Canadian Political Science Review Vol. 8, No. 1, 2014, 102-125

Constitutional Peace, Political Order, or Good Government? Organizing Scholarly Views on the 2008 Prorogation

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Abstract: This paper reports the views of 25 constitutional scholars on the 2008 prorogation. A large majority of scholars agree that the Governor General had discretion in 2008 to refuse the Prime Minister. Most hold that the 2008 prorogation harmed principles of responsible government, and a majority favour the development of a cabinet manual to outline roles and responsibilities to avoid future crises. Based on the survey data, I propose four unique schools of thought on this event, and consider how future research can test, assess, and further refine these findings.

Keywords: Prorogation; Canada; Constitutional scholars; Mixed methods

Résumé: Cet article rapporte les points de vue de 25 constitutionnalistes sur la prorogation de 2008. Une vaste majorité convient que la Gouverneure Générale disposait de l'autorité de la refuser au Premier Ministre. La plupart soutiennent que la prorogation de 2008 a mis à mal le principe de responsabilité gouvernementale, et la majorité favorise la mise sur pied d'un "manuel de cabinet" précisant les rôles et responsabilités, de manière à éviter de futures crises. Sur la base des données de l'enquête, l'auteur montre qu'existent 4 écoles de pensée distinctes sur l'événement, et considère comment les recherches futures peuvent tester, évaluer, et raffiner ces résultats.

Mots-clés: prorogation, Canada, constitutionnalistes, **approches variées**

Acknowledgements: I would like to acknowledge the assistance of the editors of CPSR, and thank those who participated in this project, and especially those who waived anonymity. The assistance, arguments, and interactions by Peter Russell, Phillip Lagasse, Andrew Heard, and Thomas Hall have been especially useful in this project.

Introduction

Nearly 5 years to the day of the 2008 prorogation of Parliament, Conservative MP Michael Chong introduced a private member's bill that would, if passed, shift power away from party leaders and towards members of Parliament and their party caucuses. Chong's bill cannot be seen as divorced from the view that Canada's system of parliamentary democracy looks neither particularly parliamentary nor very democratic (Aucoin, Jarvis & Turnbull, 2011). In 2008, a motivated prime minster was able to silence the majority of those in the House of Commons, who represented a majority of the Canadian electorate, by avoiding a scheduled confidence vote. While the Governor General ultimately granted his request for prorogation, her decision resulted in much hand wringing among scholars and exposed the general ignorance many Canadians have about their system of government (Wheeldon, 2011).

The wisdom of refusing the Prime Minister's advice in 2008 remains contested. Andrew Heard argues that constitutional scholars fall into three general categories (2012: 88-90). The first holds that the Governor General has very limited discretion, and can only constitutionally refuse cabinet advice when the government has formally and explicitly lost the confidence of the House (Brun, 2008). The second holds that the Governor General has constitutional authority to refuse a prime minister's advice but must be wary of the political and constitutional costs of a confrontation between the Crown and a duly elected government (Franks, 2009; Monahan, 2012). Third and finally, some hold that the Governor General has a broader discretionary role to assess the formation, popularity, and political viability of any alternative government (Hogg, 2010).

This paper presents results of original research that suggests a fourth group exists. Data drawn from a purposeful sample of 25 constitutional scholars suggest that a majority of those surveyed argue that the Governor General's discretion to refuse prime ministerial advice is limited to ensuring any such advice is given by a prime minster whose government holds (and is seen to hold) the confidence of the House. In this paper, I assess support for key propositions on this event, discuss areas of consensus and disagreement, and lay the groundwork to better define existing views by applying an analytic approach known as the *Analysis of Competing Hypotheses* (ACH).[1] Against the idea that divisions within the field undermine the value of survey-based research or that only a few views count in constitutional scholarship, in this paper I model a means to compare and contrast support for peer-reviewed propositions published between 2008 and 2012. The findings suggest far more consensus than is often assumed. A large majority agree that the Governor General had discretion in 2008 to refuse the Prime Minister. Most hold that the 2008 prorogation harmed principles of responsible government, and all but a few scholars surveyed favour the development of a cabinet manual to outline roles and responsibilities to avoid similar crises in the future.

Beyond demonstrating a mixed methods approach to assess support within

[1] This paper is part of a larger effort I have dubbed the *Prorogation project*. This paper focuses on the establishment of four schools of thought on the 2008 prorogation. Future work examines in more detail the views of constitutional scholars who waived anonymity through the research, and compares the views of journalists, commentators, and constitutional scholars. This project has led to another effort to survey subject matter experts on the role of governor general in the formation of government in Canada.

the sample, the paper contributes to existing literature by proposing that four main schools of thought exist. These schools may assist larger and longer-term empirical projects exploring the views of Canadians on prorogation, executive power, and parliamentary democracy.

Understanding the Constitutional Issues of Prorogation in 2008

In previous work, I have sought to review a wide variety of literature regarding the 2008 prorogation (Wheeldon, 2011). Since the publication of that paper, new contributions have better defined some positions and identified key debates (Aucoin et al. 2011; Smith & Jackson, 2012; Twomey, 2011). It may be useful to organize existing literature based on three criteria: the existence and nature of the Governor General's discretion to prorogue; the impact of prorogation on principles of responsible government; and options to guide efforts to address constitutional confusion in Canada.

Existence and Nature of the Governor General's Discretion to Prorogue

Even among those who disagree about the wisdom of the Governor General's decision to prorogue Parliament in 2008, few established scholars doubt that Michaëlle Jean had the discretion, in both principle and practice, to refuse the Prime Minister's request (Heard, 2012; Hogg, 2010; Monahan, 2012; Russell & Sossin, 2009). Those who challenge this consensus have done so in a variety of venues and offer several justifications for a limited view for the role of the Crown related to prorogation.[2] Ted McWhinney suggests that prorogation is no longer a reserve power of the Governor General based on constitutional precedents including historical developments in Canada, "received" English practice, and contemporary practice in the Commonwealth using the Westminster model of Parliamentary (McWhinney, 2009: 3-5).

A related view is that while the Governor General might possess constitutional authority in principle, he or she cannot normally act outside the advice of the political executive in practice. Citing McWhinney (2009), and historian Barbara Messamore (2011), MacDonald & Bowden, (2011: 15) attempt to link a request for prorogation in 1873 with the events in 2008 and conclude: "…it is unfathomable that a governor general could ever refuse a prime minister's request for prorogation." In a reply to MacDonald and Bowden, Peter Russell (2011) argued that there could be little doubt that discretion to refuse prime ministerial advice existed both in principle and practice. Indeed, even under the most limited historical view of Crown prerogative, the Governor General is reported to retain certain discretionary powers (Dawson, 1987: 189-194).

It may be useful to establish once and for all how many scholars argue that the Governor General had no discretion in 2008 to refuse the advice of a prime minister to prorogue Parliament while a vote of confidence was pending. Of specific interest is the justification that the Prime Minister retained the formal confidence of the House (Brun, 2008), and that the events in 2008 could not be considered an example of the 'exceptional circumstances' that would activate the Governor General's reserve powers (Cameron, 2009). Others have suggested that the prorogation, based on the 1873 example, is no longer a reserve power, either in principle (McWhinney, 2009) or in practice (MacDonald & Bowden, 2011). A

[2] These include Op/Eds in the popular press (Brun, 2008; Tremblay, 2008), personal blogs, and that well-known venue for constitutional debates in Canada: Twitter.

related concern follows from the question of constitutional legitimacy. If the Crown retains the constitutional power to refuse prime ministerial advice in exceptional circumstances, when in practice might this occur?

