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# **Standing Committee on Procedure and House Affairs**

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**EVIDENCE**

**Tuesday, June 15, 2010**

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**Chair**

**Mr. Joe Preston**



## Standing Committee on Procedure and House Affairs

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• (1105)

[English]

**The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)):** This is the twenty-first meeting of the Standing Committee on Procedure and House Affairs. We are on our study of prorogation.

We have Bradley Miller here today from the University of Western Ontario, near my hometown.

Welcome.

He's going to give us a bit of an opening statement and then we'll have questions.

In our second hour today, depending on where we end up here, we have just a bit of committee business on the technologies report, which you've all also received.

Let's go ahead and ask Professor Miller to give his opening statement. Then we'll ask some questions.

**Dr. Bradley Miller (Assistant Professor, Faculty of Law, University of Western Ontario, As an Individual):** Thank you.

I'd like to begin by thanking the committee for the invitation to be here today. This committee is addressing a matter of great importance for the governance of the country, and I'm honoured to be here working with you. I hope what I have to say will be of use to you.

Some of what I have to say today about constitutional conventions and constitutional law has been said, and said very well, by previous witnesses. My remarks are mainly to indicate where I agree and disagree with what has been said about the nature of conventions, as well as to raise some issues that have not yet been addressed with respect to the role of the Governor General.

There was also, early in these proceedings, some question about whether the Governor General was bound by convention to act only on the advice of the Prime Minister, or whether the Governor General could instead equally accept instruction from the Speaker of the House of Commons or perhaps other sources. On this point at least, there's no doubt about the relevant convention: the Governor General is to act on the advice of the Prime Minister.

In some previous meetings, there appears to have been some confusion caused by the ambiguity of the word "advice". The Governor General is free to receive information from whatever sources she chooses, but "advice" in this context has a specific technical meaning when we're talking about the Governor General's constitutional obligations. The Prime Minister's advice to the

Governor General is in fact "instruction" or "direction". In its subtle constitutional convention, the Governor General receives advice in this restricted technical sense only from the Prime Minister.

With that out of the way, I'd like to say a few words about conventions. It might be helpful to recap some fundamental points that have been established by previous witnesses, particularly Professors Russell and Heard, both of whom I have great admiration for.

First of all, in the Canadian constitutional order, the power to prorogue Parliament rests exclusively with the Governor General. Secondly, there is a constitutional convention that the Governor General acts on the advice of the Prime Minister and no one else. This is a convention of broad application, of course, and is not limited to matters of prorogation. Third, the Governor General holds in reserve a discretionary power to refuse to act on a Prime Minister's advice in exceptional circumstances.

Now, as a constitutional lawyer, it's important for me to acknowledge at the outset that conventions are not posited law, and we have little to learn about them from courts. While we in Canada tend to take the patriation reference as the starting point of any discussion on the nature of conventions, the rest of the common law world views this as a bit odd.

The ordinary course is for questions of conventions to be resolved by political actors without recourse to courts, as was done by the U. K. Parliament in 1981 when the Kershaw committee, aided by evidence from Oxford's legendary Geoffrey Marshall and John Finnis, produced a masterful analysis of the conventions surrounding patriation. The Kershaw committee's reports are nearly forgotten in Canada, but are a reminder of the primary role of Parliament in interpreting constitutional conventions.

It bears repeating that what makes conventions difficult to work with is that, in the central case, the rules governing their creation and change make them resistant to non-consensual change. It's a simple matter to determine when legislation is enacted, amended, and repealed. The same holds, more or less, for the common law. But with conventions, it's a different story. It's the parties' stable conduct that settles things. Without this stable conduct—and, more to the point, the underlying agreement that is reflected in the conduct—there is no convention.

With conventions, it's not always immediately clear whether a party's action is an infringement of the convention, or an amendment to a convention, or a replacement of an old convention with a new one. This is because the legitimacy of the action depends on whether the action is accepted and adopted by other political actors. There are no rules that can tell you when this is going to happen.

This committee, it seems to me, is concerned with the question of how to modify a particular convention or to create a new convention to govern the request to prorogue. As you're all aware, there are two ways to create a convention. The first, responsible for our most fundamental conventions, is by subtle practice over time, as parties cohere around the soundness of a particular course of action. The second way to create a convention is by simple agreement. In both cases, it's the agreement and the stability of the agreement that makes a convention and gives it force.

I agree with Professor Russell and part company with Professor Heard to the extent that Professor Heard has suggested to you that a constitutional convention surrounding the power to request or grant prorogation could be established by a majority vote in the House of Commons. The idea of creating a convention that binds one of the affected parties over the objection of that party seems to me to be inconsistent with the very concept of a convention.

