

Paul G. Thomas, Can a More Effective and More Legitimate Senate Be Designed Without Touching the Constitution? A Paper prepared for the Conference on Senate Reform, Faculty of Law, University of Ottawa, January 28, 2015

## **I) Introduction**

To state that the Canadian Senate suffers from a poor image and reputation qualifies as a gigantic understatement. Since its creation back in 1867, the institution has always been assessed critically by most politicians, including MPs, premiers, and even Senators, as well as by many members of the media, think tanks, academic commentators and the public.

The list of complaints about the Senate is long and long standing. It starts with the fact that the Senate is one of the few upper legislative houses in a western democracy that remains appointed rather than elected, something that is seen by many to be a constitutional anachronism in the 21<sup>st</sup> century. Most of the other complaints flow from this perceived lack of democratic accountability and legitimacy.

Other complaints about the Senate include: smaller provinces and regions are drastically overrepresented; appointments are made on the basis of past and anticipated future service to the governing party, regional representation is overridden by partisan loyalty, Senators on the government side refuse to challenge the Prime Minister and Cabinet on legislation, spending and other executive actions, the Senate and its committees do not provide adequate scrutiny of departments and programs and the Senate does little to uphold minority rights. The fact that many Senators have corporate connections led one academic to describe it as a ‘lobby within.’ Other critics point to the light workload, generous compensation and perks paid to Senators.

The recent scandal involving expense abuses by Senators served to galvanize and reinforce these criticisms. The book *Our Scandalous Senate* (2014), by J. Patrick Boyer, a lawyer and former MP, offered the following damning description of the Senate as: “a time trapped oasis of contentment, a body undeserving of a place in contemporary Canada, puzzling to us for ever existing, a hollow shell bereft of real purpose, a legislative assembly devoid of meaning, contributing nothing but costing us abundantly” (p.142). According to Boyer the Senate has lost its roles as a regional body, as a source of sober second thought on legislation and as a source of policy review and innovation to other more capable, credible institutions within the national policy process. Since constitutional amendment to create a more effective Senate is next to impossible, he argues for a national referendum on abolition that would force politicians to jettison a useless, expensive institution.

Support for abolition has grown among Canadians over the last decade. In June, 2006 a national poll found that 44% of respondents favoured an elected Senate, 31% favoured abolition and 25% favoured the proposal from Prime Minister Harper that Senators serve

eight-year terms rather than to the age of 75. In July, 2011 an Angus Reid poll found that 70% of respondents favoured Senate reform of some kind and 34% favoured abolition. By July, 2013, some 41% of respondents favoured abolition, a higher percentage than those who favoured the election of Senators. All these percentages have to be interpreted cautiously because other more academic surveys indicate that a significant percentage of Canadians have only limited knowledge of the most basic features of the constitutional order, including the roles powers and activities of the Senate. (Milner, 2002, 2010) It is also the case that public evaluations of institutions can shift significantly in response to short-term events.

While their opinions may lack a strong foundation in terms of knowledge, most members of the public have come to accept the prevailing negative stereotype of the Senate. As I have argued elsewhere, the stereotype contains some truth, but it also involves simplification, omissions, inaccuracies and exaggeration. (Thomas, 2008, 2003, 1992). More evidence needs to be gathered but I would argue that the Senate does more useful work than is popularly imagined. It is not a total failure as a regional voice. Its membership includes many talented, experienced, hard working individuals who earn their pay and other benefits. Under favourable circumstances the Senate can have subtle, modest, often indirect, longer term influence on policy and administration in ways that cannot be easily and validly measured by crude indicators like the number of bills blocked or amended. With more refined qualitative measures it might be possible to demonstrate that the Senate (especially its committees) serves as a forum for the identification and promotion of policy ideas that over time become part of the policy agenda of governments. Of course, it is always difficult to determine whether amendments to bills or changes to programs represent second thoughts by ministers, were already being considered within the public service, or moved on to the policy agenda because of the demands of pressure groups.