Impact of Prorogation on Principles of Responsible Government

Perhaps the largest area of inquiry concerns the impact of prorogation on underlying principles of responsible government. In previous work, I have accepted the definition of responsible government, in general terms, as a system that ensures the government is responsible to the electorate (Wheeldon, 2011). Specifically, in Canada, this means the Executive must be accountable to the House of Commons, and thus those who claim executive power need the support of the House to exercise that power (Smith, 2009). At issue is how one views the question of confidence. Reflecting on this unprecedented event, some scholars argue that the decision upheld principles of responsible government because the Government never lost the confidence of the House through a formal vote (Brun, 2008), or because it was tied to an agreement by the Prime Minister to recall Parliament to face the House within seven weeks (Cameron, 2009).

Others suggest that given the circumstances and the dangers represented by the global economic downturn, the Governor General had to consider whether the proposed alternative government - a coalition between the Liberals and New Democratic Party, supported by the Bloc Québecois - was politically stable (Cameron, 2009). A related view, perhaps, is that the Governor General need not focus on the formal question of whether a scheduled confidence vote took place or not. Instead, the reserve powers extend to substituting personal political judgement about the political viability and acceptability of any alternative government (Hogg, 2010: 200-202). A final view is that in cases like this, to paraphrase a well-worn truism from criminal justice, accountability delayed is accountability denied. Thus, acceding to prime ministerial advice when it has the effect of avoiding a confidence vote sets up a dangerous precedent that undermines accountability (Heard, 2009; Miller, 2009).

By allowing prorogation to become a tactical tool to avoid political difficulties in the House of Commons or Provincial Houses of Assembly, the underlying fabric of basic democratic principles may become frayed. Recent events from Ontario to British Columbia have lent credibility to this concern. There is an increasingly common and cynical view that Parliament has become largely a ceremonial sideshow, not the essential democratic body that serves as a necessary constraint on executive power (Wherry, 2011). From this perspective, while the disrespect of Canadian parliamentary traditions is by no means new (Smith, 2009; Weinrib, 2009), the blatant use of prorogation in 2008 is alleged to be an abuse of power that advanced no other purpose than to serve the political interests of the governing party (Aucoin et al. 2011). Accordingly, to be consistent with broader principles of responsible government, the House should have been able to proceed with its confidence vote (Heard, 2012).

Addressing Constitutional Confusion: Options to Guide Future Action

Assessing the options to ensure the events of December 2008 are not repeated assumes that what occurred was problematic. Despite the persistent and perceptive critiques of the 2008 prorogation on political, social, and constitutional grounds (Aucoin et al. 2011; Heard, 2009; Miller, 2009; Smith, 2009; Weinrib, 2009),

there remains an additional view that "ultimately, the system worked" (Cameron 2009: 189). Even among those who have argued, despite reservations, that prorogation was acceptable there is a general recognition that the means by which it was realized was problematic (Russell & Sossin, 2009). There are at least two questions here. The first concerns the best way to provide clear, consistent, and credible guidelines for the future. The second involves how best to organize this effort.

On the first question, one approach could look towards other commonwealth countries such as Australia and amend the constitution to clearly codify the role of the Crown in Canada. As a formal addition to the written constitution, this would subject the Governor General's decisions to judicial review and outline in legal terms what historically has been unwritten convention (Russell, 2009). As I have observed elsewhere, whatever the merits of such action, rooting conventions in law would be fraught with practical and constitutional difficulties (Wheeldon, 2011). A second approach would be to transfer some of the existing powers of the Executive and the Crown to the House of Commons. By formally rooting these powers in Canada's democratically elected national legislature, this approach would result in the explicit constraint of executive power. Most importantly, it would preserve the basic logic of responsible government in clear and transparent ways (Aucoin et al. 2011).

A third approach would focus on the experience of New Zealand, which pursued a less formal strategy than its commonwealth neighbour, Australia. In the late 1970s, New Zealanders developed a cabinet manual as a guide to government and public servants on cabinet procedures and constitutional roles and responsibilities (Russell, 2009). Today, this manual provides the history, justification, and relevant precedents to guide governments in new political situations. Through an explicit presentation of the requirements of constitutional conventions and the roles and responsibilities of key actors, the manual has been updated from time to time to reflect established changes.[3] While the creation of such a cabinet manual could not address every challenge associated with prorogation, it could combine efforts to educate and engage the public and offer clear guidance should future constitutional crises return to Canada.

A final approach, based on my own work, involves exploring more in depth processes to engage everyday Canadians in a series of debates and deliberations about How We Govern Ourselves. If the problem is a lack of consensus about the conventions and mechanisms of parliamentary responsible government, this view assumes whatever the solution, citizens must understand not only what "should" occur but why. To be sustainable, this must involve and engage citizens (Wheeldon, 2011). This is not an approach that is commonly used in Canada, nor one in line with practices undertaken by the current government.

While the first set of questions concerns the best way to provide clear, consistent, and credible guidelines for the future, any effort to address the diversity of views regarding the reserve powers and principles of responsible government requires a consideration of how future reforms should be organized. There are at least four options. Some might argue that any process to define the powers of the Executive would have to be driven by the Executive itself. Others might emphasize the need for a consultative approach, driven by the Privy Council Office and parliamentarians in a process similar to that used in the United Kingdom to develop its

[3] The New Zealand Cabinet Manual is available here: http://cabinetmanual.cabinetoffice.govt.nz/

new cabinet manual. Those who argue for parliament to reclaim powers now the domain of the Executive and Crown, might favour an approach driven by parliament acting alone. A final option is designed to involve and engage Canadians in the process from the outset. This view assumes reform cannot be sustained unless citizens are directly involved in the conversation, and not passive recipients of whoever is claiming constitutional expertise.

Design, Data Collection, and Analysis

There are few constitutional studies that employ survey designs to collect and analyse data from subject matter experts. Instead, edited collections or special editions of journals are often favored to showcase similarities and differences between and among selected scholars. Detailed and sometimes dense explorations highlight these views based on opaque inductive analysis of the substance and interplay of different sources, arguments, and evidence. One challenge is that different scholars use different terms in different ways, focus on distinctive sorts of arguments, and rarely acknowledge the role that underlying historical, normative, and political assumptions play in their individual analysis.

Another issue is how to understand the selection of contributors. Some editors focus on university affiliation and previous publication, while others may include private scholars who are selected for their practical expertise or personal knowledge. Rarely are these selections explicated, and instead the expert judgement of the editors serves as adequate justification. Finally, for anyone attempting an empirical study of subject matter expertise, there are questions about how best to analyze, tabulate, and present gathered data. Purely qualitative designs are likely to be criticized for bias, while quantitative designs require a larger sample than is normally possible when surveying experts in some sub-disciplines. For these reasons, survey research of constitutional scholars is rarely undertaken. This is an oversight. The knowledge and experience of subject matter experts can assist not only to answer contentious questions, but can help define where agreement exists and debates remain.