A new convention about the advice that can be given to the Governor General by the Prime Minister, or the exercise of the reserve power by the Governor General, cannot be created by the simple agreement of a majority of Parliament. To hold otherwise would require a concept of constitutional convention that's alien to our constitutional tradition.

I'd like to move now to some comments about the role of the Governor General. While this committee has been asked to study relevant issues pertaining to prorogation, it seems to me that prorogation is really a microcosm of a larger issue, which is the circumstances in which the reserve powers of the Governor General can be exercised and the role Parliament can play in changing the conventions governing the exercise of those powers.

In the commentary I wrote on the events of December 2008, I emphasized that the Governor General had the reserve power to refuse the Prime Minister if she concluded that the request was in violation of a constitutional convention and, in that sense, was unconstitutional. It required an assessment on the part of the Governor General of whether the request was a good faith attempt by the Prime Minister to act in the best interests of the country, or if it was made for mere partisan advantage or was an abuse of authority in some other way. There has to be an assessment of the reasons given by the Prime Minister in these circumstances, and an independent exercise of judgment by the Governor General.

In determining whether there is reason to believe that the Prime Minister is overreaching constitutional authority in the circumstances, there's no reason why the Governor General should not have the benefit of information provided by Parliament. This is not a matter of being advised by Parliament in the constitutional sense, but a matter of simply receiving information. To the extent that there is currently doubt about the appropriateness of the Speaker providing such information to the Governor General, there is now an opportunity for Parliament to agree on some avenue to communicate

to the Governor General any relevant circumstances or information needed to best exercise her discretion.

New and flexible rules are not needed, but simply good information and good judgment. The Governor General needs flexibility to determine, for example, when a request to prorogue is made for the purpose for which the power exists—when a government has lost confidence, when to dissolve Parliament, when to call an election, etc.

Canadians have become accustomed to an office of Governor General with little to no political function. Given the sort of statecraft that's now needed from the office, and the culture of transparency and public justification that now pervades public life, some changes to the office and how it relates to Parliament are now needed.

We can benefit from the experience of countries like New Zealand, where the office of Governor General was transformed after the adoption of proportional representation. Governor General Hardie Boys, for example, used public addresses to explain the criteria he would use in determining whether a proposed government would likely command the confidence of the House.

I'm not suggesting that the Governor General should have to justify specific decisions made after the fact with reasons to the public, but it would enhance the authority of the Governor General to hold other political actors to account if the Governor General were to be politically or publicly accountable in some way, and it would provide for some common understanding of how the office functioned. Such public accountability can be provided, for example, through public statements about how she would view the role of information provided from Parliament, or statements about criteria she would use for decisions and the exercise of the reserve powers.

While Parliament is not in a position to insist that the Governor General take any of the actions I have suggested, it's entirely appropriate for Parliament to express its desire for the Governor General's office to take steps to increase the transparency of its decision-making. Another possibility, and one that was suggested by former Governor General Adrienne Clarkson, would be to hold a parliamentary hearing for appointees to that office. Such a hearing, similar to those recently employed prior to the appointments to the Supreme Court, could provide an opportunity for an incoming Governor General to dialogue with Parliament first-hand about the expectations of the respective roles of Parliament and the executive.

Thank you.

• (1110)

**The Chair:** Thank you, Professor Miller.

Madam Jennings.

**Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.):** Thank you so much, Professor Miller, for your presentation.

I would like to come at it from the angle of the Speaker. Should a majority of the House decide or should there be a unanimous decision of the House on some aspect of the issue of prorogation and a wish to have its point of view brought to the attention of the Governor General, it has been suggested to us that the way in which this can happen is through the Speaker, and that the Speaker would have access to the Governor General virtually at any point.

If I can just read for you something that was brought to our attention, it's called "Access to the Governor General: A Little-Known Parliamentary Privilege", and it states:

At the opening of the First Session of a new Parliament, the newly elected Speaker of the House of Commons presents himself or herself to the Governor General in the Senate Chamber before the latter delivers the Speech from the Throne. The Speaker addresses the Governor General by an established formula, which is as follows:

May it please Your Excellency,

The House of Commons has elected me their Speaker, though I am but little able to fulfil the important duties thus assigned to me. If, in the performance of those duties, I should at any time fall into error, I pray that the fault may be imputed to me, and not to the Commons, whose servant I am, and who, through me, the better to enable them to discharge their duty to their Queen and Country, humbly claim all their undoubted rights and privileges, especially that they may have freedom of speech in their debates, access to Your Excellency's person at all reasonable times—

That phrase was underlined by the witness who brought this to our attention.