To a limited extent the Senate has adapted internally to the more complicated, turbulent and demanding policy environments of modern government. It could have done much more in this regard, especially if there had been more support from successive Liberal and Conservative governments. Instead, governments have increasingly sought to control the Senate, have insisted on the hasty passage of bills (increasingly bills of the omnibus variety), have discouraged certain types of policy investigations by Senate committees and have ignored reports from those committees.

Abuse of the Senate by governments, along with its presumed lack of democratic credentials and the almost non-stop barrage of criticism of its members and their work, appear to have created over time a culture of dependency, deference, compliance and lack of assertiveness within the institution. Anticipating a theme to be developed below, requirements for a reformed Senate will involve not only constitutional and institutional changes, but also cultural changes in the beliefs, attitudes and practices of governments, as well as among Senators. It is an open question whether constitutional/institutional reforms must precede and drive cultural change or whether there must be cultural change before meaningful reforms become politically feasible.

Given that the Senate is first and foremost a political body, there will always be controversy over its role, composition, activities and overall performance within the political system. There are undoubtedly significant constitutional and political limits on the types of reforms that can be introduced but we are not forced, as Prime Minister Harper has claimed, to accept the status quo. The goal should not be to design the perfect Senate. Instead we need to think about how to make the Senate more effective and more legitimate.

Would-be reformers should be humble and cautious about making claims for their redesign proposals because there are very real limits on our understanding of how particular reforms will interact with other changes taking place within the political system. The process of reform cannot be like calibrating dials to obtain a Senate with just enough authority and legitimacy to perfectly complement the roles of other institutions like the political executive, the House of Commons, the provincial governments and the courts. More incremental, evolutionary and experimental improvements should not be dismissed as unimportant if they enable the Senate—which is not going to disappear any time soon—to contribute more to the national policy process, to the operation of the federal system and to Canadian democracy.

The remainder of this paper is organized into four sections. Section II presents a brief discussion of the meaning of the terms “effective” and “legitimate” found in the title of the paper. Section III identifies four approaches to changing the Senate in order to improve its performance and support for its role within a balanced constitutional order of governing at the national level. Sections IV through VII offer a critical examination of each approach. In conclusion the paper argues for realism about what reforms are likely to be acceptable given the power structure within government at the national level. The paper also emphasizes the uncertainty and unforeseen potential consequences of certain reforms. Finally, it argues that reforms which are politically acceptable will likely lead to modest improvements to the effectiveness and legitimacy of the Senate.

## **II) Two Contentious Concepts at the Center of the Senate Reform Debates**

The attacks on the present Senate tend to use rhetorical, emotional language that simplifies and distorts the issues involved with possible reforms. For example, the critics dismiss the Senate as ineffective and illegitimate, but seldom spend any time explaining how these concepts are defined and measured.

The effectiveness of an institution refers to the degree to which it fulfills the aims or purposes for which it was established. This is not the same as efficiency, although the terms are often used interchangeably. Efficiency refers to the accomplishment of purposes through the productive use of resources such as people, time and money.

In evaluating the Senate and in designing possible reforms from an effectiveness perspective, we encounter several problems.

First, over time multiple purposes have been ascribed to the Senate—to serve as an outlet for the expression of provincial/regional opinion, as a source of sober second thought on legislation, as a protector of minority rights, as an independent source of policy/program review and as a curb on prime ministerial power in an unduly centralized policy process. In practice these multiple purposes may be in conflict and tradeoffs among the various purposes will be required when designing an effective Senate for the future. There will never be a perfect Senate that can serve all purposes equally well and meet the expectations of all the political actors who have a stake in the institution.

Second, effectiveness can clash with efficiency in the operation of the Senate. Both Liberal and Conservative governments have tended to take the Senate for granted, applying an efficiency definition which means processing government business promptly and not causing any major political controversies.

