

Article

The Right to Refuse First Ministers' Advice as a Democratic Reform¹

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Abstract

There has long been concern over the power of the Canadian Prime Minister, particularly their ability to abuse the prerogative power to advise the dissolution, prorogation, or summoning of parliament. To address this problem, this paper argues for a strong interpretation of the Crown's right to refuse advice of First Ministers. This will be presented via Eugene Forsey's theory of parliamentary government, which conceives of the Governor General as the guardian of parliament and responsible government. Such a conception allows us to see how an empowered Governor General could serve as an effective check against the potential partisan misuse of the executive's prerogative powers.

Résumé

On s'inquiète depuis longtemps du pouvoir du premier ministre canadien, et en particulier l'utilisation abusive de pouvoir dissoudre, proroger ou convoquer le Parlement. Pour résoudre cette problématique, ce document plaide en faveur d'une interprétation forte du droit de la Couronne de refuser l'avis des premiers ministres. Cela sera présenté via la théorie d'Eugene Forsey sur le gouvernement parlementaire, qui présente le gouverneur général comme le gardien du Parlement et du gouvernement responsable. Une telle conception nous permet de voir comment un gouverneur général habilité pourrait servir de contrôle efficace contre la potentielle utilisation abusive partisane des pouvoirs de l'exécutif.

Keywords: Eugene Forsey, Governor General, Parliament, Prime Minister

Mots-clés: Eugene Forsey, gouverneur général, Parlement, premier ministre

Introduction

Though not a completely new phenomenon, recent years have seen growing concern over the centralization of power in the Canadian Prime Minister's Office.² Politicians, journalists, and academics alike have decried the "elected" or "friendly" dictatorship the office of First Minister has become. The publication of Savoie's *Governing From the Centre* in 1999 brought the issue to our attention, from which it has never withdrawn. A common and cross-partisan complaint about the state of Canadian politics today is that the Prime Minister has too much power and is not sufficiently held accountable to parliament or to the Canadian public for his or her actions. Jeffrey Simpson's *The Friendly Dictatorship* (2001) made similar arguments in a more accessible format, and Michael Harris's *Party of One* (2014), despite its polemical style and sanitized history of the pre-Harper years, raises further concerns over the lack of accountability of the PM and their inner circle. Former Green Party leader Elizabeth May has

described our system as an “elected dictatorship...a mockery of the foundational principle in our system of government of the supremacy of parliament” (Campbell 2013). She later clarified in a 2015 federal leaders debate that her remark was not directed at a single political party or Prime Minister, but at our institutions themselves.³ Within the Conservative Party, Brent Rathgeber and Michael Chong emerged as two critics of increasing centralization. Rathgeber left the party in protest and described his frustration in *Irresponsible Government: The Decline of Responsible Government in Canada* (Rathgeber 2014); Chong attempted reform from within, first with his private member’s bill – the Reform Act – and eventually by running for party leadership. Ian Brodie, Stephen Harper’s Chief of Staff from 2005 until 2008, has recently pushed back against these concerns, highlighting some oft-ignored limitations on prime ministerial power (Brodie 2018).

Thus, it is clear that prime ministerial abuse of powers and institutions has become an object of policy and analytical discussion. Many of the policy issues currently debated under the “democratic reform” moniker can be traced back to this fundamental issue. This paper will address a subset of such proposals, namely those designed to limit the prerogative powers of the Prime Minister. Philippe Lagassé defines prerogative powers as “discretionary authorities of the crown that are exercised on the advice of the political executive,” such that their exercise does not require parliamentary approval (Lagassé 2017: 167). Anne Twomey likewise describes them as “executive powers which may be exercised by the Sovereign or his or her representatives without the need for legislative authorization” (Twomey 2018: 4-5). Prerogative powers include the power to prorogue, dissolve, and summon parliament. They have been the subject of democratic reform efforts in Westminster states other than Canada, and are motivated by the desire to “rebalance the relationship between the executive and the legislature” (Lagassé 2017: 168). This paper will review several proposed reforms to prerogative powers in Canada before defending an alternative solution, namely upholding the Crown’s right to refuse the advice of First Ministers. A robust understanding of the Crown’s reserve powers, such as that articulated by Eugene Forsey and put into practice most recently by British Columbia’s Lieutenant Governor Judith Guichon in 2017, will be shown to address the concerns about Prime Ministerial power. The final section will clarify the apparent tension between the power of *unelected* Governors General and the underlying goal of *democratic* reform.

