Constitutional reform by stealth: The creeping transformation of executive authority

BY DAVID SCHNEIDERMAN

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Prime Minister Stephen Harper has aligned Canadian public policy closer to that of the United States in a number of areas such as foreign policy, the environment, and crime control. What perhaps is less apparent is the slow shift in the direction of US-style executive authority. In response to challenges issuing out of the House of Commons in the last couple of years, Harper has been resisting the premise that the executive is responsible to Parliament, despite its inveterate presence in the deep structure of Canada's constitutional order. He has preferred, instead, to mimic some of the least defensible aspects of US constitutional practice concerning executive branch independence. Even if there is a semblance of a separation of powers doctrine present in Canadian constitutional law, it lacks the sharp edges of US constitutional practice. By aiming to set precedents that replicate dysfunctional parts of the US constitutional system, Harper pushes us further into the embrace of US-style limited government where the executive operates as a separate check on legislative authority.

THE FIRST PROROGATION: IMPEDING COALITION GOVERNMENT

That Stephen Harper is intent on promoting the idea of a separate and segregated executive branch becomes apparent on an examination of the first prorogation crisis of December 2008. A Liberal–NDP coalition, with assistance from the Bloc Québécois, was formed in response to the provocative budget introduced by Finance Minister Jim Flaherty, which, in addition to wildly misreading a global economic crisis already well under way, withdrew public financing for federal political parties. Facing a parliamentary vote of non-confidence, the prime minister advised Governor General Michaëlle Jean to prorogue Parliament, which she did, as per constitutional convention.

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Between the time the rumoured coalition began to take form and the prorogation of Parliament, there was an intense week of unprecedented debate across Canada. It was during this week that the prime minister and his government promoted the notion that the Canadian prime minister operates as a separate executive branch and therefore, like the US president, is directly elected. Any change of prime minister and government without a popular election, then, was constitutionally illegitimate.

The prime minister had some success in getting this message across. Immediately after the 2008 prorogation crisis passed, an Ipsos Reid poll commissioned by the Dominion Institute reported that 51 percent of respondents believed that the prime minister is directly elected, rather than appointed by the governor general. Only one-quarter of respondents were aware that Canada was a constitutional monarchy with the Queen as its head of state.

While this misunderstanding was most prevalent in Quebec, much of the vociferous opposition to the coalition emerged out of Alberta, where the Harper government had the full backing of the *Calgary Herald* and the *Edmonton Journal*. A review of the news and editorial pages of these two newspapers reveals that the government message came through loud and clear while more accurate assessments of the functioning of the executive within parliamentary systems was absent in this critical period. According to one dominant narrative, which appeared to be the main Conservative talking point, the change of government was likened to an unprecedented *coup d'état*. There could be no change of government, it was said, without a new election.

A second dominant narrative emerging out of the newspaper accounts lamented the loss of power by Alberta within any new coalition cabinet, while a third narrative concerned patriotism—mostly having to do with the participation of the Bloc in the coalition. Prime Minister Harper pushed the patriotism button when he began his counterassault in Parliament, accusing the coalition of a "betrayal" of the voters, the economy, and the best interests of the country. Typically, Harper would conjoin the patriotism theme with claims about lack of democratic legitimacy as he did in his nationwide address on the evening of December 3, 2008—there was "no democratic right to impose a coalition," he declared.

THE SECOND PROROGATION: COMPLICITY IN ALLEGED TORTURE

Events leading up to the second prorogation in late December 2009 revealed a prime minister ready to defend claims regarding executive authority that echo positions ordinarily issuing out of the George W. Bush White House. The events precipitating the late 2009 proro-

gation concerned access to documents regarding the alleged torture of Afghan detainees that had been handed over to Afghan security forces by the Canadian military in Afghanistan. The documents had been the subject of Foreign Affairs Officer Richard Colvin's testimony before the House of Commons Committee inquiring into the treatment of Afghan detainees. Though the prime minister would have preferred to have us believe that he needed time to "recalibrate," most Canadians understood that the Afghan detainee inquiry and the government's stubborn resistance to handing over uncensored documents to the House Committee precipitated prorogation.

