. It's a question of perception. That is to say, that would be a fundamental important change, and that is, of course, not a matter for this committee alone. The Prime Minister must or should consider that.

My advice would be that this committee ought to recommend that, and the House should take this matter up. It would be a signal improvement in our functioning and our system of government. It would not require any alteration in a particular power. If you do not deal with the underlying issue and merely deal with some particular exercise of power without altering the underlying issue, I do not think you will really be getting at these fundamental problems.

Mr. Chair and members of the committee, thank you very much for your attention. I'd be happy to take questions and engage in further discussion.

• (1105)

The Chair: Thank you so much, Professor Monahan, for sharing that with us.

We'll go to questions, five-minute rounds, so we can get in as many as we can.

Monsieur Proulx, you're first.

Mr. Marcel Proulx (Hull—Aylmer, Lib.): I'll share my time with my colleague, if he wants some time.

Good morning, Mr. Monahan. Thank you very much for appearing in front of the committee this morning.

Prime Minister Harper has stated that losing parties, or losers, as he calls them, don't get to form government. He has even used the term “coalition of losers” to characterize a coalition of parties, none of which won the most seats. Mr. Harper also characterized such a coalition as illegitimate.

The Israeli government is a coalition government headed by the Likud Party, which placed second in the 2009 elections.

Do you agree with Mr. Harper's definition or qualifications?

Prof. Patrick Monahan: I will answer directly in a moment, but I should say that I'm very reluctant to comment on specific statements if I don't see the full context in which a statement is made. So let me just preface my remarks in that regard. But let me perhaps address the main thrust of your question, if I may, which I think is this. Would it have been legitimate for the Governor General to call upon Mr. Dion to form a government, the coalition government? My answer is absolutely it would have been legitimate, if, in the circumstances, she had concluded that the Prime Minister did not enjoy the confidence and that there was really no alternative. For example, if the Prime Minister had come forward and said, “I wish to dissolve the House and call an election”, I do not think the Governor General should have accepted that advice, and in those circumstances I think she would have had no alternative but to call on Mr. Dion to form a government.

So it is absolutely the case that if there is a Prime Minister, or a potential member, or a potential government that could be formed, the Governor General, under a system of government, should call upon the leader of that party. Indeed, in 1985, it was Mr. Peterson who had the second most seats, who was called upon by the Lieutenant Governor, Mr. Aird, at the time, notwithstanding the fact that he had fewer seats. I know there was some discussion amongst the Conservatives at the time that it was somehow illegitimate because the Conservatives had 52 seats and the Liberals had 48, but it was entirely appropriate.

I'm sorry, I'm going on too long.

• (1110)

Mr. Marcel Proulx: Mr. Monahan, you've related all kinds of different information about the coalition back in those days. You've even divulged information that I was unaware of, so you have an excellent memory. In the context at that time, when Mr. Harper was calling it an illegitimate coalition, did you agree with his description of that coalition?

Prof. Patrick Monahan: Well, you know....

Mr. Marcel Proulx: You don't need to answer, sir.

Thank you.

The Chair: Mr. Regan, did you want to share time, or are you okay?

Hon. Geoff Regan (Halifax West, Lib.): I'll save it for now.

The Chair: We'll come back. All right.

Is it Mr. Reid for the government side?

Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC): It's actually Mr. Lukiwski to start with and then me.

Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC): I'll be sharing time with Mr. Reid.

Professor Monahan, thank you very much. I found it a very interesting presentation. I enjoyed it immensely, and I wish we had more time. I know Mr. Reid has some questions.

Just a comment and then a question for you—at least, I'd like to get your opinion.

It appears to me, based on what you are saying, that under the current circumstances, with the GG being appointed by the Prime Minister in the current manner, you are, in effect, saying that the rules we have now regarding prorogation need not be changed. I say that because you've stated that if the Prime Minister does have the confidence of the House, he has the absolute right to request prorogation and there should be no discretion on behalf of the Governor General. If, however, he does not, or if there is certain reasonable doubt that he does not have the confidence of the House, then discretion can be used. But all of those cases, if I interpret your remarks correctly, should be judged on a case-by-case basis, because there are external factors that have to be considered. It would appear to me, then, that any disincentives or any other rules regarding limitation of prorogation need not be placed in the Standing Orders because there are current checks and balances right now and circumstances dictate.

So that's the first thing I'd like to get on the record: if you agree that my opinion is that the current rules need not be changed.