—and that their proceedings may receive from Your Excellency the most favourable construction.

So basically what that witness was bringing to our attention—and other witnesses more or less agreed—was that the House of Commons can express its will, not just on prorogation, but on other issues that may be convention, that may be actual law, and bring the House's opinion or view to the attention of the Governor General, if it might be of interest in terms of her or him exercising their exclusive authority or reserve authority. That could be done through the Speaker.

I'm not sure if that's something you have considered, but if it is, I'd be very interested in hearing what you have to say about it.

•(1115)

**Dr. Bradley Miller:** Thank you. Could I just ask what you are reading from so we're on the same page?

**Hon. Marlene Jennings:** It's the address that the Speaker makes to the Governor General just prior to a throne speech when you have a new legislative session. Apparently it's a well-established formula. It's the same text that is read every time and it says that the House of Commons, through the Speaker, would have access to "Your Excellency's person at all reasonable times".

**Dr. Bradley Miller:** I haven't conducted any sort of study about the office of the Speaker and the relationship between the Speaker and the Governor General. But with that disclaimer out of the way, I don't see anything objectionable about the Speaker approaching the Governor General to provide information, provided that at all times we're very clear on this distinction between providing information and giving advice in the constitutional sense. That latter function is the exclusive preserve of the Prime Minister.

That's really all I can say about the issue. Does that answer your question?

**Hon. Marlene Jennings:** Yes....

**Dr. Bradley Miller:** You're looking at me hopefully.

**Voices:** Oh, oh!

**Dr. Bradley Miller:** By all means, follow up.

**Hon. Marlene Jennings:** No. I think the follow-up would be our chair sending you a copy of the actual document. That would then allow you to review it carefully—

**Dr. Bradley Miller:** Yes.

**Hon. Marlene Jennings:** —do your own research if necessary, and then respond to the committee through the chair.

**Dr. Bradley Miller:** If you're asking me for an opinion on what are the conventions surrounding the office of the Speaker with respect to giving information to the Governor General, I'm simply not in a position to give you any answer to that question now. But I would certainly be happy to go away, research it, and provide you with a report.

**Hon. Marlene Jennings:** Thank you.

This was prepared by B. Thomas Hall, who's a former procedural clerk of the House of Commons, for this committee for the study on prorogation. Basically what he says is that this is a convention, that the Speaker does have access to the Governor General "at all reasonable times", and that should the House of Commons, whether or not we attempt any change of the convention on prorogation, at any time believe that there is an issue and be of like mind that it should be brought to the attention of the Governor General, this is an avenue whereby that view could be brought to the attention of the Governor General.

I would ask that we send a copy of this to you.

**Dr. Bradley Miller:** All right.

•(1120)

**Hon. Marlene Jennings:** Thank you.

I'm done for now. Thank you.

**The Chair:** Great.

Mr. Reid.

**Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC):** Thank you, Mr. Chair.

Thank you, Professor Miller, for being here with us today.

I wanted to start by asking you to give us a bit more detail on the public comments that the Governor General of New Zealand has made. I'm interested, first of all, in knowing whether these were made before or after he found himself in a position to exercise the reserve powers, and then, maybe you could give us a bit of detail about what kind of content was in those comments.

**Dr. Bradley Miller:** Sure.

First of all, Governor General Sir Hardie Boys was the first Governor General to hold that post in New Zealand after they switched to the proportional representation voting. He took it upon himself to make some public addresses well ahead of time prior to being called upon to identify the government of New Zealand.

He set out the criteria that he would be using to identify a government, on the basis that he thought it would help things immeasurably if everyone was on the same foot and understood what was.... He believed it would help negotiations among the political parties if they knew what was going through his mind, so they wouldn't be operating in the dark.

Thereafter, he made periodic speeches about his office, explaining what its functions were. These were communications that weren't intended simply for the political actors, but also for the public, so that they would understand what it was he was doing as a form of providing for public accountability. Being very aware of the fact that he was exercising power and yet was not directly responsible to the electorate, that was the way in which he made himself accountable.

As far as the specifics of what he had to say are concerned, these were in some fairly wide-ranging speeches. I provided a link to the New Zealand Governor General's website in my written remarks that directs to where some of his speeches are archived.

**Mr. Scott Reid:** In general, the fact that it's on the Governor General's website suggests that these were well enough received that now.... I need your assistance on when this would have come up. I'm guessing that this was in the nineties.

