

Protests Prompt Parliamentarians to Propound Prorogation Prescriptions, as Pundits Pronounce on Proposals' Prospects

Protests across Canada on January 23, 2010 sustained the controversy about the latest prorogation of Parliament.[\[1\]](#) Two federal opposition parties have now offered proposals to prevent prime ministers from seeking prorogation in circumstances like December 30, when the Governor General prorogued Parliament on Prime Minister Harper's advice.[\[2\]](#) Prominent newspaper editorial boards continue to criticize the prime minister's recent actions on democratic and constitutional grounds.[\[3\]](#)

Proposals for New Legislation or Standing Orders

The New Democratic Party announced its proposal - or more specifically, its promise to make a proposal - on January 20.[\[4\]](#) Leader Jack Layton said: "...New Democrats will bring proposals for legislation to limit the power of prorogation so the Prime Minister cannot abuse it. The government should only prorogue Parliament on a vote in the House of Commons. This will inform the Governor General of the will of the majority, so that prorogation happens when it is needed - not simply when the Prime Minister feels like it."[\[5\]](#)

The *Globe and Mail* weighed in a few days later. According to the newspaper's editorial board, "It is time for greater knowledge and understanding about the unwritten rules of the constitution, and more legislative control over some of those rules." The editorial proposes a new law to set out a new parliamentary procedure: "...if advice to prorogue Parliament came not from the prime minister, but on an address of Parliament, Mr. Harper would have been unable to slip his request for prorogation through just before New Year's with a curt telephone call to the Governor General."[\[6\]](#) The Liberal Party followed with its own plan on January 25. It promises to "...seek to amend the Standing Orders of the House of Commons to:

- Require at least 10 days written notice from the Prime Minister of his intention to seek to prorogue, together with his specific reasons for doing so;
- Require the Prime Minister to bring the issue of prorogation before the House of Commons for a full debate;
- Prevent a request for prorogation within the first year after a Speech from the Throne, unless the House consents;
- Prevent a prorogation longer than one calendar month without the consent of the House;
- Prevent a request for prorogation if a matter of confidence has been scheduled in the House unless the House consents; and,
- Allow Parliamentary Committees to continue to function during the period when Parliament is prorogued until the start of the new session.[\[7\]](#)

The NDP plan calls for new legislation; the Liberal plan calls for a motion to amend the Standing Orders of the House of Commons, and also suggests the possibility of new legislation if necessary. Another approach was suggested by Professor Andrew Heard on January 10: the House of Commons could pass a

resolution demanding that the prime minister obtain a majority vote of the House before advising prorogation; without the authorization of a vote, he would be in contempt of Parliament.^[8] Professor Peter Russell also favours the resolution route: *It should be a resolution of Parliament saying that the Prime Minister should not ask the Governor General to prorogue without the approval of a majority of members (or a majority vote) of the House of Commons. Such a resolution would not purport to bind the Governor General in law—but would give the Governor General a political principle to guide her in exercising her discretionary power to prorogue. If the resolution supporting this principle had all party support it would have the strength of a constitutional convention.*^[9]

Are the Proposals Enforceable? Reaction from Experts and Commentators

Professor Lorne Sossin is skeptical about both legislation and resolutions, proposing instead that the Governor General take a new approach to her discretion: *I do not think such legislation would be enforceable nor do I think it is the optimal solution. A vote to prorogue seems to me to some extent redundant—the opposition parties can bring down the government if they have lost confidence, and otherwise, if they continue to have confidence in the government, they must live with some degree of executive prerogative. In my view, the better accountability mechanism is a Governor General who exercises discretion with respect to granting or denying requests to prorogue with the public interest in mind, and makes public her or his reasons for granting or denying such requests. The Governor General should make clear that prorogation will not be granted so as to avoid a vote of confidence, or for ulterior or improper purposes.*^[10] Professor Ned Franks, on the other hand, sees room for a legislated response. He envisages a law to stipulate that *...the Prime Minister cannot advise the Governor General to prorogue Parliament unless a motion to that effect has been passed in the House of Commons. So it's limiting the Prime Minister's power to advise rather than the Governor General's discretion.... It would leave the Governor General open to prorogue without the advice of the Prime Minister.... The Conservatives might argue that Parliament cannot legislate limiting the Crown's discretion and reserve powers, but Parliament isn't as long as it's limiting the Prime Minister's powers to advise ... within the ... constitutional meaning of advice to the Governor General.*^[11] Taking issue with the NDP and the *Globe and Mail* editorialists - and highlighting the example of the ill-fated 2007 federal fixed-date election law - Norman Spector takes the view that legislation limiting the prime ministerial power to advise prorogation would be unenforceable.^[12] In another article, Spector discerns a Liberal agenda to maximize the parliamentary opposition's leverage in election timing, buried in the party's scheme to prevent prorogation within a year of a throne speech, unless there is a majority vote in the Commons.^[13] CBC blogger Kady O'Malley suggests that either the NDP legislation or the Liberal standing orders amendment would be "largely symbolic" - like Spector, she sees a constitutional barrier to making the changes enforceable: "...it's not clear whether it would have any binding power outside the Chamber, since it ... fails to mention anything about the constitutional amendment that would almost certainly be required for it to have teeth."^[14] O'Malley is apparently alluding to section 41(a) of the [Constitution Act, 1982](#) - which requires the agreement of all ten provinces for an alteration to "the office of ... the Governor General." Prorogation is part of the Governor General's prerogatives; there is a strong view