However, I was interested when you said that the change you would make, or at least recommend, is that the Prime Minister, prior to the appointment of subsequent governors general, should informally consult with all of the leaders of the other parties and should come to an agreement. Does that mean there should be unanimous agreement amongst all four leaders? If not, then any one leader could, in effect, have veto over the appointment. If three leaders vigorously approved a nominee, but one party, for whatever reason, said no, they do not, would that, then, in effect, in your opinion, kibosh the appointment process? Need there be unanimous consent?

With that, I'll ask for your response, given the fact that my colleague, Mr. Reid, has a few questions he'd like to ask as well within the seven minutes.

Prof. Patrick Monahan: Let me respond briefly. First of all, if the change were made...I'm not saying there should be no change to the current rules because I'm not familiar with all the rules that exist, so I wouldn't want to go that far. I do not think a categorical rule that says any prorogation request over seven days could not be made without the approval of the House would be a wise thing to do. In general, it seems to me that some of the proposals I've seen do not seem to me to be wise.

With respect to the process for the appointment of the Governor General, I don't refer necessarily to an agreement. I think it should be a process whereby consensus of the parties in the House is obtained before a name is put forward. It seems to me such a practice exists with appointment of officers of Parliament. If you cannot get

concurrence of the parties for a particular candidate, that candidate ought not to be put forward as Governor General. I do not think it means you will not be able to find a suitable or acceptable candidate. I don't think it would be wise to proceed on the basis of votes or some other principle.

•(1115)

Mr. Tom Lukiwski: Thank you for that. Just so I'm clear, so consensus as opposed to unanimous consent?

Prof. Patrick Monahan: Yes, I think there needs to be a form of consensus. I'm not sure exactly how you express that. There has to be a broad-based agreement, not merely consultation, that this person is appropriate.

Mr. Tom Lukiwski: Thank you.

I'll cede the rest of my time to Mr. Reid.

Mr. Scott Reid: I wanted to ask this question in the second round, but briefly, following up on what my colleague asked, the way the Speaker is chosen is quite different. There is a secret ballot in the House of Commons. I made a recommendation about four years ago that we adopt that process for the Governor General, but that's not what you're talking about. You think there should be a more informal one.

Prof. Patrick Monahan: Yes. I think it should be informal, similar to the processes for officers of Parliament, which I believe are somewhat informal but do require a general concurrence or a consensus. I don't think we should be voting in the House on who the next Governor General ought to be. I think that's unseemly, and I don't think it's appropriate. I think it would be embarrassing, quite frankly, for potential candidates for the office.

The Chair: Absolutely. Thank you very much.

Madame Gagnon.

[*Translation*]

Ms. Christiane Gagnon (Québec, BQ): Good morning. Thank you very much for clarifying certain things.

When it comes to limiting discretionary powers, I do not think that even if a consensus was reached by the three party leaders, the prorogation issue would be resolved and the decision ultimately made would be the best possible one.

Could you explain to me what the reasons behind the Governor General's decisions were? You say that she made two good decisions. You have analyzed the circumstances that led to two prorogations, in 2008 and in 2009. Despite the Prime Minister's request that she prorogue Parliament, the Governor General must also have examined the circumstances on which to base her decision to prorogue Parliament. You have listed some principles to consider; would the principles that played a part in her decision be the same? You said that there may be some doubts, that in such cases... What is the political impact of such a decision?

You say that the decision to prorogue Parliament for the second time had political ramifications because the coalition was not strong enough. I expected you to tell us more about specific or general basic principles or regulations that could explain the Governor General's decision.

[*English*]

Prof. Patrick Monahan: What I've tried to say is that when the Governor General is faced with a decision on prorogation, it necessarily requires an analysis of the particular circumstances that exist, and I do not think there is some absolute rule, or set of rules, that she will be able to consult that would give her the correct answer. It necessarily will be principles or considerations that are somewhat general.

The considerations I have articulated today are the ones that were relevant then. In another case, there may be other considerations, and I do not think we can predict in advance or set out a list of what those principles are. That is why I believe the current system, which allows for this discretion to be exercised, is appropriate.

One possibility would be to ask the Governor General to give reasons for her decision, but I do not think that would be wise either. I think it would be preferable for us to retain the current situation because that will allow these precedents to evolve over time.

[*Translation*]

Ms. Christiane Gagnon: So, you are basically saying that the Governor General has everything she needs, all the insight and latitude necessary, to determine whether the decision to prorogue Parliament, at the Prime Minister's request and based on certain principles, is a sound decision.

