

Unconstitutional Senate nominations

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Political analysts will tell you that Stephen Harper has become a master in the art of self-contradiction. Consider some of his most recent about-faces: After pressing for the adoption of legislation setting fixed election dates, he provoked early elections last fall; now, after spending most of his political career advocating the reform of the Canadian Senate (or else, its abolition) and for the election of its members, he is on the verge of “packing” the Higher House with the nomination of some 18 new senators before Christmas.

The more challenging issue for this country’s constitutional lawyers — an issue which, we believe, should be of interest to all Canadians — is the illegitimate context in which these nominations would be made. Recall the extraordinary circumstances that currently prevail on Parliament Hill: minority government, a financial crisis, an economic program unacceptable to all opposition parties, the formation of a coalition, the threat of non-confidence vote, prorogation of the parliamentary session until the end of January — and this, despite the political crisis that is afflicting the government. Some of these elements, especially the prorogation, come dangerously close to being unconstitutional, not to say anti-democratic.

The nomination of senators in such circumstances would be illegitimate and, most troublingly, in clear violation of the Canadian constitutional ideals of the rule of law and parliamentary democracy. Note first that, according to Section 24 of the Constitutional Act of 1867, it is part of the governor-general’s role to name senators. In virtue of Canadian constitutional conventions, she does so on the advice of the prime minister.

In normal times, there is no real problem if a prime minister decides to fill vacancies in the Senate, even when it is felt that his party may lose power at the end of its normal term in office. This conclusion typically follows from the fact that he heads a majority government and, therefore, has the confidence of the House when he requests that senators be appointed. However, the situation would be very different if Mr. Harper, who leads a minority government that has lost, for all intents and purposes, the confidence of the House, decided to call upon Governor-General Michaëlle Jean to proceed to the proposed nominations.

Given the current (extraordinary) state of affairs, we believe that the Governor-General could, in accordance with the Constitution, refrain from acquiescing to the Prime Minister’s request. We also believe that she should exercise her residual discretionary power to delay any appointments until after Mr. Harper has demonstrated that he still has the confidence of the House — especially since the appointment of 18 senators would modify considerably the composition of the Se-

nate. Since nominations to the Senate are for life — i.e., until the age of 75 — the Governor-General's compliance would have serious consequences that would be with us for the long-term.

Irrespective of whether the coalition holds or not, or whether the Conservative's budget is adopted or voted down in January, we are living in exceptional times: a Canadian government has opted to suspend Parliament's activities and to delay the moment when the House will be able to express its confidence in the government. Whatever one may think about the prorogation of Parliament on Dec. 4, one has to admit that the government has placed itself in a situation in which the legitimacy of its important decisions is suspended until Jan. 26.

We deem it important to take a clear stance to reiterate that the Governor-General must remain the guardian of parliamentary democracy and of the rule of law in Canada. In a nutshell, she must ensure that the fundamental principle of governmental responsibility before the elected members of the House of Commons is respected.

Mr. Harper: Before you act, notably to the Senate, please make sure that you are speaking in the name of Canadians. For this, you need the support of the House of Commons, which you have lost ... until, of course, there's proof to the contrary.