**Dr. Bradley Miller:** This was in the late nineties, in about 1998 or so.

**Mr. Scott Reid:** But the public perception of these and of the process of having made them public was positive enough that they've been able to keep them on the website. Would that be correct?

**Dr. Bradley Miller:** I'm a humble Canadian constitutional academic, so my knowledge of New Zealand politics is extremely limited, but I certainly haven't heard of any great outrage at the Governor General's conduct.

**Mr. Scott Reid:** Okay.

The reason I was asking that is our previous witness.... I don't know if Professor Monahan's testimony has been up long enough for you to have seen it.

**Dr. Bradley Miller:** No, I have not seen it.

**Mr. Scott Reid:** Okay.

He wasn't dealing with this specifically, but in general he expressed concern that in dealing with the Governor General.... I'm paraphrasing to some degree and I may be doing him a bit of injustice here, but I think that in general he was expressing a reluctance, to use Bagehot's phrase, to shine light upon magic, to have too much public exposure as to what goes on when the Governor General makes decisions. He also had some reluctance in regard to dealing with a public review or appointment process.

So I guess the question arises as a general theme. Do you think it's positive to have, as Governor General Hardie Boys was trying to do, more openness in this regard, or to have less openness? Should our current Governor General or the next one we get be more forthcoming? Or what kinds of restraints should there be on the willingness to speak out about these kinds of considerations?

I'll just throw that out in a general way.

**Dr. Bradley Miller:** Well, I think it has been some time since the Governor General in Canada has been called on to act politically in the way that she must now. And during that interval, public life has been transformed in Canada. There's a much greater culture of transparency and what some call a "culture of justification" of political actors offering their reasons to the public for greater transparency. So I think it's appropriate that the office of Governor General be updated in that direction.

That said, I would not support a proposal for the Governor General to provide written reasons, or reasons, or justification, or any explanation after making a decision. I think that has to be shrouded in mystery or what have you. The function of the Governor General, when receiving advice from the Prime Minister, is not the same function as the function of a judge hearing from two parties impartially and then rendering a decision. It's a different function.

I'm uncomfortable with the Governor General having to give reasons after the fact after a decision. However, I think that it can be very helpful for the Governor General to provide, as Governor General Hardie Boys did, some sorts of discussions in the abstract ahead of time, so that political actors can know where she stands on issues and can respond accordingly, either to communicate their disagreement or their agreement, as part of a process of all the political actors working together either to re-establish or to change a convention.

● (1125)

**Mr. Scott Reid:** Just very briefly, as I only have about 20 seconds, have the subsequent Governors General in New Zealand regarded the decision rules that were discussed by Governor General Hardie Boys as being binding upon them as well or as being the kinds of rules they would use?

**Dr. Bradley Miller:** That, I don't know. I haven't heard any dissatisfaction about his role in New Zealand public life. I know the current Governor Generals still produce speeches and they're on the Governor General's website, but I haven't delved into that content at all.

**Mr. Scott Reid:** Thank you very much.

**The Chair:** Thank you, Mr. Reid.

Madame Gagnon.

[Translation]

**Ms. Christiane Gagnon (Québec, BQ):** Thank you, Mr. Miller.

A number of people have lived through prorogation of the House three times for all sorts of reasons. The last time, public opinion did not really accept it. People challenged the use of prorogation, and it probably was an abuse.

We can see that the use of prorogation has indeed been abused by the current government on several occasions. The last time, it appeared that it was not well received by public opinion. Some people, including some university professors, wanted to find out what their peers thought. There was even that young man who set about creating a website to post the reasons why the government had decided to prorogue the House.

That leads us to reflect on the need to make more prudent use of prorogation and on the role of the Governor General. As a parliamentarian, my sense is that the Prime Minister goes to ask the Governor General for advice, but she really has no choice. It would have surprised me greatly had the Governor General decided not to follow the Prime Minister's advice. Agreeing to his request is no more than a formality.

You say that there could be more transparency, but, at the same time, you say that reasons for the decision need not be given afterwards. That is a very thin line. I find it hard to believe that the Governor General could explain her reasons beforehand, but not afterwards. Agreeing to the Prime Minister's request really is nothing more than a formality. The Governor General has very little discretion.

• (1130)

[English]

**Dr. Bradley Miller:** Thank you.

There's an awful lot in your comments. With respect to how to approach this, what I'm suggesting is that the decision-making of the Governor General's office has to have some better transparency. I've suggested one way of doing it; I've drawn the line at after-the-fact reasons. I think that in transforming a public institution we have to take baby steps. I'm not certain that giving after-the-fact reasons, in our present political culture, is wise.