[*English*]

Prof. Patrick Monahan: And in the case where there is doubt about whether the Prime Minister enjoys the confidence of the House, it is necessarily the case that the Governor General will have to step back and assess the appropriateness of the request that's being made.

[*Translation*]

Ms. Christiane Gagnon: Okay.

Under the current government's rule, Parliament has been prorogued more often than in the past. The public and the media were left with the impression that the government did not want to face the House of Commons. So, prorogation was a way for the government to circumvent the problem, instead of holding a confidence vote.

You said that it was possible to determine that the Prime Minister enjoyed the confidence of the House. I am not so sure of this, but, at the same time, the public wasn't happy with the way the country was being governed, and there was some fallout. Besides, this is why we are in committee.

Do you think that this way of proceeding, that is, asking the Governor General to prorogue Parliament, was justified? We say we want to limit the Prime Minister's authority to seek prorogation, but we need to know what circumstances must be present in order for him to make this request.

● (1120)

[*English*]

Prof. Patrick Monahan: I think the issue of when the Prime Minister should ask for prorogation, the nature of the request, if he has the confidence of the House, is really a judgment for the Prime Minister to make. But it will have real consequences, and this most recent request has had very real consequences. Indeed, there was a demonstration at my university, as amazing as you might think, of students against prorogation. When one of the ministers of the government came to hand out a cheque, there was a demonstration about prorogation. It was the most amazing thing you could imagine. Prior to December 2008, no one would have even known what prorogation was.

So I think there are real consequences, and I think we should recognize that and not try to remedy this particular situation through some rules that may have these unusual consequences.

The Chair: *Merci.*

Mr. Christopherson.

Mr. David Christopherson (Hamilton Centre, NDP): Thanks, Chair.

Interesting presentation, Professor. Thank you.

I want to pick up on your comment that you found it odd—and I'm paraphrasing—that we would focus on a particular power, particularly given that there may be unintended consequences. Then I think you made a comment that because they are unintended, we don't know what they are. But by that theory alone, we would never do anything, because there are unknown consequences. A reasonable person would have to have some idea of what those potential unintended consequences would be before you used that for a reason not to do something.

Prof. Patrick Monahan: That's fair enough. It seems to me the related question is if you're going to do something, you have to say, what is the problem we are trying to remedy? What is that problem? Is the problem that a Prime Minister who may or may not enjoy the confidence of the House seeks to avoid facing the House? Is that the problem? If that is the problem, then I say that is dealt with by the reserve powers of the Governor General, and there's no necessity to try to deal with a problem that is not a problem.

If, alternatively, the problem is one where the Prime Minister does enjoy the confidence of the House, there's no question that the Prime Minister enjoys the confidence of the House, but we're going to subject the ability to seek prorogation to seven days, then you are immediately throwing this issue of prorogation into a major constitutional confrontation, because any request will immediately force the House into a motion of confidence on the request. That will be the consequence. Therefore, now, any time the Prime Minister, who has enjoyed the confidence, there has been no doubt, wants to make a request, the matter is going to become a matter of confidence and there could be an election over a prorogation of two months. You say, what's the problem? Maybe there is no problem. But we don't know.

I'm not sure why any request for prorogation must automatically become a matter of confidence, because that is in effect what that proposal would do.

•(1125)

Mr. David Christopherson: The issue for us, of course, is that the Prime Minister would have confidence, but his powers are not unlimited. It's not a monarchy; the Prime Minister doesn't just rule. Parliament is still supreme. When we're talking about prorogation, we're talking about when Parliament sits. You could argue there's nothing more fundamental for Parliament to be seized with than when they're going to sit.

I want to move on to the argument you made that restricting the Prime Minister's ability to give advice to the GG constrains the GG. I just want to read to you from our law clerk's presentation to us:

The advisory role of the Prime Minister is based on an unwritten constitutional political convention. If prerogative *legal* powers can be overtaken by legislation, it must surely be true that unwritten *political* rules can be overtaken by legislation. Thus, legislation seeking to regulate prorogation without falling under paragraph 41(a), [which is the constitutional amendment] discussed above, might seek to regulate only the advisory role of the Prime Minister and not the power of prorogation held by the Governor General.

However, a failure to comply with the statutory restrictions imposed on the advisory role of the Prime Minister would not by itself invalidate an exercise of the prerogative power of prorogation by the Governor General.