Third, there can be legitimate debates over what constitutional and institutional changes would be necessary to make the Senate an effective legislative body in terms of such purposes as regional representation, legislative review and more scrutiny of the performance of government performance. During the decades of the 1980s and 1990s advocates of a triple E Senate defined effective as synonymous with strong formal powers, including the power to block the legislative and spending proposals of governments. Such a veto was meant to prevent what were seen as “bad policy decisions” like the National Energy Program. Opponents of triple E argued that such a veto would challenge the concept of a strong initiating executive that had been central to the Canadian parliamentary tradition. It would make the Senate a rival to the House of Commons in terms of holding governments accountable, could lead to deadlocks in the parliamentary process, and could allow the Senate to determine the timing of elections. An alternative approach to effectiveness, would avoid these risks by granting Senate enough authority to exercise the “soft power” of influence rather than the “hard power” of vetoes. In other words, the Senate would be given sufficient authority and support, especially from governments, to enable it to temper or restrain the use of majority power found in the House of Commons, without risking deadlock.

In the past and in the future presumably, both the real and the perceived, effectiveness of the Senate will depend on more than just the constitutional authority that it possesses. It will also be affected by a wide range of factors, both external and internal to the institution, such as: the changing characteristics of the party system, the dynamics of the federal system, the impacts of the electoral system, the volume and types of issues on the agenda of government, the attitudes and practices of government, especially the prime minister towards the Senate, the quality of people serving in the institution, its internal organization and procedures and the resources that it possess. As is discussed below, only some of these factors can be designed and controlled with predictable results. With respect to claims about how to design a more effective Senate, a measure of humility and caution is well advised.

The second concept of legitimacy has been the subject of much debate among normative theorists in political science. Legitimacy is shown to be a complex phenomenon that

potentially arises from a number of sources, including constitutional, legal, political, and social circumstances. Most often those debates have focused on the legitimacy of the entire state apparatus, not on the legitimacy of a single institution.

For purposes of this paper, legitimacy is used to describe the public's understanding and acceptance of the validity of the rules of the political system, the roles of the various institutions that comprise the system, the procedures followed in reaching decisions and the appropriateness of the content of those decisions in terms of being consistent with widely held (though not necessarily universally endorsed) values within society.

From this definition it should be noted that there is both a substantive and a procedural aspect to legitimacy. Substantive legitimacy refers to the actions of an institution being compatible with widely held values within society. Procedural legitimacy arises from conformity to constitutional norms and the procedural requirements of the political system. Of course, how decisions are reached often affects the acceptability of the content of the decision. In the competitive and adversarial world of partisan politics, high octane rhetoric and emotional language is often used to label particular actions as illegitimate.

It is also the case that an institution that is seen as woefully ineffective will presumably over time lose legitimacy, however it appears that serious under performance will be tolerated by the public for long periods before melodramatic language like a "crisis of legitimacy" is warranted to describe a situation. Finally, objective facts can provide basis for legitimacy, but there is also a crucial element of communication, perception and group psychology involved.

Responses to several questions in an opinion survey are unlikely to capture the full meaning and significance of the concept of legitimacy. Both popular and elite opinion would have to be considered in assessing what is legitimate in the political domain. Public opinion surveys measure shifting levels of political support for institutions, their actions and the outcomes, both real and perceived, within society, But given the limited knowledge of many members of the general public, it is necessary to supplement such survey data with opinions of more informed observers such as public officials, journalists and academics in order to produce a more complete, balanced measure of legitimacy (Russell, and Sciara, 2006). Over time levels of support for and the legitimacy of institutions fluctuates in response to long term trends and short –term events within the political system.

When debating the future of the Senate, it is widely assumed that the only way the institution can gain greater legitimacy is to become an elected body. Low levels of public trust and confidence in the Senate recorded in opinion surveys is said to confirm a lack of legitimacy. Only a couple of comments on these arguments are possible in the space available here.

First, it should be noted that, despite being elected, the House of Commons is often accused of lacking legitimacy, especially when the simple plurality electoral system produces majority governments on the basis of popular vote support below 40 percent.