Prorogation was prompted by the House of Commons adoption of a December 10 opposition motion calling on the government to produce those very uncensored documents. Unwilling to do so, the prime minister then asked the governor general to prorogue Parliament and not have it reconvene until more than two months later on March 2, 2010, after the Vancouver Olympics. All would be forgotten by then, the prime minister must have assumed. However, what the prime minister was claiming for his office was an unyielding independence from the House of Commons in which the "executive branch" held office separate from the legislative branch.

This is most clearly suggested by the legal manoeuvring by government and justice department officials. The day before the opposition parties were to vote on the contempt motion in December 2009, the Assistant Deputy Minister in the Department of Justice, Carolyn Kobernick, wrote to the Law Clerk and Parliamentary Counsel to the House of Commons, Rob Walsh, to explain the government's constitutional basis for refusing to disclose uncensored documents. Up to that day, the government side had been relying on a variety of statutes, such as the *Canada Evidence Act*, which it claimed legally barred the government from releasing documents that might threaten national security interests. In which case, as the prime minister and his ministers had advised the House, the government could only produce "legally available information."

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THE BATTLE FOR DISCLOSURE

Unredacted documents simply were not legally available. Acknowledging that there really was no statutory basis for refusing disclosure under the *Canada Evidence Act*, Kobernick instead identified "several basic principles" in our system of parliamentary democracy "that must always be borne in mind." These were, she wrote, the rule of law, parliamentary sovereignty, responsible government, and the separation of powers. Concerning the separation of powers, she maintained, "[e]ach of the three constitutional branches of government—the executive, the legislative, and judicial branches—must respect the legitimate sphere of action of the other branches." If there was no strictly legal basis for refusing to comply with the production of documents order, she argued that the House of Commons and its committees should instead respect fundamental principles like the separation of powers and simply yield to the government's superior authority in this matter.

It is this alleged bedrock constitutional principle that Justice Minister Rob Nicholson invoked in the House of Commons on March 31, 2010. This critical speech was in response to the opposition motion pending before the Speaker of the House, Peter Milliken, that there had been a breach of parliamentary privilege following the House's December 2009 motion to produce unredacted documents. Nicholson, taking his cue from Kobernick, argued that the original opposition motion was an unlawful extension of the legislative power into the realm of executive authority, each of which was sharply segregated from the other.

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TIPPING THE BALANCE: UPHOLDING PARLIAMENT SUPREME

In his much lauded ruling against the government on April 27, 2010, Speaker Milliken disagreed with the minister that this was an unlawful extension of legislative power. Yet he appeared to accept the minister's troubling premise about the separation of powers. "It is the view

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of the chair that accepting an unconditional authority of the executive to censor the information provided to Parliament," declared Speaker Milliken, "would in fact jeopardize the very separation of powers that is purported to lie at the heart of our parliamentary system and the independence of its constituent parts." Though he did not elaborate on this point, presumably the Speaker meant to say that if he were to swallow the minister's argument whole, it would undermine the ability of the legislative branch to perform its checking function of the executive branch or, in terms more familiar to Westminster-style parliaments, hold the government to account.

SEPARATION OF POWERS DOCTRINE—US-STYLE POLITICS

The concern here is that, by accepting the separation of powers as foundational to Canadian constitutional law, we are drifting further in the direction of US-style constitutional politics. This is a model of divided government where a powerful executive can legitimately resist legislative initiative, where an elected upper house checks an equally legitimate lower house, and the governing party changes place with the opposition party only after a national election. All of these are innovations that Canadians perhaps should be talking about, but that this government prefers to do mostly by stealth.

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conditions that make social pluralism possible: conditions that are necessary for our liberal democracies (see *Rogue in Power* for a full analysis of this important text).

It is crucial that we immunize our institutions against these types of excesses. Citizens must be regarded as participants on an equal footing in all decisions concerning the public sphere. This means that neither the elected representatives nor the government should use political mechanisms such as prorogation, which is authorized by the law, to prevent public debate. Through effective use of the media and through political education and civic culture, civil society must assert its capacity to transmit and amplify its efforts to protect the ideals associated with the common good. However, no civil society can do such work if the government stands opposed to it.

What Harper challenges are the conditions that make social pluralism possible: conditions that are necessary for our liberal democracies.