He's basically contending that the Governor General's powers have not been touched. Even if the Prime Minister violates any rules we put in front of him, the GG still reserves her powers. Therefore, we're not doing an end run around the Constitution; we are constitutionally within our right to confine the Prime Minister, not having at all touched the powers of the GG.

That's my street interpretation of the law clerk's proposal.

Prof. Patrick Monahan: I haven't read the law clerk's submission on that, but it seems to me you would be faced with a situation where somehow legislation would say the Prime Minister may not seek a prorogation. There would have to be some kind of clause to say that nothing in this law limits the powers of the Governor General.

Mr. David Christopherson: Why would you have to say that if you believe it's there anyway? If you believe it's there in reserve, do you have to really repeat it?

Prof. Patrick Monahan: You would have to say it, otherwise it would give rise to the possibility that it would be a constitutional amendment. Indeed, that is what the provisions were in the fixed date election law that was enacted in 2008. The law said there shall be an election on a certain date in 2009, but nothing in that requirement limited the powers of the Governor General, which therefore meant that the Prime Minister could, notwithstanding that law, go to the Governor General prior to that and seek an election. That has now been upheld by the Federal Court of Appeal as valid. Therefore, on this proposition the law would say the Prime Minister may not seek prorogation, but if he does, it's okay. So I'm not sure what such a law would accomplish.

Mr. David Christopherson: We're also looking at measures.

The Chair: Thank you.

Professor Monahan, can you give us 15 more minutes?

Prof. Patrick Monahan: Yes.

The Chair: Then let's do another round of five minutes, if we can, starting with the official opposition.

Mr. Rodger Cuzner (Cape Breton—Canso, Lib.): I'm okay.

Mr. Marcel Proulx: On a point of order, we have committee business afterwards.

The Chair: We left that as committee business in case we had the report on technology back, but we do not have the translation back.

Mr. Marcel Proulx: So there will not be committee business.

The Chair: We have nothing to do on committee business.

Mr. Reid.

Mr. Scott Reid: Thank you, Mr. Chairman.

Professor, do you think Lascelles principles that have been applied to the acceptance or refusal of requests to dissolve the House have any applicability here?

As you know, in 1950 the private secretary to King George VI published a letter in *The Times* in which he discussed the principles that he thought applied. He said:

...it can be properly assumed that no wise Sovereign—that is, one who has at heart the true interest of the country, the constitution, and the Monarchy—would deny a dissolution to his Prime Minister unless he were satisfied that: (1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons.

The first criterion has no relation to prorogation by definition, because all parties are assuming that the current Parliament is viable. But what about points (2) and (3)? If the Governor General were trying to make a decision as to whether or not to accept a recommendation for prorogation, would they serve as a good basis on which to formulate the decision?

•(1130)

Prof. Patrick Monahan: I think in principle it's difficult to apply principles that might reply to a request for dissolution to one for prorogation, because they're quite different, as we know, and as you know and you're suggesting.

In the dissolution situation, the Prime Minister is saying, "I want an election now." There has only been one case where such a request has ever been refused, which is the 1926 case, which is itself still a matter of some uncertainty. But in the case of dissolution, the only alternative for the Governor General at that point would be, it seems to me, to ask, is there an alternative Prime Minister who could be called upon to form a government? If not, then it's not clear to me that there would be any other option but to grant the request for dissolution.

That would require an assessment by the Governor General. It would require an assessment as well of how close in time we were to the previous election. The closer in time you were to the previous election, the more tendency there would be for the Governor General to want to find that there is an alternative government.

So I think the principles in the dissolution scenario are rather different from those in the prorogation scenario.

Mr. Scott Reid: Right.

What attracted me to this, and looking at parallels, is there is emphasis on finding another Prime Minister to carry on the government, obviously, because presumably by refusing a request for prorogation, one of the consequences of refusing advice is you're actively dismissing your Prime Minister, are you not?

Prof. Patrick Monahan: Some commentators have made that proposition, and indeed Mr. King in 1926 immediately resigned upon the Governor General refusing his request. It's not clear to me that the Prime Minister would necessarily be required to resign. It would depend upon the discussion between the Governor General and the Prime Minister at that time.

If the Governor General did not wish there to be an election but there was no alternative government, I could imagine the Governor General, if she refuses the dissolution, asking the Prime Minister, "Do you nevertheless wish to maintain or continue in office?" And he may, at that point, say, "I'm going to resign." It's not clear, necessarily, that he has to resign.