In this study, the design sought to provide an overview of published opinion that extended beyond simply reviewing existing literature and comparing the varied assumptions, arguments, and evidence found within published materials. The value of this design is that it allows specific propositions to be tested using the same language and based on consistent categories. Participants were drawn from a defined judgement sample of scholars knowledgeable on the subject and willing to share their views. This approach, common in purposeful qualitative research (Marshall, 1996), was used to derive a sample of Canadian constitutional scholars was identified based on the following criteria:

1. Those on the tenure track, tenured and/or Emeritus professors;

2. Those who published articles, books, or edited chapters on the 2008 prorogation and issues emerging from the decision of the Governor General (2008-2012);

3. Scholars suggested by senior constitutional scholars, including those whose views are sometimes overlooked.

Between August 10 and October 31, 2012, 34 Canadian constitutional scholars were contacted by email and invited to

complete an online survey.[4] Of the 34 scholars contacted, 28 started the survey and 25 completed it, which represents a response rate of just over 71%. Participants were assured confidentiality and anonymity. Data collection was completed using online survey software *Qualtrics*.

Nine questions followed the preamble, with each question followed by optional answers from which participants selected their response. Each option was based on a proposition published in credible sources following the events of 2008, although the specific citations for each of the propositions were not provided to participants. In every question, there was an opportunity for participants to add their own responses, or refuse to answer. The final question requested that participants include any other relevant comments, suggestions, and/or considerations regarding their view of the 2008 prorogation or the survey itself.[5]

Analysis and Approach

The analysis was conducted using a mixed methods framework [QUANT→ qual]. First, the two most common answers (mode) were compiled. Second, additional narrative data were used to further explicate or complicate the general categories that emerged. Mixed methods are of increasing interest because they can provide more nuanced descriptions based on integrated numeric findings, while explicitly valuing the depth of the "…experiences, perspectives and histories" of research participants (Ritchie & Lewis, 2003: 3). This sort of methodological pragmatism assumes all conclusions are tentative, limited and based on the best information at hand (Wheeldon, 2010). As such, researchers are encouraged to explore explanations that emerge through the research process itself, and to remain sceptical about the role their own beliefs may play in their findings (Wheeldon & Ahlberg, 2012: 117). In this paper, by cataloguing quantitative support for survey questions and capturing the qualitative nuance associated with each group of questions, a richer and more detailed and analysis was attempted.

Quantitative Analysis of Competing Hypotheses

The research utilized the analytic tool *Analysis of Competing Hypotheses* (ACH), which is an example of 'Structured Analytic Techniques' used to assist the training of intelligence analysts. These techniques are designed to identify mindsets, challenge ingrained biases, and improve overall judgement on contentious questions (Heuer, 1999). These strategies were developed in part through careful analysis of past decision making processes drawn from domestic and foreign policy scenarios (Neustadt & May, 1986). ACH is especially useful when there is a large amount of data to absorb and evaluate, and when analysts

[4] The study "Assessing Views on the 2008 Prorogation," IRB Number 12688, was certified exempt on August 9, 2012 by the WSU Office of Research Assurances based on policy provisions under 45 CFR 46.101(b)(2). The survey preamble read "Welcome! This is a short anonymous survey designed to understand the views of Canadian constitutional scholars on the 2008 prorogation. You have no obligation to participate and reasonable and appropriate safeguards have been used in the creation of the web-based survey to maximize the confidentiality and security of your responses. You should be aware, however, when using information technology, it is never possible to guarantee complete privacy. There is space within the survey for more detailed views. Any and all insights are most welcome."

[5] Three scholars who have published distinct positions on the 2008 prorogation reviewed the questions, and offered revisions that were integrated into the final survey. Appendix A - C outlines examples of the questions and options provided to participants, alongside the citations upon which the options were based.

themselves have a view on the topic or issue. The approach focuses on presenting what theories have been advanced, the evidence for these views, and disentangling the assumptions upon which they are based (Heurer & Pherson, 2010).

In this study, the replies for each question were quantified and compared. This included the close-ended survey options (based on existing literature) as well as other common themes that emerged from the open-ended options provided in each question. The two most popular positions taken by participants based on all the survey data were presented for each question. Additional questions exploring the underlying logic of each position were likewise quantified and compared in the same manner. Consistent with ACH, the focus involved testing support for specific hypotheses surrounding the 2008 prorogation. In this way, instead of focusing on the majority view, the two most popular positions emerged through the analysis and were used to ascertain which explanations were most popular and which remain contentious and/or require more attention.

Qualitative Review of Participant Proffers of Additional Information

In addition to quantifying the top two responses, the study's design allowed for participants to provide additional information in each question. This data usefully clarified participant responses, offered a counter point to the survey's assumptions, and provided a unique window into the views of participants. Based on a revision of Kvale's (1996) seven stages of doing qualitative research, common and unique themes were identified for each question. They were then grouped for each of the three issue areas, previously identified through the literature review.

Wherever possible, the participants' own words were used to prioritize the presentation of issues on their own terms. While edited for verb/noun agreement and typographical errors, the essential meaning of each quote was left intact. In addition to the use of this "running commentary" to better understand the assumptions upon which different positions had been taken, special attention was paid to comments provided following a request for "additional comments, suggestions, and/or considerations on…the 2008 prorogation." These comments are integrated thematically throughout the analysis, and revisited in the discussion section.

Mapping Four Schools of Thought

A final analytical approach involved mapping the positions of scholars who waived anonymity through the research. While the use and interest of diagramming to collect and present data is by no means new (Umoquit et al. 2013), few Canadian political scientists have employed this technique to present categories of thought on controversial questions/issues. Visualizing the principles and positions may prove valuable as part of efforts designed to engage and educate non subject matter experts.

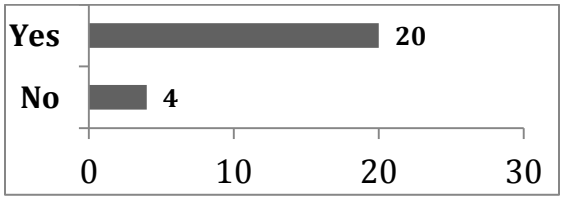
Findings: Quantitative Counts and Qualitative Nuance

Based on the themes presented above, the findings are organized below to focus on: 1) the existence and nature of the Governor General's discretion; 2) the impact of 2008 Prorogation on responsible government; and 3) proposals to guide future action. Numeric data is presented using a simple table, and relevant narrative data is embedded within these findings.

The Existence and Nature of the Governor General's Discretion

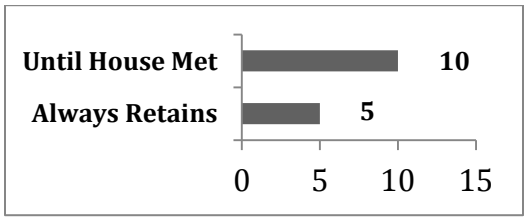
Despite a few loud voices that have argued that the Governor General had no discretion in 2008, table 2 suggests that scholars who participated in this project reject that view.