Second, other appointed bodies, such as the Supreme Court and regulatory agencies, have traditionally enjoyed much higher levels of credibility than either the Senate or the Commons; a fact which suggests the method of selection of officeholders—election versus appointment-- is not the only basis for gaining legitimacy. Courts and regulatory bodies are seen as more legitimate because of their greater independence from the political process, the qualifications of their members and the image that they always engage in objective, evidence-base decision-making. Recent political attacks suggesting such bodies do not embody neutral competence no doubt have eroded some of their legitimacy in the eyes of the public. These recent developments offer warnings for reformers seeking to design a more credible and legitimate Senate that the task will not be easy.

With respect to the Senate, its legitimacy, or lack thereof, could depend on a number of factors: whether there is acceptance within general and elite public opinion of the reasons for its existence; the prevailing perceptions of how effectively the Senate fulfills those purposes; the regional composition of the Senate which is unbalanced in terms of population; the method of selection of Senators and the backgrounds of appointees; the actions of individual Senators who bring the institution into disrepute; and the image of the institution conveyed in the media coverage that tends to be non-existent or limited to scandals or showdowns with governments. On this last point, there is an inherent dilemma for the Senate: if it fails from time –to-time to challenge the government, it will be seen as superfluous, yet if it stands its ground it will be accused of blocking the will of the popularly elected House of Commons.

### **III Four Broad Avenues to Senate Reform**

At the risk of simplification, it is possible to think of four broad, somewhat overlapping and intersecting, avenues to Senate reform:

- Changes to the constitutional role, authority and relationships of the Senate to other parts of the political system;
- Changes to the methods of selection and the types of people elected/appointed to serve in the Senate and the terms of their service;
- Changes of leadership philosophy and operating style within government, especially by the prime minister, leading to changes to the institutional culture of the Senate, including to the informal rules of the game that create incentives and disincentives for certain types of behaviour.
- Changes to the organizational structure, procedures/rules and resources of the Senate;

These four broad categories of changes overlap and intersect in practice. In the discussion to follow, it will be shown that developing a change agenda will require a recognition and

accommodation of different political interests, values and aims of reform. Each possible category of change will affect the existing relationships and dynamics of power to a greater or lesser extent so various sources and methods of resistance can be anticipated.

#### **IV It Starts, But Does Not End, with the Constitution**

Proposals for a reformed Senate have to start with the constitutional realities and constraints which have become clearer as a result of the recent court rulings by the Quebec Court of Appeal and the Supreme Court of Canada. Other commentators, particularly constitutional lawyers, are better qualified than the present writer to comment on the details and significance of the two court decisions. Here are some points from the two rulings that I take to be germane to any discussion of non-constitutional reform of the Senate:

- Underlying constitutional principles must be used to interpret the detailed wording of the constitutional text. The Senate is a fundamental component of the federal compromise of 1867;
- The Senate is not simply a mirror of the House of Commons. A popular mandate, derived from the election of Senators, would not be compatible with the Senate's complementary role as a legislative chamber of second thought;
- Canada is a federal country and the principles of shared power apply to the processes of change to national political institutions. Parliament alone cannot amend those parts of the federal structure that affect the interests of the provinces;
- The constitutional amending formula requiring approval by seven provincial legislatures representing 50% of the national population is required for changes to four features of the Senate: its powers, the method of selection of Senators, the number of Senators per province and the residence requirements for eligibility to serve in the Senate;
- Abolition of the Senate would require unanimity among provincial legislatures.

According to Prime Minister Harper, the court rulings mean that we are stuck with the status quo and his government will not proceed further with the plan for advisory elections at the provincial level to choose potential nominees for Senate positions and the adoption of nine-year terms.

Clarification of the constitutional amendment rules undoubtedly means that fundamental changes of the type discussed in previous rounds of Senate reform debates would require a highly fortuitous combination of political circumstances to be considered by governments, let alone successfully adopted. There may still, however, be the potential for agreement on narrow, more technical changes, such as the property qualification for Senators.