Mr. Scott Reid: So in the case of a prorogation, going back now to 2008, the thought that has occurred to me—and I may very well be wrong, from what you're saying—is that had the Governor General said to the Prime Minister, "I'm turning down your advice to prorogue", my assumption would have been that that would have required him to resign on the spot.

Am I incorrect that she couldn't have legitimately said, "I'm refusing your advice, but I want you to stay on to see the outcome of the confidence vote that will be taking place next week"?

Prof. Patrick Monahan: I do not see why the Prime Minister should have resigned at that moment. He could have, but the House was to meet on the following Monday. I assume the results would have been that the House would meet, there would have been a vote taken, and as a result of that vote the government would have been defeated. At that point, Mr. Dion would have been called upon to form the government.

If he had resigned at that point, I would imagine she would have simply at that point called upon Mr. Dion and would not have had to wait.

I do not think he would have had to resign at that time. I think it would have been appropriate for him to continue in office until the following Monday.

Mr. Scott Reid: That's very helpful. Thank you very much.

The Chair: Thank you, Mr. Reid.

Monsieur Guimond, Madam Gagnon, no?

Mr. Christopherson, another shot?

Mr. David Christopherson: Yes, please.

I was interested in the issue of asking the Governor General for reasons. Could you expand on why you think that's a bad idea?

Prof. Patrick Monahan: I think it's a bad idea because it would be an attempt to set the reasons as to why the Governor General exercised her power at that time. The Governor General is not trained in matters of state. She does take advice; however, it seems to me that any set of reasons would necessarily have to be drafted primarily by others and not by her personally.

I think the exercise of discretion is her personal discretion. She does take it upon advice, but I think it is exercised by her. I think the requirement that the Governor General then write or prepare her personal reasons may cause difficulties, and I do not think it is necessary. Because the range of considerations is complex, they are difficult and may evolve as subsequent circumstances unfold in later terms.

Again, I believe there's been some discussion about this requirement. On balance, I don't favour a requirement of reasons.

• (1135)

Mr. David Christopherson: I want to pursue this a little bit. I heard your first rationale, but I have to tell you, the fact that she's not a lawyer and would write her own brief.... I guarantee you that when I was a cabinet minister, I didn't write my own briefs when they were legal and technical in nature, and we don't expect a minister of health to be able to write a how-to book on how to do brain surgery.

You said it would cause difficulty.... I'm just trying to get some specifics, sir. I'm not hearing good, specific reasons why that causes so much grief, remembering that we're into an era in which less and less often are ordinary people prepared to accept the mystical, deferential powers of anybody, even of the Queen's representative. I'm having some trouble understanding why we wouldn't at the very least ask someone who has incredible power to give us at least a reason why he or she has exercised those powers. I don't understand why that's such a big problem, sir.

Maybe you can help me with that.

Prof. Patrick Monahan: First of all, I don't think it's a big problem; it's a matter of judgment. On balance, is it better or not that she write reasons?

If she were to write reasons, those would have to be drafted by others. Those reasons would, however, then become controlling, because everyone would look at those reasons and would say, these are the reasons and this is really the decision; this is the rationale. I don't see why unappointed people, let alone unelected.... They're not even appointed; they're simply advisers. Who are those advisers? What gave them the right to draft those reasons? It's unlike the situation in the Supreme Court of Canada, where they have law clerks and advisers to support them but ultimately the judges themselves decide, and unlike the case of a minister: while speeches and other things are written for you, you could write your own.

Mr. David Christopherson: I'm talking about a cabinet submission. There are lots of formal documents that ministers have to have, and they don't write them. They're prepared by legal departments and run past the deputy. They look at it, and as long as it's okay politically, they sign it.

Prof. Patrick Monahan: Right, but those don't have controlling effect; those are merely submissions or briefs. Ultimately, it is the legislation that is produced—the result of that submission—that is controlling and binding. It is what the statute says, as enacted by Parliament or by the legislature.

I think it's a serious proposal; it requires serious consideration. I know many people support it. On balance, I don't support it.

Mr. David Christopherson: Thank you.

Thank you, Chair.

The Chair: I have Mr. Albrecht and then Mr. Lukiwski.

Mr. Albrecht is first.

Mr. Harold Albrecht (Kitchener—Conestoga, CPC): Thank you, Mr. Chair.

Thank you, Professor, for being here.