Table 2 – Existence of Governor General Discretion in 2008 (n=24)



When asked about the logic behind their view, those who responded that the Governor General had discretion to refuse the Prime Minister by a 2-1 margin selected the option that discretion in 2008 was limited to allowing the House to meet to determine if the Harper government retained the

Table 3 – Nature of Discretion (n=15)



confidence of the House, as presented in table 3.[6]

The comments provided by participants served to provide an additional explanation for the view present in the Tables above. The most common view was:

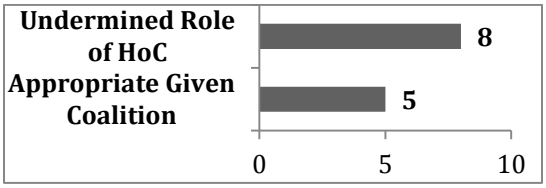
> …the Governor General could refuse the Prime Minister's advice until the House met to express its confidence (or lack thereof) in the government as a confidence vote had been scheduled. The Governor General could legitimately entertain doubts as to whether the Prime Minister still enjoyed the confidence of the House.

A number of other comments in this section referred negatively to the Prime Minister's actions in 2008. One justified the Governor General's authority based on the fact that this "was a new constitutional issue in which the Prime Minister was acting in an unorthodox, if not improper, manner."

Impact of 2008 Prorogation on Responsible Government

When asked which statement best reflected the views of participants on the Governor General's decision to follow the advice of the Prime Minister in 2008, a slight majority replied that the Governor General's decision was problematic given that prorogation temporarily undermined the role of the House to determine who governs Canada, as outlined in table 4.

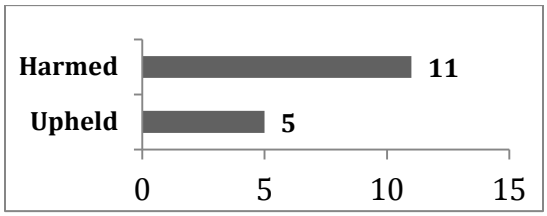
Table 4 – Assessing the Governor General's Decision of 2008 (n=13)



In terms of the impact of the 2008 prorogation on principles of responsible government, a majority of scholars stated prorogation had harmed principles of responsible government. Based on the ACH analysis the top two responses are presented in table 5.

[6] Among the four scholars who argued the Governor General had no discretion in 2008, the majority argued that this was because the Prime Minister had not formally lost the confidence of the House. While two individuals suggested prorogation is no longer a reserve power, not a single respondent referred to the 1873 Prorogation as any sort of precedent for 2008, contrary to the thesis of MacDonald & Bowden (2011).

Table 5 – Impact of 2008 Prorogation on Responsible Government (n=16)



Of those who shared their view of the impact of the 2008 prorogation, a clear majority argued that allowing prorogation to avoid a confidence vote is not consistent with, and cannot be squared with, the principle that the government must maintain the confidence of the House. Many considered that the violation of this principle was exacerbated by the actions of Prime Minister Stephen Harper and the Conservative government. These arguments included concern about the "…highly misleading arguments the Conservatives put forward about responsible government that so many people, including many in the media, swallowed."

Others pointed to the "totally inaccurate interpretation of how our system works" and that "the Prime Minister was, in my view, undermining the principles of responsible government... [by] using a procedural ruse to avoid facing a vote of confidence." As one participant suggested:

> The Prime Minister is either responsible to the House or not. The brinkmanship that brought on the crisis is the Prime Minister's responsibility as well. The Governor General in effect gave the Prime Minister another chance. This is not a desirable precedent.

This concern introduced the problematic way in which the Governor General was advised. One participant summarized 2008 in this way:

> ... Harper fuelled the fears of his political base by raising and then exploiting this myth of the Bloc Québécois holding power behind the scenes. Harper deliberately called upon Canadians, especially those in his Western base, to take to the streets and protest the role of the Governor General in the process of prorogation. A group of protestors showed up at Rideau Hall!! Harper threatened the very integrity of the Parliamentary system and the role of the Crown's representative in Canada…the Harper government put a full court press into action in order to dissuade the Governor General from exercising her reserve powers...

Proposals to Guide Future Reform

When asked which of the variety of proposals participants favoured to address the continuing constitutional confusion in Canada, a large majority favoured the cabinet manual proposal by Peter Russell as presented in table 6.

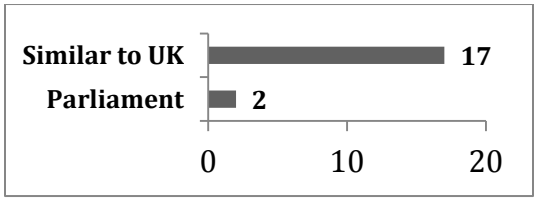
Table 6: Best Reform Options (n=18)

When asked the best way to pursue this reform, a large majority favoured the approach undertaken in the United Kingdom, which was driven by the Privy Council Office and parliamentarians. One participant cautioned that:

> It would be a mistake to try and codify conventions that, in any event, by their nature cannot be codified. No code could anticipate all eventualities. Any

> code would simply become encrusted with its own evolving set of precedents. And, of even more concern, if there were a code the matter would simply be thrown to an unelected court to decide.

Table 7 – Best Way to Pursue Reform (n=19)



A small minority argued that Parliament alone should engage in this reform as outlined in Table 7. In general, there was support for the idea that "Political actors need some more help in understanding what the general rules, practices and principles are, so that they can gauge their political reaction appropriately." This might include:

> [A process] driven by the Privy Council and Parliament with (a)…joint committee of the Senate and the House of Commons that solicits input from the public, individuals and organizations, and then reports back to Parliament with a set of recommendations on how to proceed to codify responsible government in law or update the cabinet manual.

Another participant suggested that: "a broad range of scholars with established records of expertise in the area should be involved in initial drafts of proposed cabinet manual… including PCO, Parliament, citizens and add academic efforts as well." Finally, one participant pointed to a larger need to educate Canadians:

> I agree with formalization, but wonder if a cabinet manual is sufficient. The House's commitment to a positive vote of non-confidence would be an improvement. This would impress the public as an act of their democratic representatives …They [the public] need more education re: parliamentary government.

Mapping Views on the 2008 Prorogation

Figure 1 provides the most common view of those surveyed through this study. Based on the data drawn from participants, a number of conclusions may be drawn. There is remarkable unanimity around the question of the Governor General's discretion in 2008 and views about what might be done to reduce constitutional confusion in the future. Despite important and well-framed arguments to transfer some of the Crown's reserve powers to the House of Commons (Aucoin et al. 2011), the vast majority of participants responded that the best course of action was the development of a cabinet manual, following the procedure established in the United Kingdom (Russell, 2009).

While the analysis undertaken in this paper rejects the idea that the most popular view of prorogation is the only one that matters, it may offer an important counter point to those who argue that the 2008 prorogation was neither controversial nor problematic.[7]

Beyond simply combining and counting the most popular views, Figure 2 below offers another way to explore the findings of this paper. I propose four schools have emerged on the 2008 prorogation, each of

[7] While this paper reports the views of the 25 constitutional scholars surveyed to date, each of the positions in the map in figure 1 represent the majority view of those contacted through the Prorogation Project. To date 25 constitutional scholars, 7 advisers to GGs and LGs, 10 national journalists, and 10 parliamentary insiders have been surveyed (Wheeldon, 2013). These views are part of forthcoming comparative analysis.

which has a distinct view of the event, the authoritative precedents, and past practices which
may (or may not) be applicable. Figure 2 includes the views of respondents who waived anonymity and agreed to be included as part of an analysis strategy designed to map various schools of thought. 12 of the 14 took positions that allowed them to be placed in the chart below. To validate my findings in this project, those who waived anonymity were re-contacted and asked to verify their placement in the chart. Not a single scholar suggested my description of their views or their placement in the chart was an error or oversimplification.