I believe that it would be tremendously helpful for the Governor General to talk about the role of that office, such that there could be an understanding by the Prime Minister or by others as to.... Ahead of time, she could draw a line as to when she believes she would be entitled to use the reserve powers and when not.

You say that the culture now is such that she has to accept the advice of the Prime Minister. I think there's some debate about that. I think good arguments could have been made—either way—back in 2008 as to what she could have done. It would have been very difficult, to be sure. It would have been very difficult for her to refuse the advice of the Prime Minister.

Perhaps it would have been much easier if she had, ahead of time.... Well, she would never have anticipated the situation; I certainly can't suggest that. But if ahead of time there were rules set out in advance, that would strengthen the position of the Governor General, who could then later say that these rules have not been followed and this is why I'm now refusing the advice of the Prime Minister.

[Translation]

**Ms. Christiane Gagnon:** So, what kind of rules do you see exactly?

[English]

**Dr. Bradley Miller:** It would be some articulation of what the convention is regarding prorogation. I don't have a proposal for what those rules ought to be. That is something for the political actors to come to, political actors who include the Governor General. All I'm suggesting is that there needs to be some discussion, as you are all engaged in, to come to an agreement as to how things will work going forward.

[Translation]

**Ms. Christiane Gagnon:** It would need some kind of committee in which all the stakeholders would take part. It could reflect on more precise rules to ensure that opposition parties would also be consulted on such a move and that everyone would agree on certain rules. In the case of prorogation, accepting it is one thing, but there is also how long it will last. Often that is what shocks opposition parties. We are here to sit, to defend legislation. In our committees, we have been left hanging. There was something frustrating in that, because we were no longer able to do the work that parliamentarians are supposed to do. We came back to the House in March. The session is out of balance because it was chopped by five weeks. We have less time in which to work in our committees. We are suffering the consequences.

Perhaps prorogation could have been better identified in terms of its justification and its duration. But it has to be said that, in one way, that makes no sense, because, before this session ends, we are not going to be able to deal with bills that come back to the Order Paper.

[English]

**Dr. Bradley Miller:** Well, what sort of format or venue is used for these discussions is something that's beyond my expertise, but certainly the discussions are of great value and are necessary.

• (1135)

**The Chair:** *Merci.*

Mr. Christopherson.

**Mr. David Christopherson (Hamilton Centre, NDP):** Thank you, Chair.

Thank you very much, Professor, for attending today. I appreciate it.

Perhaps I could just pick up where Madame Gagnon left off on the GG. Another presenter had the same opinion you have: that it's not in the best interests of our system for the GG to give reasons after the fact.

I'm still having some trouble getting my head around that. I've mentioned before that Canadians are no longer as deferential as they used to be to all the powers that be, even up to and including the Queen and her representatives. And as for this notion that there's some kind of mysticism that needs to be protected in order to make the system work.... I'm just having trouble getting there.

Please help me understand why you believe it wouldn't be wise for the GG to give reasons. There's so much power there, so much authority, and in this day and age of accountability—and we're living through that personally as members of Parliament, writ large—accountability is the cornerstone. And here we are, saying that the highest authority in the country, we could argue, with the ultimate power to decide who gets to form a government, is to remain in secret as to why certain decisions are made. Help me to understand in that context how keeping things secret is helpful.

**Dr. Bradley Miller:** I don't think the language of mystery and mystique is particularly helpful here.

**Mr. David Christopherson:** I'm sorry: you don't think it's helpful...?

**Dr. Bradley Miller:** I don't think it's helpful, the language of mystery and mystique, that keeping something shrouded in secrecy is a good in itself...I don't mean to say that. We lawyers tend to be a rather cautious lot, so I'm reluctant to recommend a very large change like that.

However, more importantly, in circumstances where the Governor General refuses the advice of the Prime Minister, the focus is then removed from the Governor General. What seems to me to be important, then, is what subsequently happens in the House; when the advice to the Governor General is refused, things are sent back to the House of Commons, where the House can take what steps it will.

**Mr. David Christopherson:** Let's try to stay general. You used the term—and I jotted it down—that you weren't sure it's "wise". Why? What are the downsides? What are your concerns? What if we said, "Continue to exercise the powers, but we would like an explanation..."? What is the harm that you think could happen? I'm not seeing that.