You commented on the proposed coalition in 2008, and notwithstanding the fact that you made a point of the negatives of it—that it was done in haste, that there was no previous discussion during the campaign, the uncertainty of Mr. Dion's tenure, and that it was unwieldy—you seemed to attach a fair bit of significance to the fact that it was in writing. I'm wondering, in terms of the political realities, how much weight we should put on the fact that it was in writing.

Prof. Patrick Monahan: I think it was very important that it was in writing. In my view, if there had not been a written agreement, then it was not really a matter that the Governor General ought to have taken very seriously. It is only because it was in writing that I think it was a matter of significance and in fact acquired a level of significance that made it very important—and also that it was for a timeframe greater than 12 months.

Mr. Harold Albrecht: It's the timeframe that I'd like to follow up on. How binding would a written agreement be, six months into it or two months into it, if one of the players suddenly decided not to acknowledge it?

Prof. Patrick Monahan: That's the difficult judgment that has to be made. But given the fact that it was in writing, that it was for a period of 18 months, it seems to me plausible to conclude that the government in fact would have survived for 18 months. We don't know that. Mr. Dion may well have been the Prime Minister for 18 months or longer under that scenario; we can't predict that. But I think it was a very significant fact that there was an agreement in writing and that it was for a period of longer than 12 months.

• (1140)

Mr. Harold Albrecht: In the other point you made, right about that point, you speculated or indicated that there were media reports that centred around three topics that the Governor General and the Prime Minister....

How do we know this, going back to Mr. Christopherson's point about reporting the reasons?

Prof. Patrick Monahan: We don't know that. I simply offered my opinion as to what would have been appropriate to discuss or not.

Mr. Harold Albrecht: I just wanted to highlight that. There's really no—

Prof. Patrick Monahan: I do not know what was discussed at that meeting.

Mr. Harold Albrecht: Then finally, I think your point that the Prime Minister promised a confidence vote in January when the House resumed was a fairly significant factor to consider, in terms of whether or not the Governor General would follow the Prime Minister's advice.

Prof. Patrick Monahan: Yes, the fact that the request was bounded in that way and that there was a commitment for a

confidence vote was essential. Had the Prime Minister not made that commitment, I do not think the request should have been granted. Moreover, if, let us suppose, on January 25 the Prime Minister had appeared at Rideau Hall and said that he'd like to extend that prorogation, that he'd like the order to be amended and be granted a longer period of time, the Prime Minister's request in that circumstance would have been illegitimate, inappropriate, and the Governor General should clearly have rejected it and required the House to sit on January 26 as agreed.

Mr. Harold Albrecht: Thank you.

Is there some time for Mr. Lukiwski?

Mr. Tom Lukiwski: Very quickly, Professor—I know your time is very limited—we've had discussion from previous witnesses about the ability, the right, the authority of the Speaker of the House to give advice to the Governor General as to whether or not the House has confidence. I'd like to get your opinion on that. Even more particularly, we've talked about whether, if the Speaker of the House has that right, the Speaker of the Senate perhaps also has the right to give advice.

If that is the case, what would happen, in your opinion, if the advice from the two Speakers were conflicting? What could be done then?

Prof. Patrick Monahan: I hadn't contemplated that. The Governor General takes advice from her appointed advisers.

That is the person to whom she must look. She obviously has to look to the surrounding circumstances to see whether there's doubt as to whether the Prime Minister enjoys the confidence, and I suppose the statements of the Speaker of either the House or the Senate would be relevant to that. But they are not advisers to the Governor General, nor are the opposition parties advisers.

The fact that the opposition parties wrote to the Governor General is important in the sense that it indicated, first, that there was doubt, significant doubt, that the government had confidence—it was certain, in fact, that the government would be defeated—and second, that there was a likely alternative government that could have been formed in the circumstances.

I don't think the Speaker is an adviser in that sense, and any advice the Speaker might have given would not have been binding or particularly in the nature of advice that she would be required to follow as a matter of constitutional principle.

I believe I'm going to have to—

The Chair: Thank you. I'm going to let you go.

At this moment, we thank you. It has been very informative for us today, and it was great to get another set of opinions on this.

Professor Monahan, thank you for coming. You are excused.

Prof. Patrick Monahan: Thank you.

The Chair: Committee, we do not have committee business today. Next Tuesday we have Professor Bradley Miller from the University of Western Ontario, and then we hope to do committee business on the technologies, following his presentation and the round of questioning.

So on Tuesday that is our order of business. I remind you all that a week from today we're visiting Elections Canada on a road trip. The meeting is adjourned.

We'll see you all on Tuesday. Thank you very much.

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