Some Recent Proposals

The following is not meant as an exhaustive account or evaluation of these proposals. It indicates what I take to be their central difficulties, with the qualification that much more would need to be said to give these suggestions any finality. The guiding hypothesis of this section is that these reforms will not accomplish what their advocates claim, in large part because they are inconsistent with other aspects of Canada’s Westminster parliamentary system. Canada’s parliamentary framework is a whole system, and changing a few parts has the potential to cause friction or unintended consequences. Regarding proposals to relax party discipline, Robert Jackson and Paul Conlin write the following:

Simplistic prescriptions such as the relaxation of party discipline, while seductive, fail to take into account the complexity of the parliamentary system. It is fallacious to assume that certain selected features of the congressional system can be appended to the parliamentary system without seriously affecting the functioning of the entire system (Jackson and Conlin 2002: 231).

More recently, David E. Smith has argued that most treatments of institutional reform in Canada treat individual bodies in isolation from each other rather than treating them as bound up in a constitutional whole. He thinks this is a mistake, and that “in the matter of specific institutional reform it is necessary to evaluate the interrelationship of all parts of parliament” (Smith 2017: xii). In another passage he writes that Stephen Harper’s efforts to reform the senate failed because they lacked a “coherent theory of the constitution” (Ibid.: x). This paper will not attempt to provide such a coherent theory, but it will examine reform proposals in light of the architecture of the Canadian constitution.⁴

Fixed Election Dates

Two recent policy proposals designed to constrain executive prerogative are fixed election dates and codified constitutional conventions. Fixing election dates removes a key partisan tool from sitting Prime Ministers, namely the ability to call snap elections when prospects for electoral success are at their best.⁵ However, fixing election dates in a parliamentary system is easier said than done. When a government either loses confidence or is defeated before the set date, there is usually no choice but to dissolve parliament and go to the polls. Moreover, the 2008 federal election, occurring as it did well in advance of the legislated fixed date, proved that even a loss of confidence is not required, so long as the Governor General approves the request for dissolution.⁶ This loophole, which was required in order to avoid amending the constitution, rendered the law effectively useless. It is for this reason that Twomey goes so far as to suggest that “in practice, there are no fixed parliamentary terms at the national level in Canada” (Twomey 2018: 478).

It should be noted that Twomey’s claim is not without its critics. Some observers have noted the prevalence, and apparent efficacy, of fixed election date laws at the provincial level (Heard 2009). Moreover, Justin Trudeau respected the fixed election date in October 2019, which made it the second federal electoral cycle in which the fixed election date was respected. The difficulties inherent in legally enforcing such laws notwithstanding, it has been suggested that setting, and respecting, fixed terms establishes a precedent and thereby increases the political cost of calling snap elections (Ferris & Olmstead 2017). That is, fixed election dates are operating somewhere between “the rigidity of a constitutional amendment” (Ibid.: 134) and the pure discretion of First Ministers. It therefore must be asked what the possible emergence of a norm concerning fixed-term parliaments means for Twomey’s claim – with which I am in agreement – that legislated fixed election dates are ineffective.

The important detail here is that the efficacy of such fixed dates issues not from the force of law itself – which we have seen can be flouted – but from the perceived illegitimacy of early elections. If the rule against opportunistic elections is functioning as a *precedent* or *norm* then we are in the realm traditionally assigned to constitutional conventions. These are upheld politically – that is, by increasing the political cost of violation – rather than legally. About this, two points can be made.

First, this is not how fixed election dates are typically construed by their proponents, who argue that the force of legislation will prevent First Ministers from doing what would otherwise be politically expedient (See for example Aucoin et al. 2011: 218-221). But if fixed dates are operating as conventions, then waiting out the term *becomes* the politically expedient thing to do, insofar as it is done to avoid electoral punishment. More work should be done to sort out the precise nature of the causal logic in effect, but it will suffice for now to point out that it may not be the force of legislation itself that is encouraging First Ministers to wait out their terms, but the changing calculus resulting from new conventions. This fact should make us reconsider how we understand the claims made on behalf of legislating fixed election dates.

