The Speaker's Ruling on Afghan Detainee Documents: The Last Hurrah for Parliamentary Privilenge?

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> On 3 January 1642 the Commons sat, and claimed a breach of privilege which, deliberately or not, incited the king to attempt force. On 4 January [King Charles I] entered the Chamber, leaving the door open so that members could see the troops "making much of their pistols." ... He asked the Speaker if the five [rebel MPs] were present. Lenthall, on his knees, spoke. "May it please Your Majesty, I have neither eyes to see, nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here; and I humbly beg Your Majesty's pardon that I cannot give any other answer than this to what Your Majesty is pleased to demand of me."[1]

On April 27, 2010, the speaker of the Canadian House of Commons ruled on a question of parliamentary privilege. Although most such rulings pass unnoticed outside Parliament Hill, Peter Milliken's address to the House attracted intense interest. He declared that the government of Prime Minister Stephen Harper had committed a *prima facie* breach of privilege by withholding documents pertaining to the handling of Afghan prisoners by Canadian soldiers and officials from the Special Committee on the Canadian Mission in Afghanistan. He also scolded both sides for refusing to cooperate, and told them to work out a solution to the impasse. If they failed to do so within two weeks, he would ask the House to decide whether the executive branch was in contempt of Parliament.[2] A majority vote in favour could have brought down the Harper government.

In the wake of Milliken's ruling, the cabinet was unusually meek. There were no partisan denunciations of the speaker (who happens to be a Liberal MP), and no trumped-up charges of unconstitutional chicanery. Instead, justice minister Rob Nicholson announced that the government would immediately begin talks with the three opposition parties. They reached an agreement in principle on May 14. The final accord was signed a month later by only three of the party leaders, and approved by Speaker Milliken despite substantial concessions by two of the opposition parties.[3]

It is possible that the government accepted the April 27 ruling because there is no appeal from the speaker's ruling on a *prima facie* question of privilege.[4] However, the most likely explanation is simply that Milliken's decision was unassailably correct. He did what speakers in the British tradition are supposed to do: he vindicated the collective privilege of Parliament against an exaggerated assertion of Crown prerogative. Having done so, he invited the executive and legislative branches to strike a balance between these two fundamental constitutional principles. Milliken's speech to the House lacked the drama of the confrontation between Speaker Lenthall and King Charles I, for which – given the bloody events of the 1640s – we should be grateful.[5] Then again, subsequent developments suggest that Canada's current MPs might benefit from the bellicose spirit of their British predecessors. Nonetheless, Milliken's ruling remains important because it offers a distinctively Canadian answer to two longstanding political

questions. First, should the legislative branch hold the upper hand over the executive branch, or vice versa? Second, does Crown prerogative trump the powers of Parliament just because national security is invoked? Before considering the practical impact of the ruling, I will briefly outline the controversy at issue and the two contending constitutional principles which Milliken was asked to reconcile.

The Afghan Detainee Documents and the Question of Privilege

In June 2008, the House of Commons approved a government motion to extend Canada's military deployment in Afghanistan from February 2009 until February 2011. As recommended in the Manley Report,[6] the motion provided for the creation of a Commons committee to monitor the Canadian mission. The committee was instructed to "review the laws and procedures governing the use of operational and national security exceptions for the withholding of information from Parliament, the Courts and the Canadian people with those responsible for administering those laws and procedures, to ensure that Canadians are being provided with ample information on the conduct and progress of the mission." The motion also committed the Government of Canada "to meeting the highest NATO and international standards with respect to protecting the rights of detainees," and to "a policy of greater transparency with respect to its policy on the taking of and transferring of detainees including a commitment to report on the results of reviews or inspections of Afghan prisons undertaken by Canadian officials."[7]

The Special Committee on the Canadian Mission in Afghanistan started work in April 2008. It issued a preliminary report in June of that year, before the House was dissolved. The committee was finally reconstituted in March 2009. In early November it started to investigate the treatment of Afghan prisoners by Canadian personnel. Specifically, the committee (or at least the majority of opposition members) wished to know whether prisoners had been mistreated after being handed over to Afghan authorities, and if so, whether Canadian soldiers or civilians had known in advance that their detainees were at risk. Any such prior knowledge would raise doubts about Canada's compliance with international law.