**Dr. Bradley Miller:** I don't know. It's just a step into the unknown.

**Mr. David Christopherson:** Just because it's unknown, we don't want to go there...? Is that the only reason?

**Dr. Bradley Miller:** That's as good as I can come up with at—

**Mr. David Christopherson:** But I could give you a good argument on the other side, and I already did, as to why we need to do that. There's no response to that. You just say that it's unknown.

**Dr. Bradley Miller:** Well, what was the response I gave? I think what I said was that once the advice has been refused—

**Mr. David Christopherson:** But in any circumstance, regardless of refused or accepted, just if the GG makes a decision, why not have to give some rationale for it?

**Dr. Bradley Miller:** Why should the GG give a reason or rationale for accepting the Prime Minister's advice?

**Mr. David Christopherson:** Well, that would be a simple statement, wouldn't it? It would be, "I've accepted the advice of the Prime Minister because I don't think there's anything harmful, untoward, blah blah blah, thank you very much, and subjects be seated...".

**Dr. Bradley Miller:** Is that not implicit in accepting the advice of the Prime Minister? If that's all that's to be said—

**Mr. David Christopherson:** But if you set the pattern that there needs to be some kind of accountability, then in those times when it

is controversial, the Canadian people will be looking at something other than two hours of a camera focused on a doorway.

**Voices:** Oh, oh!

**Mr. David Christopherson:** That was the reality of what we went through the last time.

At the end of the day when she came forward...well, she never did come forward. When the Prime Minister eventually emerged through said doorway and announced that he had what he wanted, the person who made the decision didn't say a word, and still hasn't.

Why? What would be the harm in coming forward and saying, "Here's why I've decided what I've decided"? The rest of us have to live with that, notwithstanding senators, who don't have to answer to anybody, anywhere, anytime. But the rest of us involved in making laws are accountable.

I don't understand. All I'm hearing so far is that because it's a little risky, or you're nervous, you don't want to do it. That's not really a reason, I don't think, but obviously you do. Okay, fine. We're going to go on. If I have time, I would like to return, then, to the main—

I don't know...you make recommendations and you expect them to be defended.

**On March 17, the House passed this motion put forward by Mr. Layton:**

That, in the opinion of the House, the Prime Minister shall not advise the Governor General to prorogue any session of any Parliament for longer than seven calendar days without a specific resolution of this House of Commons to support such a prorogation.

What are your thoughts on that specifically?

• (1140)

**Dr. Bradley Miller:** Do you want my thoughts on the motion?

**Mr. David Christopherson:** Yes.

**Dr. Bradley Miller:** I think the motion can provide a good starting point for the formation of a convention.

The agreement is what's important here. If that motion can attract the requisite agreement, then you have what you came for.

**Mr. David Christopherson:** Do you think changing the Standing Orders of the House is sufficient or do we need to add a legislative change also? Or do you think doing both is belt and suspenders and is redundant?

**Dr. Bradley Miller:** I see them both as simply evidence of agreement. I don't see that legislation is any more evidence of agreement than a standing order is, provided that the agreement is there.

**Mr. David Christopherson:** Great. Thanks very much, Professor.

Thanks, Chair.

**The Chair:** Madam Jennings, we'll have five-minute rounds this time. We'll see if we can get through that and see if everybody who wants a chance gets a chance.



**Hon. Marlene Jennings:** Thank you, Chair.

Thank you, Professor Miller.

Given the suggestions you made following what's taken place in New Zealand, I would have to say that it might be of interest to have the Governor General, prior to any specific use or exercise of his or her authority and powers, whether they be regular or reserve, to in some way make public the kind of process behind that kind of exercise, but not once an actual decision—an exercise of authority—has been taken by the Governor General, so not to then publicly justify any particular decision. I actually agree with you on that. It may be because of my legal training.

Should we, as a House of Commons, attempt to change the convention, to change our constitutional framework in order to require a Governor General to have to justify specific decisions that have been taken, I do think that then we're on the road to eroding our actual parliamentary democracy and our democratic institutions that uphold that democracy. I am in full agreement with transparency, but I do think there are occasions when that's a dangerous road, and it's not one that I personally would want to take.

However, I do believe that in the interests of transparency that it is a good idea that the Governor General may wish to expound a bit on the process that leads him or her to a decision, in the way that Adrienne Clarkson did once she was no longer Governor General. But I think it should be done while they are a sitting Governor General, because that can then inform the public and shed more light. It's not some scary thing like the Wizard of Oz behind the curtain pulling all of the levers without anybody knowing. This way, we would know what the levers were. We may not know the sequence in which they were pulled, but we would know what the levers are, so we that gives us a good sense of arriving at our own idea of what the justification is.