Second, it is worth asking how new of a development this convention is. Parties have been punished for calling early elections long before legislated fixed dates. Adam Dodek notes that there already seems to be a convention regarding the length of terms, and that voters have punished past governments for violating it (Dodek 2010: 225). This convention perhaps accounts for the gap between the *perceived* electoral timing incumbency advantage and *reality*. Roy and Alcantara (2012) show that the incumbency advantage is limited to situations in which the government is receiving positive media coverage. Schleiter and Tavits (2018) find that voters are likely to punish governments perceived to have opportunistically called an election; this electoral punishment, however, can be outweighed by strong economic performance. So although there can be an advantage to be gained from calling an election during a period of positive press coverage or strong economic performance, there does seem to be a real political cost associated with opportunism, even before the fixed election date law came into effect. This gives weight to Dodek's claim that there is a convention against elections outside a specific temporal window (Dodek 2010: 225). The effect of fixed date legislation, absent a constitutional amendment limiting the power of the Governor General, seems therefore to be fairly minimal. Any effect it has is arguably a function of its strengthening of the conventions surrounding election timing rather than the direct force of the law itself. Moreover, strengthening the law via constitutional change may very well introduce new problems of its own. Prohibiting the Governor General from dissolving parliament until a particular date raises the possibility of deadlocked or moribund legislatures in which no party or coalition is able to form government. It seems that there must be at least some situations in which the Governor General has the ability to dissolve parliament. These difficulties were noted in Bill C-16's legislative summary itself. The first of eight disadvantages raised by opponents of the bill was that "fixed terms are inconsistent with a parliamentary form of government, in which the executive must retain the confidence of the legislature" (Canada 2007: 10). The sixth disadvantage likewise calls into question the compatibility of fixed election dates with parliamentary government, reminding the reader that it is not *governments* that are elected, but *members of parliament*. Much of the desire for fixed election dates, the legislative summary suggests, comes from the widespread misunderstanding that Canadians elect governments, not parliaments (Canada 2007: 11).

Governments require the confidence of the House of Commons, and when confidence is either lost or unattainable in the first place, dissolution and new elections are a legitimate and sometimes necessary procedure in Westminster systems (Forsey 1974: 152-156; Twomey 2018: 460). A law that truly prevented Governors General from dissolving parliament until a four-year term ended might easily lead to political deadlock. Twomey

notes that a fixed election law with teeth, such as those in the UK and some Australian states, has the potential to increase, rather than decrease, the risk of political instability, contrary to expectations (Twomey 2018: 479-480).

Moreover, scholars point to yet another unintended consequence of fixed parliamentary terms, namely the prolongation of campaigns, beginning long before the writ period. Though not the only factor in this recent development, fixed election dates have been said to incentivize “pre-campaign electioneering” (Marland 2015: 24). Lagassé cautions against overly-simplistic understandings of the causal relationship but notes that fixed election dates have “amplified” the permanent campaign (Lagassé 2017: 167). The logic behind this is easy to see, especially when we consider that pre-writ advertising is not uniformly or even universally regulated in Canada. As recently as 2016, there were no federal restrictions on pre-writ advertising at the federal level or in five of the provinces (Marland 2015: 16).⁷ A fixed election date, no matter how far in the future, provides a shared time frame within which all parties can prepare platforms, initiate advertising strategies, and commence other campaign activities (Lagassé 2017: 176).

Lagassé also argues that fixed election dates lead to earlier election speculation in the media, which is “arguably the legislation’s strongest contribution to permanent campaigning” (*Ibid.*: 175). With an eye to the future of fixed election dates and the permanent campaign, he suggests that if a norm develops with respect to the four year fixed terms, the speculation effect might recede, though it would not “diminish the elongation of the campaign preparation period” that fixed terms have encouraged (Lagassé 2017: 178). Nothing that has been written so far implies that First Ministers have not abused their prerogative to request dissolution; indeed this is demonstrably a tactic for which multiple parties are to blame.⁸ Rather, the question is whether it is possible or desirable to fix election dates within a parliamentary system. The foregoing suggests that fixed election dates have an uneasy, at best, relationship with parliamentary responsible government such that they either are impossible to effectively implement or will lead to parliamentary paralysis and unreasonably long campaign periods. If we wish to prevent First Ministers from abusing their prerogative powers then it seems that we must look to other policy or institutional changes

Codified Conventions

Another response to the abuse of the prerogative powers has been an emerging literature on codifying constitutional conventions. Aucoin, Jarvis, and Turnbull (2011) provide a systematic defense of this proposal, though this idea has longstanding historical roots (Evatt 1936). Proponents of this idea suggest that the problem comes from the nature of unwritten conventions themselves. Lack of clarity regarding what exactly is permitted combined with partisan interest in manipulating the rules for partisan gain have allowed Prime Ministers to abuse their power, and neither the Governor General nor the House of Commons have proved able to provide an effective check (*Ibid.*: 57; See also Russell 2012). The thrust of many of their reforms is to enshrine in writing much of what is currently unwritten and therefore open to abuse, either through constitutional reform itself or a Cabinet manual in the style of New Zealand.⁹

This approach avoids the problems associated with fixed election dates while remaining attuned to the easily-abused powers of proroguing, dissolving, or summoning parliament.¹⁰ The authors are certainly correct in their claims that as things stand it is too easy for a Prime

Minister to abuse these powers. Counting on electoral constraints alone to generate compliance with conventions has proved insufficient.