Most of the officials who appeared before the committee refused to provide essential information about the handling of Afghan detainees. Lawyers for the various departments argued that solicitor-client privilege trumped parliamentary privilege, a claim the Commons Law Clerk and Parliamentary Counsel rejected.[8] Others said that they were bound by section 38 of the *Canada Evidence Act*, which prohibits the public disclosure of "information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security."[9] In response, the committee offered to allow witnesses to answer "potentially injurious" questions *in camera*, rather than in a public and transcribed session.[10] This concession did not make the officials any more forthcoming.

The one crack in the stonewall was Canadian diplomat Richard Colvin, who appeared on November 18. Colvin testified that Canadian military officials had knowingly or recklessly transferred detainees to torture, and that civilian officials in Afghanistan and Ottawa had either ignored his warnings or tried to cover them up.[11] The ensuing firestorm in the House and the media may have made the government even more reluctant to cooperate with the committee. Opposition MPs grew increasingly frustrated as they tried to question witnesses about documents which had been withheld from them.

On November 25, the opposition members of the committee[12] passed a motion by Liberal MP Ujjal Dosanjh, giving the government one week to produce hundreds of documents. These included Colvin's reports to his superiors, the official replies to those reports, and any information turned over by the government to the parallel investigation by the Military Police Complaints Commission.[13] The following day the committee reported to the House that "a serious breach of privilege has occurred and members' rights have been violated, that the Government of Canada, particularly the Department

of Justice and the Department of Foreign Affairs and International Trade, have intimidated a witness of this Committee,[14] and obstructed and interfered with the Committee's work and with the papers requested by this Committee."[15]

On December 10, the House of Commons adopted Dosanjh's motion as an order for the production of documents. The preamble referred to "the undisputed privileges of Parliament under Canada's constitution, including the absolute power to require the government to produce uncensored documents when requested," and "the reality that the government has violated the rights of Parliament by invoking the Canada Evidence Act to censor documents before producing them."[16] The order remained in force despite the December prorogation. After Parliament reconvened in March 2010, three opposition MPs raised formal questions of privilege concerning the government's refusal to comply with the order. Over the next few weeks the House sporadically debated the question. Meanwhile the government tabled – without prejudice, advance notice, or translation – thousands of pages of heavily redacted documents, claiming that it was now in compliance with the order and the privilege question was moot.

The Harper government probably expected a favourable ruling from the speaker: "In the vast majority of cases, the Chair decides that a *prima facie* case of privilege has not been made."[17] Their confidence was likely increased by the subject-matter of the documents at issue. The government justified its refusal to comply by pointing to the Crown's undoubted duty to protect national security (see the discussion of Crown prerogative below). Its spokesmen in the House asserted that the executive branch could legally defy an order to produce documents – reflecting the will of a majority in the Commons – when the information contained therein pertained to national security. By extension, the government claimed to be the sole judge of its own compliance (in tabling the heavily redacted documents in the House). Given the tendency of the legislative and judicial branches to defer to the executive when the safety of the public or the military is at stake, a ruling in favour of the government seemed likely. In some quarters, therefore, the speaker's ruling was a welcome surprise.

Parliamentary Privilege

In the course of their public duties, parliamentarians enjoy two types of privilege which are denied to other citizens. The first is individual privilege, such as the freedom to speak in the House without fear of prosecution. That particular immunity also extends to witnesses before parliamentary committees. The second, with which we are concerned, is collective privilege. The Compendium of Commons Procedure identifies seven distinct rights which make up collective privilege, ranging from the power to punish to "the right to publish papers containing defamatory material."[18]

Parliamentary privilege is entrenched in the Constitution of Canada by the preamble to the *Constitution Act, 1867*.[19] The phrase "a Constitution similar in Principle to that of the United Kingdom" incorporated much of the British common law, as well as the central principles and documents of the British constitution. Several such principles have been identified as prerequisites for parliamentary government,[20] including the individual and collective privileges of legislators. Parliamentary privilege was also explicitly entrenched in section 18 of the *Constitution Act, 1867*,[21] and subsequently elaborated in the *Parliament of Canada Act*.[22]