Discussion: Four Schools of Thought on the 2008 Prorogation

To date few empirical attempts to organize existing schools of thought have been attempted. While there is far more support for some views over others, more productive constitutional dialogue might come from an attempt to clearly distinguish the four schools based on the themes of this research. These themes include: the existence and nature of the Governor General's discretion to prorogue; the impact of prorogation on principles of responsible government; and options to guide efforts to address constitutional confusion in Canada. The four schools are executive authority, constitutional peace, political order, and good government. Each of these schools is addressed in turn.

Figure 1 - Most Common Views on 2008 Prorogation

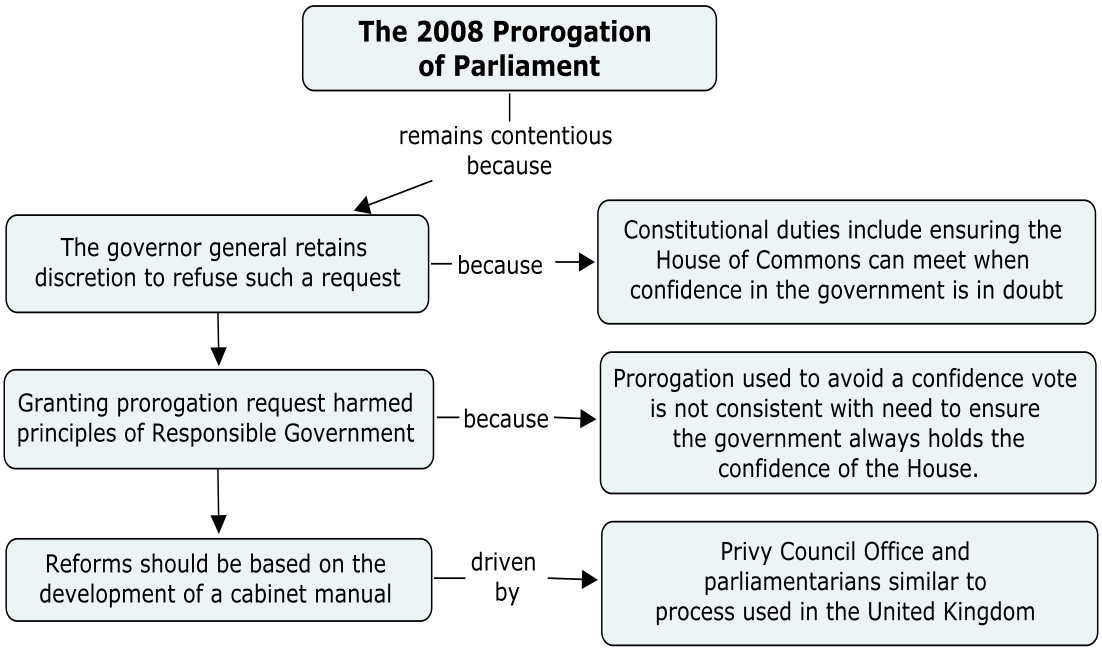
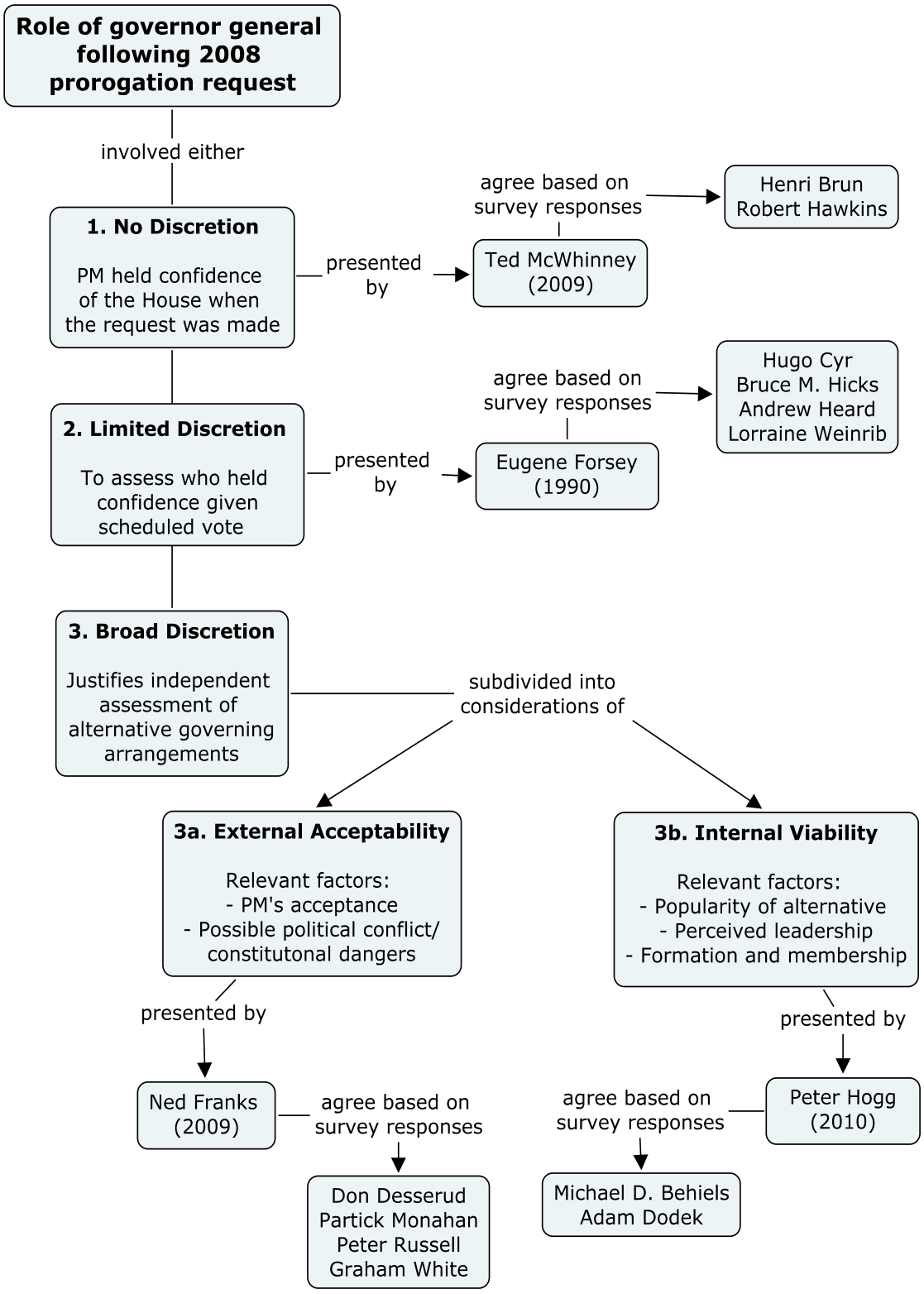


Figure 2 – Schools of Thought on the Role of the Governor General in 2008



Executive Authority

Scholars associated with the executive authority school hold that their view of historical developments and practical precedents regarding the role of the Crown in Canada are determinative. To ensure the Crown is never seen as acting contrary to executive authority, the Prime Minister is afforded supreme deference. This view is consistent with McWhinney's view of historical practice since 1867. On his view, the solution to a prime minister who flouts conventions and/or avoids accountability is political and exercised by the electorate through an election (McWhinney, 2009: 8).