that a legislated change in the procedure leading up to the exercise of the prerogative is itself a change to the “office.” Columnist Chantal Hebert makes a similar argument, saying the “pattern” since the election call in 2008 is “...that the governor general is at the beck and call of the prime minister of the day, regardless of whether his advice reflects the will of Parliament as expressed in laws or through the voices of a majority of its elected members.” She sees no prospect that a mere law of the federal Parliament could change this pattern: a law limiting the prime minister’s power to obtain prorogation “would almost certainly suffer the same fate as the fixed-date law set aside by the Prime Minister when he called the last election.” Like Spector, Hebert alludes to the Federal Court decision on the fixed-date election law: “It found that the fixed-election law neither superseded the constitutionally enshrined powers of the governor general to dissolve Parliament nor created a new constitutional convention that limited the discretion of the prime minister to seek dissolution.”^[15] Accordingly, a unanimous constitutional amendment is the only route she sees to effective reform.

^[1] Vito Pilioci, “Protesters demand Harper reconvene House” *Ottawa Citizen* (24 January 2010); Andrea Sands, “Thousands want Harper back at work” *Edmonton Journal* (24 January 2010); Clara Byrne, “Thousands protest prorogued Parliament” *The Globe and Mail* (23 January 2010); Aaron Wherry, “[The Tally](#)” *Macleans.ca* (24 January 2010); John Geddes, “[Will the prorogation of Parliament set off a populist revolt?](#)” *Macleans.ca* (25 January 2010). ^[2] “Prorogation primer: Shutting down the House” *The Globe and Mail* (25 January 2010). ^[3] Editorial, “[Questions for proroguing PM](#)” *Toronto Star* (25 January 2010); Editorial, “Seeing through the prorogation ploy” *Vancouver Sun* (8 January 2010); Editorial, “Silent Parliament, forgotten roots” *The Globe and Mail* (25 January 2010); Editorial, “Time to stand up for Parliament” *The Globe and Mail* (23 January 2010); Editorial, “Democracy diminished, accountability avoided” *The Globe and Mail* (31 December 2009). ^[4] Jane Taber, “Jack Layton drafts anti-prorogation bill” *The Globe and Mail* (20 January 2010). ^[5] Press release, “NDP proposes restrictions on Harper’s powers” *NDP.ca* (20 January 2010). ^[6] Editorial, “Time to stand up for Parliament” *The Globe and Mail* (23 January 2010). ^[7] News release, “Liberals pledge to prevent abuse of prorogation” *Liberal.ca* (25 January 2010); Jane Taber, “Trumping NDP, Michael Ignatieff lays out tough new prorogation rules” *The Globe and Mail* (25 January 2010). ^[8] Andrew Heard, “Give the House the authority” *The Globe and Mail* (10 January 2010). ^[9] Andrew Wherry, “[How to go about this](#)” *Macleans.ca* (21 January 2010). ^[10] Andrew Wherry, “[How to go about this \(II\)](#)” *Macleans.ca* (22 January 2010). ^[11] Andrew Wherry, “[How to go about this \(III\)](#)” *Macleans.ca* (22 January 2010). ^[12] Norman Spector, “Why the Globe prorogation editorial fails” *Spector Vision, Globe and Mail blogs* (23 January 2010). ^[13] Norman Spector, “Mr. Ignatieff’s game” *Spector Vision, Globe and Mail blogs* (23 January 2010). ^[14] Kady O’Malley, “ProrogueWatch - Battle of the Prime Ministerial Prerogative-Limiting Proposals!” *CBC.ca* (25 January 2010). ^[15] Chantal Hebert, “Hebert: Proroguing pattern is now set” *Toronto Star* (25 January 2010).