However, on the issue of the motion—

**Dr. Bradley Miller:** Can I just interrupt you right there?

**Hon. Marlene Jennings:** Yes.

**Dr. Bradley Miller:** It's just to say that I agree with you completely.

**Hon. Marlene Jennings:** Oh—I love you.

**Voices:** Oh, oh!

**Hon. Marlene Jennings:** Now you're blushing—

**The Chair:** You don't know how special that is—

**Dr. Bradley Miller:** Sorry. I've interrupted you.

• (1145)

**Hon. Marlene Jennings:** Now, on the issue of the motion.... Actually there are two motions, a NDP motion and a Liberal motion, that deal with attempting to modify the Standing Orders of the House of Commons to provide a regulatory—if I can use that word—framework for prorogation, not in any way impeding or limiting the Governor General's exclusive authority on that.

You have said that's a good starting point. But if I understand you correctly—and this is what I'd like you to comment on—given what you have said about convention, for a convention to actually become

a convention it would require, if I'm not mistaken, in your view, not simply a majority vote. If it were a majority vote, then it would be practice. The respect of that particular rule by all parties subsequently would ultimately lead it to being an actual convention. Or it would need to have consent of all parties for it to be established immediately as a convention. Am I correct that this is what you're saying?

**Dr. Bradley Miller:** Yes, that's correct. The significance of the motion isn't in the motion itself; the significance is in how it's received by the political actors. So it has ordinary force as a motion, but the way that everyone looks at it and says yes, that's the phrasing, we all agree on the statement of principle....

**Hon. Marlene Jennings:** But if I understand, for instance, if in the House of Commons one party or another tables a motion to amend the Standing Orders to create some kind of framework through the Standing Orders on prorogation, and it is adopted by a majority vote, it would not equal a convention, because it was not supported by all parties in the House.

**Dr. Bradley Miller:** That's correct. It would not be a convention. It could become one later.

**Hon. Marlene Jennings:** Yes. If, through time, the different parties that form government, that do not form government, and those that may have no hope in hell of ever forming government or have no interest in ever forming government, all adhered to it, then ultimately it could become a convention.

**Dr. Bradley Miller:** Yes.

**Hon. Marlene Jennings:** Thank you so much.

**The Chair:** Good. I let you go on just a little longer, but you're making a great point there about how we got to a convention.

**Hon. Marlene Jennings:** Don't I always, Chair?

**The Chair:** Of course. I'm sorry. My mistake today—

**Hon. Marlene Jennings:** Don't equivocate now....

**The Chair:** Mr. Albrecht.

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

Thank you, Professor Miller, for being here today. You've really been helpful in terms of outlining the difference between advice to the Prime Minister and information from any source to the Prime Minister. I think those words have been used interchangeably in the past. For me, that has been helpful.

You also pointed out that the conventions are created either by a practice over time or by an agreement of all parties. They can't be instituted simply by a majority of Parliament, as my colleague has just reaffirmed.

Right near the end of your talk you mentioned a hearing or a discussion with the Governor General appointee. I'm not clear on whether that hearing would occur prior to it being ratified. If so, would one party in that hearing have the power to veto the recommendation of the Prime Minister? Would you need unanimous consent of that group? How would you envision it, for example, in regard to having an appointee brought before a committee and then one or two of the committee members disagreeing with the majority? How would you envision that playing out?

**Dr. Bradley Miller:** I wouldn't envision anything that is different from the process currently followed for appointments to the Supreme Court. Correct me if I'm mistaken about the process, but as I understand it, that appointment rests with the Prime Minister throughout.

I am not entirely sure what the status is of a hearing before Parliament, but there is even greater value with the appointment of the Governor General than there is in following that process for a Supreme Court nominee, because it's much more relevant for the function of the Governor General to hear from parliamentarians as to what they expect from a Governor General. This is an opportunity for a face-to-face interaction directly with members of Parliament that would not occur subsequently in the tenure of the Governor General.

I'm not proposing any sort of hearing where anyone has any veto over the proposal or anything like that. I'm just suggesting that there is some value in a face-to-face meeting in the House prior to taking office.

• (1150)

**Mr. Harold Albrecht:** So in some ways, it would be subsequent to the appointment, but now you're sitting down with him or her trying to discover what their *modus operandi* is in terms of how they would approach a question like a request or the advice of the Prime Minister to prorogue Parliament.

**Dr. Bradley Miller:** Yes.

**Mr. Harold Albrecht:** That's helpful, because I would have some difficulty with the former interpretation where it's possible that one or two members could actually veto the appointee or the appointment being ratified. So that's good.