Canadian legislators enjoy fewer privileges than their British counterparts. The common-law powers of the English Parliament reflect its origins as a judicial body, which has no parallel in the former colonies. Consequently, "Canadian legislative bodies properly claim as inherent privileges [only] those rights which are necessary to their capacity to function as legislative bodies."[23] A privilege will be recognized in law if its exercise is essential to the efficiency, the dignity, and/or the autonomy of the legislature or the member who asserts it.[24]

As Milliken pointed out in his April 27 ruling, "the fundamental role of Parliament is to hold the Government to account" for the actions

of its officials.[25] It follows that withholding or excessively redacting essential documents, and thus obstructing the committee's investigation into the Afghan mission, is a *prima facie* breach of parliamentary privilege. The speaker quoted Bourinot, the pre-eminent authority on British parliamentary procedure: "under all circumstances it is for the house to consider whether the reasons given for refusing the information are sufficient."[26] In other words, there is no unilateral executive power to withhold or to black out "potentially injurious" documents.

Milliken acknowledged, also in the words of Bourinot, that parliaments usually "acquiesce when sufficient reasons are given for the refusal,"[27] but he made it clear that this was a description of practice and not a binding precedent. He also implied that if acquiescence was not forthcoming in this instance, it was likely due to the poisonous relationship between the Harper government and the three opposition parties. As John Locke pointed out in the late seventeenth century, the Crown prerogative reaches its greatest extent when it is vested in wise and trusted hands.[28] In this context, the speaker's ruling – his assertion, in effect, that Crown prerogative ends where parliamentary privilege begins – is more than an attempt to resolve a temporary partisan impasse. It is a contribution to the longstanding debate over the proper relationship between the two branches. We will explore that relationship further in the conclusion.

The Crown Prerogative

The Conservatives who participated in the privilege debate justified the government's refusal to comply with the order on three grounds. First, the Commons had overstepped its powers by trying to force the government to produce sensitive documents pertaining to defence and national security. The minister of justice argued that "finding a breach of privilege on this matter would be an unprecedented extension of the House's privileges."

> There are diverging views on whether the House and its committees have an absolute and unfettered power to be provided with any and all documents they order from the executive branch and within the Crown prerogative.
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> It is true that the House of Commons has significant powers and privileges that are necessary to support its independence and autonomy. However, the Crown and the executive branch is also entrusted with powers and privileges as well as responsibilities for protecting public interest, implementing the laws of Canada and defending the security of the nation, in particular, as the Government of Canada has an obligation to protect certain information for reasons of national security, national defence and foreign relations.
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> Crown privilege as part of the common law recognizes that the government has a duty to protect these and other public interests.[29]

Second, making the documents public would risk the lives of Canadian military and civilian personnel in Afghanistan.[30] Third, divulging information provided by third parties would jeopardize "the future of our ability as a nation to be able to deal with international agencies like the Red Cross and other sources of information and intelligence that is so absolutely vital for our nation to be a player in the world."[31]

The nub of all three arguments is the idea that Crown prerogative should prevail over parliamentary privilege (at least in this instance). In Dicey's famous formulation, the prerogative is "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown."[32] It is a common-law power, which "can be limited or displaced by statute"[33] – but only with the consent of the Crown itself, given the requirement of Royal Assent.

In domestic matters, the prerogative is barely visible in Canada. The situation is very different in foreign affairs, including defence, national security, and the power to conclude agreements with other sovereign states. Here the Crown prerogative remains broad and largely unconstrained by statute,[34] but by no means unlimited:

> Traditionally the courts have recognized that within the ambit of these powers the Governor in Council may act in relation to matters concerning the conduct of international af-

> fairs including the making of treaties, and the conduct of measures concerning national defence and security. The prerogative power is, of course, subject to the doctrine of parliamentary supremacy and Parliament, by statute, may withdraw or regulate the exercise of the prerogative power.[35]

In sum, the Crown prerogative is part of Canada's constitution. It is not absolute, nor is it the full extent of the powers the government considers to be necessary or expedient for its purposes at a given time. The prerogative is limited by other constitutional principles and provisions, including parliamentary privilege and the *Canadian Charter of Rights and Freedoms*.[36]