Proponents of codification argue that it will reduce the uncertainty surrounding the meaning and application of conventions, while preventing their arbitrary application and partisan abuse. Here too, however, there is a risk of unintended consequences. The unwritten nature of conventions provides them with a helpful elasticity or flexibility which will be lost if they are written down (Twomey 2017: 41). Moreover, if the conventions are enshrined as statutory or constitutional law, they become a matter for the courts and hence become legally enforceable, or “justiciable” (Twomey 2017: 39-41; Bowden & MacDonald 2012). This would constitute a legal encroachment on the Crown’s prerogative and possibly even threaten responsible government itself (Bowden & MacDonald 2012: 372). An additional consequence of conventions’ justiciability is the potential for protracted legal battles or constitutional crises, where immediate discretionary action could otherwise put an end to potentially volatile or unstable situations. Since conventions are meant to solve political, not legal, crises, they are ill-suited to enshrinement and justiciability (Twomey 2017: 39-41). Twomey’s final conclusion concerning codified conventions is that the very uncertainty of conventions, which proponents of codification seek to do away with, is actually the source of their power. She suggests that reserve powers are most effective when they are *not* used, but *may* be; it follows that the possibility that they may be utilized at any given time acts as a constant check on the behavior of First Ministers (*Ibid.*: 42-43).

The principle upon which codified conventions rests is incompatible with Westminster government. Westminster government is built around the principles of flexibility, ambiguity, and sovereign discretion, albeit balanced by the requirement to maintain the confidence of an elected chamber (MacKinnon 1976: 166; Mallory 1984: 2; Smith 2013: xv; Smith 2017: 19, 136). Codification is meant to eliminate the need for discretion as much as possible. Eliminating the need for discretion while retaining the constitutional framework of responsible government leads to the following paradoxical effects. Conventions, now written and hence harder to change, cease to develop organically along with Canadian society and political culture. Changing conventions into written laws constitutes a judicial encroachment on the Crown-in-Parliament, insofar as the prerogative powers of dissolution, summoning, and proroguing of parliament, which have thus far been held in check by politically-enforceable conventions, are now answerable to the courts. Finally, the ability of the Governor General to act decisively in times of crisis will be hampered by the need to wait for the legal system to deliver a judgement before action can be taken. Without downplaying the possibility of abuse, with which Aucoin et al. are rightly concerned, these possible flaws must be considered. On balance, we can say that codifying constitutional conventions, while promising to limit the partisan use of prerogative, would actually bring about important changes in the constitutional structure of Canada in ways that fundamentally alter the practice of responsible government.

The above discussion has highlighted some of the ways in which calls for fixed election dates and codified conventions, while originating from legitimate concerns, fail to take into account the way in which Westminster systems work as organic wholes in which each part must be consistent with the rest. Fixed election dates are incompatible with the House of Commons’ role as a confidence chamber and are only institutionally appropriate in presidential systems (Forsey 1974: 27-28). An essential feature of Westminster government is that elections are required when the government loses confidence and no one else can

garner the confidence of parliament. As long as responsible government is retained, and with it the requirement that the government maintain the confidence of the House, elections can never be truly fixed. Another important feature of Westminster government is that it operates according to *politically*-enforced conventions. The effects of codifying them has been discussed above, but suffice it to say again that *legal* codification makes conventions a matter for the courts and removes their capacity for adaption and adjustment to changing Canadian society. It would thus appear that such proposals lack what Smith refers to as “a coherent theory of the constitution” (Smith 2017: x).

The Classic Theory of Parliamentary Government

My proposal shares with the previous two the goal of limiting First Ministers’ ability to abuse their prerogative powers for partisan purposes. The aspect of Prime Ministerial power it addresses is the ability to dissolve, prorogue, and summon the House of Commons at will, because this gets to the heart of what it means for a government to be responsible to parliament. However, it differs markedly from them in important ways. First, it preserves the discretionary principle of Westminster government, and as such keeps our conventions and election dates uncodified and open to the requirements of changing political situations. Second, it rejects the claim made by some authors discussed above that granting more authority to Governors General is inherently undemocratic. For example, as part of their argument for codified conventions Aucoin et al. assert that the democratic nature of the Canadian political system is incompatible with unelected Governors General having decision-making powers over important matters:

The claim that the Governor General has discretion – albeit limited by convention – hardly supports the understanding of responsible government as a structure with *democratic* constitutional constraints on the Prime Minister and Government (Aucoin et al. 2011: 59-60).