On the existence and nature of the Governor General's discretion to prorogue, scholars in this school hold that the Governor General had no discretion in 2008 and has little to no discretion even where advice by the Prime Minister is viewed as problematic.[8] According to one respondent:

> If the Governor General were to refuse the request of a PM who had demonstrated the confidence of the House, it would call into question our democratic system. The Governor General was elected by no one…

On the impact of the 2008 prorogation on principles of responsible government, those in this school reject that any harm occurred. Indeed, some suggested responsible government had been upheld. This is based on the view that there is no issue with a prime minister who held the confidence of the House delaying a pending vote of no confidence. One scholar noted that since prorogation was time limited, and a day had been appointed on which Parliament would re-convene, missing a scheduled vote of confidence was irrelevant. As a result this school sees no reason to pursue reform. The only problem is the failure among constitutional scholars to appreciate the reading of historical documents, constitutional precedent, and existing practice favoured by this school.

While not a popular view through this research, it does offer a coherent view of the role of the Crown and how power ought to be exercised in Canada. However, while some respondents appear concerned with protecting the role and reputation of the monarchy in Canada, others reject any role for the Queen's representative in Canada's democracy. Future research might better assess the justifications offered by those in this school.[9] Another question is whether this view is more popular among a broader range of political scientists who study these issues than found in this research.

Constitutional Peace

A more popular view based on the survey is held by the editors of the most comprehensive collection of voices and

[8] Participants associated with this school provided four examples in which the reserve powers of the Crown might be activated: uncertainty following an election; the refusal of the Prime Minister to meet the House after he/she had just lost an election; where the Prime Minister was obviously physically or mentally incapacitated (stroke, drug addiction) and could not discharge the functions of the office; or the use of the prorogation mechanism in a way that would have violated overarching constitutional principles in a non-remediable way.

[9] One challenge is the shifting basis and increasing number of justifications offered for this school of thought. For example one respondent stated: "Your survey ignores the issue of reciprocal confidence, i.e. the fact that had the Governor General refused advice, the Crown's confidence in the government would have been void." There is no citable authority for such a statement as applied to 2008, and no example in Canada or elsewhere in the Commonwealth (Twomey, 2011). Existing efforts to survey practitioners to assess whether this view is more popular among parliamentary insiders or advisers to the Crown suggest the breakdown of views reported in this paper is remarkably similar.

views on the 2008 prorogation (Russell & Sossin, 2009). Scholars in this school acknowledge that prorogation in 2008 was problematic but argue that the alternative would have been worse. Overall, this view is preoccupied with the potential dangers should a governor general refuse advice from a sitting prime minister (Franks, 2009). The concern appears to be that in cases like 2008, a refusal could be used to set up an unprecedented political and constitutional crisis (Monahan, 2012: 76-80).

On the question of the existence and nature of the Governor General's discretion to prorogue, this school views the Crown as having an overarching interest in and concern for the consequences of economic, political, and social dangers faced by the Canadian people. Scholars in this school appear to agree with Russell's (2011:19) contention that: "…in this democratic age, the head of state or her representative should reject a prime minister's advice only when doing so is necessary to protect parliamentary democracy." This is consistent with Eugene Forsey (1943) view of the important role played by the Governor General that without this reserve power:

> …existing governments irremovable except by their own consent. Such a doctrine is a travesty of democracy. It delivers every Opposition gagged and bound into the hands of any jack-in-office…. This is not democracy. It is despotism; more or less benevolent, perhaps, for the moment, but despotism none the less.[10]

On the impact of prorogation on principles of responsible government, scholars in this school seek to retain the theoretical power in rare circumstances for the Governor General to refuse a prime minster who holds the confidence of the House. While it should be rarely relied upon, without this reserve power the government could use prorogation to delay or even perhaps avoid the judgement of the House (Russell, 2011). According to one participant:

> …the Crown remains as the people's last safeguard of democracy in our system. While rarely called upon to make a decision regarding the validity of a sitting government or to take overt action to correct untenable issues, the Crown's ability to intervene remains an important part of ensuring that our parliamentary system does not become a benevolent dictatorship.... Why would we complain when the Crown is then called upon to ensure that process is protected?

To address the constitutional confusion about when the reserve powers of the Crown may be activated, scholars in this school (and others) favour the cabinet manual approach based on the New Zealand experience. A manual could ensure Canadians and the media have a common basis for what the constitutional conventions are and why they matter. As one scholar associated with this school stated:

> The PM and his flunkeys put forward a totally inaccurate interpretation of how our system works….[these] highly misleading arguments …put forward about responsible government confused many people, including in the media.

[10] See Forsey, E (1943) The Royal Power of Dissolution in the British Commonwealth. London, UK: Oxford University Press cited in Forsey, H (2012) Eugene Forsey*: Canada's* Maverick Sage. Toronto: Dundurn Press, (see page 318)

A cabinet manual may offer the best means to ensure that that constitutional conventions are outlined, understood, and observed by the relevant actors and do not allow constitutional ignorance to lead to political insecurity and social strife (Russell, 2011).

Future analysis might consider how this view of a theoretical reserve power without a clear sense about how and when it may be applied can challenge those who seek to abrogate basic principles of parliamentary democracy for short-term political advantage.[11] If the threat of a prime minister stoking a constitutional crisis can justify a prorogation to avoid a confidence vote in future, it seems such crises are more likely to occur, not less.

Political Order

The second most popular school of thought based on the survey responses is one presented by Peter Hogg (2010). On the existence and nature of the Governor General's discretion to prorogue, those in this school concede that the Governor General almost always defers to the Prime Minister, and that only in exceptional circumstances can the Governor General refuse his or her advice. However, where there is a loss of confidence or an imminent loss of confidence in the Government, the Governor General has the personal discretion to refuse the Prime Minister's advice to prorogue. Based on the Crown's reserve power, the Governor General decides the best course of action in the rare instances these circumstances arise (Hogg, 2010: 197-198). This view appears to consider that the Crown's role includes acting as protector of a certain sort of political order and it is the Governor General who assesses in each case the best political outcome.

In terms of the impact of prorogation on principles of responsible government some in this school pointed to the political liabilities of the coalition led by Dion and supported by the Bloc Quebecois. Others held that ensuring the House met within a reasonable period of time did not unduly harm responsible government. One participant stated that the Governor General upheld her constitutional duty:

> … by keeping Prime Minister Harper for two hours and then claiming that she set a condition for prorogation, which was that the government would have to introduce a new budget recognizing the severity of the economic and financial crisis…

To address the constitutional confusion and guide future practice, some in this school supported the development of a cabinet manual. Others suggested 2008 was simply another example of the "wise" exercise of the Governor General's discretion.

> …this is a power which, according to the conventions of responsible government and the democratic principle which underlies them, should be used only in highly exceptional circumstances. As it happens, in my view, 2008 approached these exceptional circumstances, but, again, the default mode is to accept the PM's advice.