If the Crown prerogative stretched as far as the Harper government claimed, then justice minister Rob Nicholson might have been correct to argue that "finding a breach of privilege on this matter would be an unprecedented extension of the House's privileges."[37] But as Milliken observed, "This can only be true if one agrees with the notion that the House's power to order the production of documents is not absolute." Such a claim, he suggested, "subjugates the legislature to the executive."[38] He concluded that "accepting an unconditional authority of the executive to censor the information provided to Parliament would in fact jeopardize the very separation of powers that is purported to lie at the heart of our parliamentary system and the independence of its constituent parts."[39] In effect, the vast scope of the Crown prerogative claimed by the Harper government is inconsistent with the logic of Canada's constitution – even when national security is invoked to justify the government's reluctance to share information.[40]

The Broader Implications of the Speaker's Ruling

Milliken's reference to the separation of powers highlights the breadth of his ruling. The proper limits of executive and legislative power, both in isolation and in their mutual relations, have been debated for centuries. Thomas Hobbes, having lived through the horrors of the English Civil War, argued that it was too dangerous to divide the powers of government among different institutions: "this division is it, whereof it is said, a kingdom divided in itself cannot stand."[41] Much safer, he thought, to unite all the sovereign powers in one man.[42]

Most subsequent thinkers have rejected Hobbes's argument for an indivisible sovereign, preferring to divide the legislative power from the executive power (either partially or completely).[43] There is less agreement about the proper relationship between the two branches: should one be subordinate to the other, and if so, which one? Locke asserted that the Crown was subordinate to the legislature (a view that gained some credibility from the 1689 Bill of Rights).[44] In the eighteenth century, the French lawyer Montesquieu famously argued that "When both the legislative and executive powers are united in the same person or body of magistrates, there is no liberty."[45] Less well-known is his claim that the legislature "would become despotic" if the executive failed to keep it in check; the latter branch was naturally weaker because it issued temporary decrees rather than permanent laws.[46] So Montesquieu agreed with Locke that the legislative branch was supreme, but did not share his view that this was necessarily a good thing.

The American framers shared the eighteenth-century fear of encroaching legislative power, which they attributed to the legislature's democratic legitimacy and its control over the public purse.[47] Unlike Montesquieu, they came up with a solution to the problem: not the complete separation of powers, as is commonly believed, but partially overlapping powers which "give to each [branch] a constitutional control over the others."[48] The only effective way to keep each branch within its "parchment barriers" is to give its members "the necessary constitutional means, and personal motives, to resist encroachments of the others."

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.... [T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a

> sentinel over the public rights.[49]

Such a check on arbitrary power will only work where members of the two branches contest the same field of power. In cases of direct conflict, one must yield to the other. Such acquiescence is only to be counted on where one is *a priori* subordinate to the other, and that subordination is recognized in law. In the Afghan detainee controversy the Harper government tried to assert just such an *a priori* principle, by claiming that Parliament must defer to the Crown whenever national security is at stake. It is significant that Milliken rejected that argument. In the immediate wake of 9/11, legislators and judges throughout the Western world backed off and allowed their executives to expand prerogative powers to an extraordinary extent. Hobbes began to sound less like an aberration than a prophet. The prevailing attitude was forcefully expressed by the senior British judge Lord Hoffmann in the immediate wake of the terror attacks: "the recent events in New York and Washington ... are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on … question[s] of ... national security."[50]

Since 2001 the legislative and judicial branches have gradually recovered their nerve. They have increasingly challenged their governments' handling of the "war on terror" and the treatment of those who have been caught up in it. Hoffmann himself implicitly repudiated his own dictum just three years later, writing that terrorism did not pose a sufficiently grave threat to the British nation to justify derogating from the *European Convention on Human Rights*. In a slightly Churchillian cadence, he declared:

> [Britain] is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda.[51]

It appears that the resurgence of the Hobbesian sovereign was a temporary phenomenon – although of course it could recur in the wake of future terror attacks.