Arguments for fixed election dates similarly refer to the increased prospects for democracy that will result from taking election timing out of the hands of Prime Ministers or Governors General (Leuprecht and McHugh 2008; Canada 2007: 10). On the contrary, an important aspect of the following proposal is that the ability of unelected Governors General to refuse cabinet advice, when appropriate, actually *upholds* Canadian democracy.

Third, the above solutions all involve additions or reforms to our parliamentary structure. However, there is a tradition of scholarly reflection according to which our constitution *already* contains the tools required to constrain executive abuse. For simplicity’s sake, I will refer to it using Eugene Forsey’s term, the Classic Theory of Parliamentary Government, since the primary goal is a return to an earlier understanding of the constitution. The work of Forsey will be discussed in order to demonstrate how this theory understands the problem of Prime Ministerial abuse and what its solution to it is.¹¹

In brief, the Classic Theory of Parliamentary Government offers a robust interpretation of the reserve powers of the Crown, specifically the power to refuse Cabinet advice. This is particularly relevant in the wake of BC Lieutenant-Governor Judith Guichon’s denial of Christy Clark’s request for dissolution in June 2017. The weaker interpretation of these powers, what Forsey calls the rubber stamp theory of the constitution (Forsey 1974: 30, 34, 87), asserts that representatives of the Crown must accept any and all advice of First

Ministers. Since 1926 this has been the dominant view in Canada, so much so that the possibility of Guichon refusing Clark's advice was recently referred to as a constitutional crisis (Morcos 2017; Hunter 2018; for the opposing view see Heard 2017).

Eugene Forsey v. the Rubber Stamp Theory

A full elaboration of Forsey's constitutional theory is not possible in this paper, but the following principles were central to his scholarship and bear heavily on his theory of reserve powers:

1. The Crown as guardian of the constitution
2. The importance of parliament
3. The insufficiency of majoritarianism alone as a guide for governance¹²

These principles are in fact different elements of what Forsey calls "the classic theory of parliamentary government" (Forsey 1974: 98), namely that cabinet must be responsible to parliament. Any attempt to undermine or minimize parliament's role of giving or withholding confidence from governments is unconstitutional and amounts to an unacceptable increase of prime ministerial power. This can even be the case, Forsey argued, with appeals to the electorate, when it is appealed to in order to escape the judgement of parliament. This is where the reserve power of the Governor General is required, he claimed, specifically to refuse such requests for dissolution.¹³ This is not simply an imperial or elitist intrusion into democratic politics, he insisted, but the constitutional mechanism by which responsible and parliamentary government is upheld. It is in this sense that the Crown – and by extension the Governor General as representative of the Crown in Canada – is the guardian of the constitution. The centrality of parliament to the functioning of responsible government is, for Forsey, the determining factor in questions concerning the meaning and weight of constitutional conventions, and in particular the reserve power to refuse dissolution (Forsey 1968: 257).

Forsey's response to the "rubber stamp" theory is most clearly articulated in a short essay entitled "The Crown and the Constitution," first published in 1953. It begins by relating two arguments against the Crown's power to refuse Cabinet advice: "Many people will object that there is no reserve power; that the Crown is just a rubber stamp for the Cabinet, or that if it isn't it ought to be" (Forsey 1974: 34).

Against the first objection Forsey replies that there obviously is such a power because it has been exercised in the past. He could point to over 50 such cases of denied requests; the only post-Confederation Canadian case was the infamous King-Byng affair of 1926, though there were six pre-confederation refusals between 1858 and 1903 (*Ibid.*: 34-35; see Forsey 1968 for an extended analysis of the King-Byng affair). We can now add the 2017 British Columbia case. In other writings Forsey supported the historical precedents with the opinions of leading constitutional scholars. For example, his 35-page review of "constitutional authorities" in *The Royal Power of Dissolution of Parliament in the British Commonwealth* led him to the conclusion that "[t]he consensus of opinion among the authorities seems clearly to be that in the United Kingdom the Crown has some discretion to refuse dissolution" (Forsey 1968: 106). The question is not whether there is such a reserve power, but only how far it extends and in which circumstances it may legitimately be used.

The response to the second, normative, objection is more instructive for the present argument. If his first argument could be called the argument from precedence, his second can be called the argument from parliamentary or democratic integrity.¹⁴ It is important to stress that the effect of strong reserve powers is the integrity of our democratic institutions; more about this will be said later.