This discretion, among those associated with this view, involves a number of political calculations, and the Governor General enjoys wide personal latitude not only to

[11] In fairness Russell does suggest reserve powers could be activated in cases where a request for a prorogation was for a "…length of time significantly longer than past prorogations…" (Russell, 2011: 21). Thus the Governor General could refuse advice only when a requested prorogation would exceed the length of time established during past practice.

determine whether the Prime Minister has the confidence of the House, but also to assess the political viability of any alternative government (Hogg, 2010: 200–201). This is the kind of authority that is not in line with developments across the Commonwealth and appears reminiscent of an earlier age (Twomey, 2011).

Future analysis might consider whether the robust role for the office of the Governor General is consistent with constitutional developments in the Commonwealth and to what extent such extraordinary powers could be justified in a democracy in the 21st century. The idea that the Governor General may assess the political appropriateness of alternative governing coalitions may give the Crown a role far beyond that of neutral arbiter (Wheeldon, 2011). It may, in fact, contribute to the widespread misunderstanding among Canadians that the Governor General has everyday decision-making power in Canada.[12]

Good Government

The most popular view expressed within the survey accepts the existence of the Governor General's discretion to refuse a prorogation request when confidence is in doubt. On this view, the nature of the Crown's "reserve powers" are limited to assessing whether a proposed alternative government could hold the confidence of the House. Andrew Heard (2012: 95), has provided the most authoritative statement on this school:

> The lessons to be learned from the events of 2008 underline the very real nature of the reserve powers of the Crown. A Canadian governor general or lieutenant governor retains material authority, in exceptional circumstances, to form an independent judgement on whether he or she should follow the unconstitutional advice offered by the first minister or cabinet. These reserve powers are essential to the proper functioning of our parliamentary system, in which a government's legitimacy flows from the support of the elected members of the legislature.

In terms of the impact of the 2008 prorogation, those in this school viewed the prorogation as harmful to principles of responsible government. Given the availability of an alternative government that appeared to have the support of a majority in the House, the Governor General ought to have upheld the primary role of members of Parliament to hold the government to account. In 2008, this would have required that the scheduled confidence vote take place before acceding to any subsequent request to prorogue Parliament (Heard, 2012: 93-95). As one participant suggested:

> A PM who postpones or delays or obstructs a confidence vote undermines the principle of responsible governance and supports no other principle of which I am aware.

On this view, the House should be the only body to pass judgement on whether a Government retains the confidence of the House, or whether another governing arrangement is more appropriate. If this view is correct, an essential role of the

[12] The notion that Canadians are confused about the Governor General's everyday decision-making power can be surmised based on the results of a 2012 Harris/Decima poll sponsored by *Your Constitution, Your Canada*. Details available at: http://ycyc-vcvc.ca/news/press-releases/two-thirds-of-canadians-want-changes-to-governor general-and-prov-governors-powers-and-positions/.

Governor General is to defend the primacy of parliament against executive overreach. As Eugene Forsey presciently stated:

> If a Prime Minister tries to turn Parliamentary responsible government into unparliamentary irresponsible government, only the Crown can stop him; only the Crown can keep government responsible to Parliament and Parliament to the people. (Forsey, 1967: 30)

While many in this school took a positive view of a cabinet manual to educate Canadians, some expressed concerns that any effort would distort rather than clarify. For example: "I support the idea of a cabinet manual, but I think the current government would use such a manual to misrepresent conventions." Others offered some more reflective comments about how their view had changed since 2008:

> In interviews at the time, I took the position that the Governor General should be guided by the principle of 'doing no harm'. The grant of prorogation with an early recall of Parliament kept the matter before Parliament. The same would not have been true for dissolution. More troubling is that since this event the Prime Minister has intentionally misrepresented conventions so as to prevent the possibility of coalition governments in the future. So, while the Governor General used the reserve powers at the time appropriately, the Prime Minister has been able to seed confusion. And Canadian understanding of the Governor General's level of discretion is too conservative. So, with the benefit of hindsight, the Governor General should have refused to grant prorogation.

Limitations and Conclusions

All research is by its very nature limited. The failure to acknowledge limitations, whether one is engaged in qualitative analysis or comparing quantitative measures, cannot be squared with credible academic inquiry. This project is no different. While this research clearly suggests the contrary, some scholars object to an assumption of this research, which is that 2008 represented a crisis at all:

> There was no prorogation crisis in 2008. The constitution functioned exactly as it was meant to. There is no need, and no demand, in the country to play with the constitution. This is bad news for some constitutional scholars who enjoy the attention that this kind of debate produces from the media. But it is good news for Canadians.

Critics of this project have also suggested that surveying scholars serves no useful purpose. This is a strange argument given that an inherent part of establishing credible contributions to the field involves "surveying" published experts through the peer review process. A central assumption in this work is that the views of subject matter experts do indeed matter. They are significant both in terms of how we understand the issues that were at stake in 2008 and the core disagreements about the relationship between the Crown and Parliament that are too often presumed rather than clearly acknowledged. Some have suggested that weighting each published scholar's view equally undermines the traditional hierarchy within constitutional scholarship. I respectfully and vigorously disagree.

It should be noted that not all scholars initially contacted chose to participate. Indeed, there is no question that

other experts with useful views were missed in this research. In addition, defining the sample as I did, while defensible, means some participants were asked to comment on propositions they themselves had published. On one view this is a limitation. On the other hand, this suggests one approach to validating the findings. Scholars who waived anonymity and who had published views on the 2008 prorogation can be consistently located within the schools of thought presented in this paper. Indeed, no scholar who waived anonymity requested that his or her placement within the chart be revised. As such, it might be said this research more clearly organizes widely disparate literature in conceptual categories that now can be further tested, explored, revised, and perhaps ultimately rejected.

By creating a survey that outlined various positions and justifications published in credible scholarly outlets, however, it is possible that core assumptions about the 2008 prorogation were accepted without adequate reflection. Efforts to reduce this possibility included having the survey questions reviewed by senior scholars, ensuring all options are based on propositions published in peer-reviewed journals, and deliberately leaving space for participants to share additional views. It is nonetheless possible that the survey misrepresented and/or simplified one position or another. While this aspect of the project ensured that positions and justifications could be located in existing literature, some may feel that their personal (and/or as yet un-peer-reviewed) positions were ignored. Perhaps this effort can spur those who hold distinct views to present them for scrutiny in credible scholarly outlets.

Whatever the limitations, this project may serve as an exemplar of sorts about how others interested in Canadian constitutional studies might survey subject matter experts. Provided that the value of collecting data from those who have spent their life acquiring it is not in doubt, future efforts might use this study as an example of the potential and associated complications of such a project. No doubt, future researchers can improve upon the method detailed here and will devise better surveys, define a more expert sample, and ensure analysis that considers both numeric and narrative data. While the findings may not address every individual view (or mix of views), this research serves as a model for soliciting views from a variety of scholars who have published on a topic of interest through scholarship designed to clarify the often-cloudy categories upon which constitutional quarrels are based.[13] Perhaps this approach can clarify the constitutional confusion that persists in Canada (Bonga, 2010).