In the absence of an *a priori* hierarchy among the branches of government, politicians must work out mutually agreeable compromises. Like the Supreme Court of Canada in its 1998 ruling on secession,[52] Milliken did not try to impose his own solution to the impasse. Instead he defined the applicable principles and invited the government and opposition parties to strike a workable balance among them.[53] This is what they initially did: the government negotiators agreed to turn over the documents essential to the committee's investigation, while the opposition accepted the Crown's responsibility to protect national security and confidentiality. Unfortunately, the balance did not last. Having lost the argument over Crown prerogative, the government now insisted that "Cabinet confidences" and "solicitor-client privilege"[54] entitled it to withhold documents as it saw fit. On June 15, the Liberals and the Bloc Québécois accepted this condition; the New Democrats refused, and were excluded from the committee. Milliken accepted the June 15 accord, apparently willing to overlook the fact that his broad assertion of parliamentary privilege had been rejected by a large majority of MPs.

When it was first issued, the April 27 ruling appeared to herald a change in the relations between the House of Commons and the government of the day. Milliken followed Lenthall's example, asserting the privileges of Parliament against an overweening Crown prerogative, because of his own character, expertise, and love for the institution. In all likelihood, he also did so because he is fully independent of the prime minister. Ever since the English House of Commons chose its first presiding officer in 1376, the speaker of the British House of Commons has been ostensibly elected by the MPs.[55] In practice, the speaker was nominated (and could thus be replaced) by the prime minister of the day. So despite their claims to be servants of the House, speakers were until recently servants of the Crown. Prime ministerial appointment persisted in Canada until 1986, when the Standing Orders were amended to permit MPs to freely

elect one of their own as speaker without interference from the Prime Minister's Office.[56] It is difficult to imagine a speaker standing up to the prime minister quite as boldly as Milliken did if he feared for his job. So the April 27 ruling seemed to demonstrate that the move from a *de facto* appointed speaker to a genuinely elected speaker changed the relationship between the two branches of government.

In the event, the conflict over the handling of Afghan detainees did not initiate a period of greater cooperation between the legislative and executive branches. Nor did it herald a renaissance of parliamentary privilege. Indeed, it may have the opposite effect. Now that a majority of MPs have agreed that the government can withhold cabinet documents and legal advice, it will be very difficult for any future speaker to repeat Milliken's sweeping assertion of privilege. On April 27, 2010, Milliken could say that "procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents."[57] Today, thanks to the Liberals and the Bloc, that is no longer true. The House is the ultimate procedural authority. For the sake of averting a vote to hold the government in contempt, and a consequent snap election, two of our opposition parties may have permanently weakened the institution in which they serve.

Notes

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1 John Field, *The Story of Parliament in the Palace of Westminster* (London: James & James, 2002) at 107.

2 *House of Commons Debates,* No. 034 (27 April 2010) at 2039-2045 (Hon. Peter Milliken, Speaker).

3 The four parties in Parliament agreed to strike an *ad hoc* committee to review the documents under strict conditions of confidentiality. Each would have one member (and one alternate). Disputes over the public release of specific information would be referred to a panel of three "eminent jurists." See *House of Commons Debates,* No. 047 (14 May 2010) at 2847-2848 (Hon. Rob Nicholson).

4 *Standing Orders of the House of Commons*, s. 10, online: Parliament of Canada <http://www.parl.gc.ca/information/about/process/house/standingorders/chap1-e.htm>.

5 Charles's violation of the Commons did much to precipitate the bloody civil war which consumed England, Scotland and Ireland. The King was defeated, captured by the parliamentary forces, and ultimately executed for treason seven years after Lenthall's speech. To this day, the monarch and his or her representatives are barred from entering the lower house in Westminster-style parliaments (hence the reading of the Throne Speech in the upper house). See Trevor Royle, *Civil War: The Wars of the Three Kingdoms, 1638-1660* (London: Abacus, 2004), especially Chapter 10 at 149-166.

6 The Panel concluded that "The Government should provide the public with franker and more frequent reporting on events in Afghanistan, offering more assessments of Canada's role and giving greater emphasis to the diplomatic and reconstruction efforts as well as those of the military." See Independent Panel on Canada's Future Role in Afghanistan, *Final Report* ["Manley Report"] (Ottawa: Minister of Public Works and Government Services, 2008) at 38, online: <http://dsp-psd.pwgsc.gc.ca/collection_2008/dfait-maeci/FR5-20-1-2008E.pdf>.