Forsey illustrates the usefulness of the Crown's right to refuse in a number of situations, in each of which advising dissolution can be used for partisan purposes and to avoid responsibility to parliament, such responsibility being the cornerstone of Westminster government. Two such situations are worth exploring here since, even though Forsey intended them as thought experiments, they bear noteworthy similarities to recent Canadian experience. He raises the possibility of a Prime Minister, upon winning a plurality of seats in a general election and being defeated by the other parties, requesting dissolution and a new election rather than allowing another party to form government. Suppose the second election produces a similar result, and another dissolution is requested, and so on. "Is the Governor-General," Forsey rhetorically asks, "bound to acquiesce in the game of constitutional ping-pong from electorate to parliament, from parliament to electorate again, back and forth interminably" (Forsey 1974: 40)? The effect of this would be to give a Prime Minister the unfair advantage of being able to appeal to either Parliament or the electorate, based on whichever group he thinks has the best chance of supporting him. Doing so fails to hold Cabinet responsible to parliament by giving it the option of another judge when preferred; it is a "'heads I win, tails you lose' theory of the constitution....[that] bears not the faintest resemblance to Parliamentary government" (*Ibid.*: 41).

This is a plausible explanation of Christy Clark's actions following the 2017 BC provincial election. After winning a slim plurality of seats and being defeated in the legislature by the Greens and NDP, she advised another dissolution. Her advice was refused, and there is no telling what would have happened if a second election resulted in another slim minority, but suffice to say that Forsey's example was sufficiently realistic, in particular the possibility of appealing to either the legislature or the voters whenever convenient.

In another hypothetical situation, Forsey supposes that a government facing criticism and a vote of non-confidence might request a dissolution before the parliamentary vote can be taken. In so doing, the ability of parliament to judge a government and possibly withhold confidence is denied. However, according to the rubber stamp theory, such a dissolution would have to be granted; this leads to Forsey's judgement that the rubber stamp theory enables a Cabinet to defy both Parliament and the electors (*Ibid.*: 43).

This situation is similar to Stephen Harper's requested prorogation in 2008.¹⁵ Fearing defeat by an upcoming non-confidence motion supported by the opposition parties, Harper asked for and received a prorogation in order to convince the public of the illegitimacy of coalition governments before allowing the motion to come to a vote. This strategy has the same "heads I win, tails you lose" quality as Forsey's example. If Harper was unable to prevent the House of Commons from removing confidence, he would simply end the session before it had a chance to formally do so, such that the extent of his responsibility to Parliament was limited.¹⁶

Forsey's conclusion from these thought experiments – though we have seen that they resemble real situations – is that the rubber stamp theory, by placing inordinate power in the Prime Minister to dictate how and even whether the House of Commons is able to hold them responsible, *reduces* rather than *increases* the level of our democracy. An "appeal to

the people,” he writes, “is not necessarily democratic. It may be merely demagogic, pseudo-democratic, or even anti-democratic” (Forsey 1974: 44). It naturally follows that “[t]he reserve power is, indeed, under our constitution, an absolutely essential safeguard of our democracy” (Forsey 1974: 48). Similar statements can be found throughout his constitutional writings (*Ibid.*: 30, 98).

We can further elucidate Forsey’s position. First Ministers sometimes offer advice that has the effect of limiting the ability of Parliament to hold the government to account. Alternatively, they can offer advice when they do not have the constitutional authority to do so, such as making Governor-in-Council appointments immediately after losing an election. Doing so, in Forsey’s words, has the effect of “setting the verdict of the electorate at defiance” (Forsey 1974: 38).

When advice of either type is given, the way to uphold parliamentary government is to deny such requests (Forsey 1974: 30, 40, 43; Forsey 1968: 257-259). Bearing in mind that the democratic element of Westminster systems consists in the government being held responsible to Parliament rather than in control of it, any advice that has the effect of limiting Parliament’s ability to hold the government to account can be said to minimize the democratic constraints on executive power (*Ibid.*: 258). The corollary is that insofar as the reserve power protects Parliament’s ability to hold the executive branch to account it is an important component of our democracy (Forsey 1974: 48).

The result of the weakened conception of the Governor General’s reserve power to refuse cabinet advice has been to fundamentally alter the balance of power between parliament and the Prime Minister. When, as Forsey says, the PM “always has a dissolution in its pocket” (Forsey 1968: 258; 1974: 44), he or she can hang the threat of an election over the heads of individual members. Without automatic recourse to a dissolution, the government’s inability to maintain parliamentary support might either mean dissolution – i.e. parliament ends – or their resignation – i.e. the life of the government ends but parliament continues. Presently, however, the inability to maintain confidence simply entails dissolution. That is to say that a loss of confidence is more of a threat to parliament than to the government. It is for this reason that Forsey writes that the rubber stamp theory allows the Prime Minister to “put himself above both” the electorate and parliament (Forsey 1974: 105). In other words, it gives the Prime Minister an alternative to securing support in parliament, which in turn reduces their incentive to work with the parliament that has been elected by voters. The difficulty that the House of Commons will have in holding such governments responsible is manifest.