Amidst the interest and intrigue over Conservative MP Michael Chong's private member's bill to limit the power of party leaders, few have recognized it was introduced nearly 5 years to the day of the 2008 prorogation. It is far from the only effort designed to limit the centralization of political power in Canada (Aucoin et al. 2011). A persistent question related to a number of proposed parliamentary reforms is how to understand the role of the Crown. The 2008 prorogation provides an important case study. This paper has reported the most common views and justifications of 25 constitutional scholars. While the Governor General is widely seen as retaining discretion to refuse a prime minister seeking to avoid judgement in the House, there is a

[13] While this paper has focused on identifying the constitutional schools of thoughts and underlying justifications based on groups of experts, it is of some interest that the numeric breakdown among journalists, advisors to the Crown, and even parliamentary insiders gathered over 2 years is nearly identical to the views of presented here (Wheeldon, 2013).

belief that this role needs to be outlined in a Cabinet Manual, but not legislated.

Future research should test both support for these four schools of thought and assess differences that may exist between and among advisers to the Crown, media and journalists, parliamentary insiders, and Canadians themselves. If the public is to understand their system of government, more attention should be paid to how best to summarize and acknowledge leading views, and ensure that credible scholarship accounts for alternative competing hypotheses. This paper has presented a method that might be applied to other constitutional questions, such as the proper role of the Crown when no party holds a majority after an election. While the 2008 may have been a unique event, the mixed empirical approach detailed here can supplement existing analytic approaches, summarize the most common views, and perhaps lead to a more informed debate on the use of reserve powers in Canada, executive authority, and parliamentary democracy.

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Appendix A: Survey Questions and Possible Replies on Existence and Nature of the Governor General's Discretion

Question	Possible Replies	Citations and Notes
Did the Governor General have the discretion to refuse the Prime Minister's (PM) 2008 advice to prorogue Parliament?	1. Yes, Governor General had discretion to refuse PM's advice;	Heard (2012); Hogg (2010); Monahan (2012); Others.
	2. No, the Governor General did not have discretion and was bound to follow advice;	Brun (2008); McDonald & Bowden (2011); McWhinney, (2009)
	3. List Other	
	4. Refuse to Answer	
If you hold that the Governor General had discretion to refuse the PM's advice, which statement best reflects the logic of your position?	1. The Governor General always retains the right to refuse a PM's advice regarding exercise of Crown's reserve powers	Hogg (2010)
	2. The Governor General could refuse PM's advice until the House met to express its confidence (or lack thereof) in the government as a confidence vote had been scheduled	Forsey (1943); Heard (2012)
	3. The Governor General could refuse PM's advice because by cancelling a scheduled confidence vote the government had effectively lost the confidence of the House already	Heard (2009)
	4. List Other	
	5. Refuse to Answer	
If you hold that the Governor General had no discretion and was bound to follow the PM's advice which statement best reflects the logic of your answer?	1. The government had not lost a confidence vote in the House hence the Governor General was bound to follow the advice of the PM	Brun (2008)
	2. It was unclear if the opposition parties could form a politically viable government	Hogg (2010) argues Governor General *had* discretion but political viability of alternative government in doubt
	3. The situation in 2008 could not be characterized as example of 'exceptional circumstances' that allow Governor General to refuse PM's advice	Cameron (2009) does not dispute governor general's discretion but suggests "ultimately, system worked"
	4. The Governor General no longer has the discretion to refuse a PM as the reserve power regarding prorogation resides with PM	McWhinney (2009)
	5. List Other	
	6. Refuse to Answer	

If you hold the Governor General did not have the discretion to require the PM to meet House to assess confidence in 2008 what circumstances (if any) would allow Governor General to refuse advice?	1. List any that may apply_____	

Appendix B: Survey Questions and Possible Replies on Perceived Impact of Prorogation on Principles of Responsible Government

Question	**Possible Replies**	**Citations and Notes**
If the Governor General had the discretion to require the PM to meet the House to assess who held confidence, which statement best reflects your view of the Governor General's decision to follow the advice of the PM in 2008?	1. Acceptable as Governor General can rely upon personal discretion to assess 'appropriateness' of alternative governing coalitions	Hogg (2010)
	2. Acceptable given unique economic/ political/social circumstances in December 2008	Russell & Sossin (2009)
	3. Problematic given that prorogation temporarily undermined role of House to determine who governs Canada	Aucoin et al. (2011) Forsey (1943) Heard (2009)
	4. List Other	
	5. Refuse to Answer	
Which statement best reflects your view on the impact of the 2008 prorogation on principles of responsible government?	1. No consensus on 'principles of responsible government' thus not possible to answer question	Based on media reports/ reviewing scholars
	2. 2008 prorogation harmed principles of responsible government	Aucoin et al. (2011) Forsey (1943) Heard (2009)
	3. 2008 prorogation did not harm principles of responsible government	Russell & Sossin (2009)
	2008 prorogation upheld principles of responsible government	Cameron (2009) Hogg (2010)
	List Other	
	Refuse to Answer	
Which statement best reflects your justification for your answer to the question above?	1. Diversity of views and lack of understanding among citizens and parliamentarians alike undermines idea that common view of responsible government exists	Based on media reports, comments from reviewing scholars
	2. Allowing prorogation to avoid responsible government cannot be squared with need to ensure government always holds, and is seen to hold, the confidence of the House	Aucoin et al. (2011) Forsey (1943) Heard (2009)
	3. PM had recently survived a confidence vote and refusing PM advice was not worth the risk associated with the political crisis that the PM's party may create during 2008 economic crisis	Franks (2009) Monahan (2012)
	4. Governor General secured the PM's commitment to have parliament summoned no more than a few days after the scheduled Christmas recess and to immediately submit a budget to a confidence vote in the House of Commons	Russell & Sossin (2009)
	5. List Other	
	6. Refuse to Answer	

Appendix C: Survey Questions and Possible Replies on Possible Options to Guide Future Action

Question	Possible Replies	Citations and Notes
Given the diversity of published views on this issue and the seeming ambiguity surrounding with the role of Governor General and the Crown's reserve powers in Canada, which statement best reflects your view as the best way to provide clear, consistent, and credible guidelines for the future? Please select one statement.	1. Codify agreed upon conventions of responsible government in law	Russell (2009)
	2. Outline agreed upon conventions of responsible government in consolidated cabinet manual	Russell (2009); Monahan (2012)
	3. Abolish Crown's reserve powers and transfer these authorities to the House of Commons	Aucoin et al. (2011)
	4. Leave the Crown's reserve powers and conventions of responsible government as is	Cameron (2009)
	5. List Other	
	6. Refuse to Answer	
If there was support for an effort to address the diversity of views regarding the reserve powers and principles of responsible government, which statement best reflects your view about how this effort should be organized? Please select one statement.	1. Driven by Executive, acting alone;	Based on comments from reviewing scholars
	2. Driven by Privy Council Office and parliamentarians in a process similar to that used in United Kingdom to develop cabinet manual;	Russell (2009)
	3. Driven by Parliament, acting alone;	Aucoin et al. (2011)
	4. Driven by citizens first, based on a process to inform, engage, and debate and then involving Executive, Privy Council, and/or Parliament;	Wheeldon (2011)
	5. List Other	
	6. Refuse to Answer	

Appendix D: Additional Requests for Information

Please include any other relevant comments, suggestions, and/or considerations regarding your view of the 2008 prorogation or the survey itself.
This project involves mapping schools of thought on the 2008 prorogation. If you waive this anonymity, your name may be used to present key schools of thought on the 2008 prorogation. If you agree to your name being linked to the responses above, please include your name below.