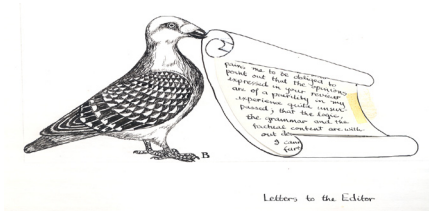

Letters

Sir:

Thank you for the invitation to comment on the prorogation of parliament by the Governor General in December 2008.

The position is an unprecedented one. The governor-general stands in place of the Queen as Head of State but, since the Imperial Conference of 1926, it has been recognised that a governor-general is not the monarch's representative (in terms of acting on instructions from the monarch) but serves as the equivalent of the monarch, and acts on the advice of ministers. However, as Vernon Bogdanor notes in his book, *The Monarchy and the Constitution,* 'The Imperial Conference did not… lay down any guidance as to the precise circumstances in which the sovereign or the governor-general was expected to act on advice, and the circumstances in which they enjoyed a discretion to use their reserve powers.'

On occasion, a governor-general has used the reserve powers, as with Sir John Kerr's dismissal of the Whitlam government in Australia in 1975, but generally such powers remain – as the name indicates – in reserve. There is a constraint operating in respect of a governor-general that does not apply in respect of the monarch: a governor-general may be dismissed (on the recommendation of the government) whereas the Queen may not. Had Gough Whitlam advised the Queen to dismiss Kerr before he had a chance to exercise his reserve powers, Kerr would have been removed. In the event, he moved first and dismissed Whitlam: Whitlam then had no standing in relation to the governor-general since he was no longer prime minister.

In the Canadian case, the governor-general was essentially between a rock and a hard place. There is (as far as I am aware) no precedent and no guidelines for agreeing to a prorogation in such circumstances. Had the request been for a dissolution, then there are some guidelines adumbrated in the UK by Sir Alan Lascelles (not, though, that they would have bound the governor-general). The governor-general thus had to decide whether to act on the advice of her prime minister, as is the convention, or decline to do so because of the exceptional circumstances. Though it appeared on the face of it that the request was to avoid a vote of no confidence, the formal position is that the prime minister was operating in a situation in which he still retained the confidence of the House (or rather had not lost it). The governor-general may therefore have believed that the balance of argument favoured agreeing to the request, not least because it did not preclude the House of Commons, when it returns, voting on a motion of no confidence. There is also the presumption that the Queen's government must be carried on. She may also have borne in mind the extent to which she differs from the Queen in terms of vulnerability. Had she declined the request, she would equally have caused a constitutional crisis.

What the case does highlight is the need to draw up guidelines to cover such cases. This applies in a Commonwealth and not just a Canadian context. What if James Callaghan in 1977, facing the prospect of losing a vote of confidence, had not quickly negotiated a pact with the Liberal parliamentary party but instead advised the Queen to prorogue Parliament to give him time to negotiate with other parties? The more there is clear guidance for cases where there is no precedent or works of authority to guide the exercise of prerogative powers, the better in order to keep the monarch or governor-general above the partisan battle.

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