The seeming paradox of this solution is that an unelected official is being counted on to preserve the power of parliament and empower our elected representatives. To close it may be helpful to frame this solution in a way that reconciles its apparent undemocratic quality with the goal of democratic reform.

Liberal Democratic Reform of Parliamentary Government

This proposal includes the counter-intuitive claim that appealing to the electorate is not necessarily democratic. The link between electoral democracy and good governance has been challenged in recent years (Brennan 2016; Achen and Bartels 2016; Mounk 2018). More specifically, Fareed Zakaria has clarified the relationship between elections and what is distinctly “liberal” in our conception of democracy. He suggests that liberal democracy

includes the two distinct conceptions of “constitutional liberalism” and electoral representation, and further argues that it is really the former that is essential to healthy politics, even when the latter is not present (Zakaria 2003). This accords with the common sense observation that majorities can support just or unjust, liberal or illiberal policies and politicians.¹⁷ His formulation has particular relevance to the topic of reserve powers on account of his favourable description of Westminster government as “liberal autocracy” (*Ibid.*: 20, 57). His point is similar to Forsey’s distinction between parliamentary responsible government and mere plebiscitary majoritarianism. Zakaria’s formulation and Forsey’s constitutional theory share the assumption that the mere counting of heads does not a functioning democracy make.

If this is true, then what we usually refer to simply as Democratic Reform should more properly be called *Liberal* Democratic Reform. Conceiving of the project in this way clarifies the goal; it is not simply increased voter input, per se, but the goods associated with constitutional liberalism including the rule of law and checks on executive overreach. Though turning down requests by First Ministers does not easily fit the minimalist conception of democratic reform, insofar as it places important decisions in the hands of an unelected Governor General, it does fit nicely within the broader conception of *liberal* democratic reform, insofar as it strengthens parliament’s ability to hold the executive to account. Removing the option of conveniently timed prorogations and dissolutions tilts the balance of power in the direction of the House of Commons. This would not only strengthen the constitutional liberal aspect of our politics but would also help to restore the proper balance between responsiveness to voters and Cabinet’s direct responsibility to parliament.

An important principle in Forsey’s political thought is that democracy cannot be reduced to simple majoritarianism or endless plebiscites (Forsey 1968: 257; 1974: 43-44, 98). In practice this means that the House of Commons, not the electorate itself, is the check on government. The democratic element of Canadian politics is to be found in the elected lower house deciding who forms government; it is not, nor was it ever meant to be, found in plebiscites or constant appeals to the people. Through his writings Forsey demonstrates how allowing First Ministers to appeal to the people at will in fact increases their power instead of empowering the voters.

Given the constitutional architecture of Canada’s Westminster system, the proper way to limit the improper use of the prerogative powers is to hang over the head of First Ministers the threat that any advice not in accord with the principles of responsible government is open to refusal. In other words, the Governor General, as guardian of the constitution, needs to be able to act in order to uphold the democratic element of our political system. Furthermore, in the context of the first section of this paper, the traditional conception of the reserve powers does not introduce foreign elements into parliamentary government and as such avoids such problems as those introduced by fixed election dates and codified conventions. Allowing the Crown to refuse advice that restricts parliament’s ability to perform its constitutional role is consistent with Westminster government, unlike other proposals that might be more at home in presidential systems.