7 *House of Commons Journals*, 39th Parl., 2nd sess., No. 66 (13 March 2010) at 596.

8 Special Committee on the Canadian Mission in Afghanistan, *Evidence*, 40th Parl., 2nd sess., No. 014 (4 November 2009) at 7-8 (Rob Walsh).

9 *Canada Evidence Act*, R.S.C. 1985, c. C-5.

10 Special Committee on the Canadian Mission in Afghanistan, 40th Parl., 2nd sess., *Evidence* No. 015 (18 November 2009) at 1 (Rick Casson, Chair).

11 *Ibid*. at 1-5.

12 The Conservatives abstained, citing concerns about national security and Cabinet confidentiality.

13 The actual list reads as follows: "All documents referred to in the affidavit of Richard Colvin, dated October 5, 2009; All documents within the Department of Foreign Affairs written in response to the documents referred to in the affidavit of Richard Colvin, dated October 5, 2009; All memoranda for information or memoranda for decision sent to the Minister of Foreign Affairs concerning detainees from December 18, 2005 to the present; All documents produced pursuant to all orders of the Federal Court in *Amnesty International Canada and British Col-*

umbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada; All documents produced to the Military Police Complaints Commission in the Afghanistan Public Interest Hearings; [and] All annual human rights reports by the Department of Foreign Affairs on Afghanistan." Special Committee on the Canadian Mission in Afghanistan, *Minutes of Proceedings*, Meeting No. 16 (25 November 2009).

14 Presumably a reference to Colvin.

15 Special Committee on the Canadian Mission in Afghanistan, *Third Report* (26 November 2009).

16 *House of Commons Debates* No. 128 (10 December 2009) at 7877.

17 Audrey O'Brien and Marc Bosc, eds., "Procedure for Dealing with Matters of Privilege", in *House of Commons Procedure and Practice*, 2nd ed. (Ottawa: House of Commons, 2009), online: Parliament of Canada <http://www2.parl.gc.ca/procedure-book-livre/Document.aspx?Language=E&Mode=1&sbdid=ABBC077A-6DD8-4FBE-A29A-3F73554E63AA&sbpid=13E698A7-333F-42DA-9C20-AD416E51BD1C#13E698A7-333F-42DA-9C20-AD416E51BD1C>.

18 "Application of Parliamentary Privilege to the House of Commons as a Whole," *Compendium: House of Commons Procedure Online* (2007), online: Parliament of Canada < http://www.parl.gc.ca/compendium/web-content/c_d_applicationparliamentaryprivilegehouse-commonswhole-e.htm>.

19 *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (S.C.C.), [1993] 1 S.C.R. 319 at para. 108 [*New Brunswick Broadcasting*].

20 See the famous dictum of Chief Justice Duff in *Reference re Alberta Statutes*, 1938 CanLII 1 (S.C.C.), [1938] S.C.R. 100 at 133: "the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions."

21 That section reads as follows: "The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof." *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c.3.

22 Section 4 of the *Parliament of Canada Act*, R.S.C. 1985 c. P-1, reads as follows:

> The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise
>
> (a) such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and
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> (b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

23 *New Brunswick Broadcasting*, *supra* note 19 at para. 118. See also *Gagliano v. Canada (Attorney General)*, 2005 FC 576 at paras. 64-82 (CanLII).

24 *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 29 (CanLII).

25 *House of Commons Debates* No. 034 (27 April 2010) at 2043.

26 *Ibid*.

27 *Ibid*.

28 John Locke, "Of Prerogative" (The Second Treatise, ch. XIV [1690]) in C.B. MacPherson, ed., *John Locke: Second Treatise of Government* (Indianapolis: Hackett, 1980) at 83-88.

29 *House of Commons Debates* No. 021 (31 March 2010) at 1227 (Hon. Rob Nicholson).

30 Justice Minister Nicholson told the House that "The release of at least some of this information would clearly undermine the safety of Canadian officials working in Afghanistan. Information about when and how Canadian officials visit a particular prison, for instance, would be of great value to the insurgents and to the terrorists. They could use this knowledge to attack our monitors and free the detainees." *House of Commons Debates* No. 128 (10 December 2009) at 7882.