Thank you. That's all.

I will share my time.

**The Chair:** There are a couple of minutes left on your time, Mr. Albrecht.

Is there anyone else on your side? No?

Monsieur Guimond, there is nothing from you today...?

Mr. Christopherson, would you like another throw?

**Mr. David Christopherson:** I'm good, Chair. Thanks.

**The Chair:** Excellent.

Rodger?

**Mr. Rodger Cuzner (Cape Breton—Canso, Lib.):** No. Go ahead.

**The Chair:** Good. We've given everybody a chance today and we've done all we can do. That's fantastic.

As you can see by our questions, Professor Miller, we're well into this. We've had many views from others.

If I can just sum up a little, though, Madam Jennings asked you.... We're going to supply you with the quote she used, on the Speaker's advice, and we'll ask for you to answer that and give it back to this committee, if you can.

If I could just throw in another piece on it, too, we've had more than one witness suggest that the Speaker is able to give advice to the Governor General, or at least.... The interpretation, as you've said in your opening remarks, is whether it's advice or information. If that were the case, then, would the Senate Speaker also have the same purview...? Does he have the same ability? What would happen if the advice were contrary?

**Dr. Bradley Miller:** That puts us on some fairly tricky ground.

**The Chair:** Right.

**Dr. Bradley Miller:** I do not know whether the Senate Speaker has the same access to the Governor General. I can't see a reason in principle why not; I've heard of no convention to the contrary.

If the advice, and here I don't want to misspeak.... It's not so terribly important if the information is contrary from the Speaker of the House or the Speaker of the Senate. Because it's not advice in the constitutional sense, as it is from the Prime Minister: this is just some background information saying that these are things you need to be aware of when you are making your decision.

I would be very surprised if it were not already the case that the Governor General has multiple advisers who do not always agree.

**The Chair:** Multiple information suppliers....

**Dr. Bradley Miller:** Yes. I'm now causing—

**The Chair:** We're going to have to differentiate these—

**Dr. Bradley Miller:** Someone's now going to have to come after me to clarify my remarks.

**Voices:** Oh, oh!

**The Chair:** Right. This is never-ending....

Mr. Reid, did I spark something?

**Mr. Scott Reid:** Yes, you prompted something.

We've had what has been an interesting discussion with the past few witnesses. I'm not sure that it's been entirely fruitful on the discussion regarding the Speaker of the House and, sort of parenthetically, the Speaker of the Senate.

My impression from the remarks or the formula that the Speaker of the House reads at every throne speech.... As one of the members of the House of Commons jostling around the bar of the Senate, I get to hear it each time, and it seems to me what that's really about is a reaffirmation of the settlement of 1688—or if you wish, of 1660 and the restoration—and the establishment of the fact that the House of Commons is part of a Parliament. It has certain privileges that the crown can't take away, and the crown can't arrange to have access of the House of the Commons. The ministers around the crown can't freeze out the access of the House of Commons as a whole to the Governor General.

By the same token, it's also the reaffirmation of our freedom of speech. We can speak in the House without facing any consequences. We have parliamentary privilege in that regard. I think that's what's going on.

The Speaker of the Senate, if I'm not mistaken, is appointed by the Prime Minister. It's actually in our Constitution. It's actually written down that it's not an independent post. I suspect, therefore, that it would have lesser rights in this regard. It's really, in a sense, a government post. That's just an observation. He's not elected by the Senate.

• (1155)

**The Chair:** Do you have anything on that, Professor?

**Dr. Bradley Miller:** You're way ahead of me there. That's all very interesting. It would make sense. Again, as I said before, I have not looked deeply into the conventions surrounding the Speaker of the House of Commons. That applies doubly so for the Speaker of the Senate.

**The Chair:** All right.

Well, it's great that we gave you homework to do.

**Dr. Bradley Miller:** Yes.

**The Chair:** Do you have any words just to finish off?

**Dr. Bradley Miller:** No. I'll just say that I've greatly enjoyed reading the testimony of the other witnesses. I actually found that the quality of the questions throughout have shown a very well-briefed and well-functioning committee. I'm very grateful to have had the opportunity to be here.

**The Chair:** Thank you very much.

We do thank you for coming and sharing that with us today.

I'm going to suspend just for a minute so we can excuse the witness. We have a bit of committee business, so I think we'll go in camera. We have a report to discuss. With the will of the committee, we'll suspend for two minutes.

*[Proceedings continue in camera]*

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