Endnotes

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- ¹ This paper was one of the two recipients of the [Marjorie Griffin Cohen Award](#) for the best two papers presented to the BCPSA 2019 held May 3-4 at Langara College / snəwəyət lələm, Vancouver, BC, 2019.
- ² The author would like to thank Alex Marland, David E. Smith, and Andrew Heard for their helpful comments on early versions of this paper.
- ³ This occurred during the Macleans Magazine hosted debate on August 6th, 2015. The transcript is available in “Tale of the tape: Read a full transcript of Maclean’s Debate,” (2015, August 7). *Macleans*. Retrieved from <https://www.macleans.ca/politics/ottawa/tale-of-the-tape-read-a-full-transcript-of-macleans-debate/>.
- ⁴ The phrase “constitutional architecture” was used by the Supreme Court of Canada. *Reference re Senate Reform*, 2014 SCC 32.
- ⁵ There is limited consensus on the extent of the incumbent advantage, though there seems to be at least some benefit in being able to determine the timing of elections (Ferris & Olmstead 2017; Dickson, Farnsworth & Zhang 2013; Roy & Alcantara 2012; Leuprecht and McHugh 2008). Peter H. Russell argues in favour of fixed election dates’ ability to cut back on snap elections (Russell 2008: 134-142). Aucoin, Jarvis, and Turnbull offer a more sceptical account (Aucoin et al. 2011: 130-132, 218-221). See also the Legislative Summary for Bill C-16 for a summary of main arguments both for and against fixed election dates (Canada 2007).
- ⁶ See Lagassé (2017: 173-174) for a discussion of Stephen Harper and Rob Nicholson’s justification for advising dissolution without losing the confidence of the House of Commons. Also Aucoin et al. (2011: 62-65).
- ⁷ Federal and provincial governments have since begun to close this loophole. Since 2016, federal pre-writ “partisan advertising” has been restricted to roughly \$1.5 million (Government of Canada 2018), and PEI has limited pre-writ campaign activities (*Election Expenses Act*, RSPEI 2018).
- ⁸ Aucoin et al. point out that John Diefenbaker, Lester B. Pearson, Pierre Trudeau, Jean Chretien, and Stephen Harper all called snap elections for partisan advantage (2011: 207).
- ⁹ Bowden and MacDonald correctly note the difference between legal-constitutional codification and less binding cabinet manuals (2012: 366). The present argument is primarily concerned with legal-constitutional codification. A less binding manual or guide to the various conventions is not necessarily inconsistent with a strong conception of the reserve powers of the Crown, so I will not address it in this paper.
- ¹⁰ Aucoin et al. do raise the prospect of fixed election dates but recognize the difficulty in formulating such a law that would be impervious to abuse (Aucoin et al. 2011: 218-221, 225-226).
- ¹¹ Forsey is often recognized as an authority on constitutional matters (MacKinnon 1976: 39; Smith 2017: 130), though to date there have been remarkably few scholarly works devoted to systematically interpreting or applying his constitutional thought. The only two book-length treatments of Forsey are Helen Forsey’s *Eugene Forsey: Canada’s Maverick Sage* (2012) and Frank Milligan’s *Eugene A. Forsey: An Intellectual Biography* (2004). Of the two, Helen Forsey provides the more comprehensive analysis of Forsey’s constitutional thought. In fact, it could be argued that the single chapter Milligan devotes to Forsey’s constitutional theory misrepresents its subject matter. For example, Milligan writes that Forsey affirmed the principle that “the power and rights of the people [must be protected] against the partial, particular interest of the governments or majority parties” (Milligan 2004: 207). This principle is taken, in Milligan’s account, to justify the reserve power to refuse dissolution. However, this ignores, or at least downplays, the crucial element of Forsey’s position, which requires distinguishing between the *electorate* and *parliament*. It is precisely Forsey’s claim that appeal to “the people” is not always justified. Forsey’s position is that it is not enough the say appealing to parliament is important because it represents the

democratic principle in Canadian politics. If that were the sole important fact about parliament then there would be no reason to oppose rubber-stamp granting of appeals to the people themselves. But parliament itself has an indispensable role in our system, over and above the mere fact that it happens to be the democratic element. Appealing to the people – though more democratic in a limited sense – actually weakens the parliamentary check on prime ministerial power.

To fully account for this dynamic, we must distinguish between *parliament* and *the people* in a clearer fashion than Milligan does. Helen Forsey does just that, for example by specifying the importance of Parliament itself as being one of Forsey's fundamental constitutional principles (Forsey 2012: 309).

- ¹² Eugene Forsey's daughter, Helen Forsey, distills his constitutional thought down to five principles, on which my list is based (Forsey 2012: ch. 12). I have limited my list to those principles concerned with the reserve powers of the Crown, and hence have left off some of hers, like Federalism. This does not imply, however, any disagreement with Helen Forsey's list.
- ¹³ Most of Forsey's published work discusses instances in which the Governor General is permitted to refuse dissolution. However, an unpublished paper on the powers of the Governor General written in 1984 refers to prorogation alongside dissolution, without changing any other elements of the argument (quoted in Forsey 2012: 318). For that reason, it is perhaps fair to assume that Forsey believed that his arguments for refusing dissolution could apply to prorogation as well.
- ¹⁴ Both arguments are integral to Forsey's defense of reserve powers. He argues that precedent alone is an insufficient guide to constitutional conventions, for the simple reason that at one point in time everything was unprecedented. We must therefore, he suggested, refer also to the spirit and intention of the constitution (Forsey 1968: 6-8, 72; Forsey 2012: 334; Milligan 2004: 206-207).
- ¹⁵ Aucoin et al. provide a helpful and concise summary of these events (2011: 65-68).
- ¹⁶ See Helen Forsey (2008) for an application of Eugene Forsey's critique of the rubber stamp theory to the events of December 2008.
- ¹⁷ Yascha Mounk has more recently made the same conceptual distinction between "rights" and "democracy" (Mounk 2018).

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