31 Hon. Jim Abbott, Parliamentary Secretary to the Minister of International Cooperation, *House of Commons Debates* No. 128 (10 December 2009) at 7878.

32 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at 424, quoted in *Black v. Canada (Prime Minister)*, 2001 CanLII 8537 (ON C.A.), 199 D.L.R. (4th) 228 (Ont. C.A.) at para. 25 [*Black*].

33 *Black*, *ibid*. at para. 27.
34 *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paras. 34-37 (CanLII).
35 *Vancouver Island Peace Society v. Canada*, 1993 CanLII 2977 (F.C.), [1994] 1 F.C. 102 at 141, quoted in *Khadr v. Canada (Attorney General)*, 2006 FC 727, [2007] 2 F.C.R. 218 at para. 92 (CanLII).
36 *Black*, *supra* note 32 at para. 46.
37 *House of Commons Debates* No. 121 (31 March 2010) at 1227.
38 *House of Commons Debates* No. 034 (27 April 2010) at 2043.
39 *Ibid*.
40 Milliken stated: "the procedural authorities are categorical in repeatedly asserting the powers of the House in ordering the production of documents. No exceptions are made for any category of government documents, even those related to national security." *Ibid*.
41 Thomas Hobbes, *Leviathan* (Oxford World's Classics, 1998 [1651]) at 121.
42 The likelihood that this man would suffer from the same failings which Hobbes attributed to humanity in general – greed, ambition, irrationality – does not seem to have bothered him. Locke was less sanguine: "he that thinks that absolute power purifies men's blood, and corrects the baseness of human nature, need read but the history of this, or any other age, to be convinced of the contrary." Locke, s*upra* note 28 at 49.
43 Judicial power receives surprisingly little attention in the literature, apart from Alexander Hamilton's contributions to the Federalist Papers. The separation between legislative and executive power in the British model has never been absolute, insofar as the Crown is an integral part of the legislative branch.
44 Locke, *supra* note 28 at 69-70.
45 Charles de Secondat, Baron de Montesquieu, "The English Constitution" (The Spirit of the Laws, Book XI, ch. VI [1748]) in Melvin Richter, ed., *Montesquieu: Selected Political Writings* (Indianapolis: Hackett, 1990) at 182.
46 *Ibid*. at 187-188.
47 James Madison, "The Federalist No. 48" in J.R. Pole, ed., *The Federalist* (Indianapolis: Hackett, 2005 [1788]) at 269.
48 *Ibid*. at 268.
49 James Madison, "The Federalist No. 51" in J.R. Pole, ed., *The Federalist* (Indianapolis: Hackett, 2005 [1788]) at 281.
50 *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47, [2002] ACD 6 (BAILII) at para. 62.
51 *A and Others v. Secretary of State for the Home Department,* [2004] UKHL 56, [2005] AC 68 (BAILII) at para. 96.
52 *Reference re Secession of Quebec*, [1998] CanLII 793 (S.C.C.), [1998] 2 S.C.R. 217.
53 In this context, it is interesting to reflect on the similarities between the judicial function and the job of the Speaker – as Canada's Chief Justice has done: Beverley McLachlin, "Reflections on the Autonomy of Parliament", *Canadian Parliamentary Review* 27:1 (Spring 2004) 4.
54 "Memorandum of Understanding" between the Rt. Hon Stephen Harper, the Hon. Michael Ignatieff, and Gilles Duceppe (15 June 2010), at 1, online: CBC.ca <http://www.cbc.ca/politics/insidepolitics/2010/06/memorandum-of-understanding-on-the-afghan-detainee-documents.html>.
55 Sir Peter de la Mare was chosen in early 1376 to express the Commons' concerns to King Edward III on its behalf. Because the King was frail and sick, de la Mare met with his oldest surviving son and regent, John of Gaunt, and told him bluntly that the King must rid himself of his "evil counsellors" if he wanted Parliament to approve any more taxes. The worst offenders were duly tried in the Lords, impeached, and banished. Ann Lyon, *Constitutional History of the United Kingdom* (London: Cavendish, 2003) at 105-106.
56 C.E.S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987) at 122.
57 *House of Commons Debates* No. 034 (27 April 2010) at 2043.