It is also necessary to remember, as the courts pointed out, that the constitution is a blend of law and politics, with the political portion consisting of long standing, mainly unwritten conventions that are accepted to varying degrees as binding by political actors. Constitutional conventions can be recognized, but are not enforceable by the courts;

remedies for violations must occur instead through the political process. There may be opportunities for improvements over time to the appointment process and functioning of the Senate as a regional body through the development of new conventions.

### **V A Better Selection Process**

On January 29, 2014, Liberal Party leader Justin Trudeau announced a new approach to Senate reform that would address “two central problems: partisanship and patronage”. As an immediate step towards “ending partisanship”, he announced the expulsion of 32 sitting Liberal Senators from the parliamentary caucus while simultaneously announcing his support for a more open and non-partisan appointment process, the precise details of which were to be developed in consultation with experts. In general the new process would be informed by existing approaches to the appointment of Supreme Court Justices and Order of Canada recipients. The discussion here will focus on an end to patronage in appointments, while the matter of creating a non-partisan Senate will be discussed in Section VI that deals with the institutional culture of the Senate.

Within days of the Supreme Court ruling on the Senate reference, constitutional law Professor Hugo Cyr (2014) wrote in the *Toronto Star* that Trudeau’s plan, if it was to be meaningful, would require a constitutional amendment. Cyr cited the Court’s comment that the entire process of selection of Senators, not just the formalities of prime ministerial recommendations to the Governor General, fell under the scope of the 7/50 amending formula. If a new plan created the expectation that the prime minister would be bound by the recommendations of a selection committee, Cyr concluded, a constitutional amendment would be required. Other constitutional law experts, like Professor Peter Russell, cited examples of other appointment processes to argue that the Court ruling was not so limiting in its impact on the freedom of a prime minister to seek advice on potential nominees.

For several reasons I tend to side with the latter argument. The main reason is that I believe the Court would see consultative elections at the provincial level to identify a list of nominees as different from seeking advice from a council of distinguished citizens. As part of the appointment process in general, prime ministers have always been free to accept advice from whatever source they deem most appropriate. The consultative election method, however, creates far greater public pressure on the prime minister to forward the names of election winners to the Governor General. There would probably be a constitutional challenge to any new selection process, but success before the courts would depend on how that process is established and its operational features.

In broad, general terms there is a dilemma involved in designing a new selection process. On the one hand, any selection process must be credible in order to avoid the perception that it is a smokescreen for continuing political favouritism in Senate appointments. An informal, non-statutory, non-binding advisory process may not, at least initially, be credible with a suspicious media and public who are unwilling to grant political leaders credit for acting with honest intentions. On the other hand, any process that involves



legislation and guarantees that the names of recommended nominees will automatically be forwarded to the Governor General may not pass constitutional muster.

Some inspiration for a possible path forward might be taken from the example of the creation in the UK of the Appointments Commission back in 2000. Immediately it must be said that the UK political system differs in several important respects from Canada, most notably the historical fact of federalism in this country, so lesson drawing from overseas must obviously be done carefully (Levy, 2014). Back in 1999 the Wakeham Report on reforming the House of Lords had recommended, among other things, the creation of an appointments commission on a statutory basis. Instead the commission ended up being created by the prime minister based on his authority over the executive machinery of government. The commission has become a fixture in the UK constitutional order, despite its non-statutory basis of existence. Its advice to the prime minister is confidential. All prime ministers regardless of party have declared publicly that they will only decline to recommend commission nominees in exceptional circumstances. Far more detailed analysis of the UK experience is necessary to support a fully informed judgment, but the case suggests that a set of constitutional conventions have arisen in response to the original decision by the prime minister to adopt a less partisan appointment process.

In a similar manner, the Trudeau initiative could set the stage for the establishment of new conventions respecting Senate appointments. The prime minister's role, including the process for making appointments, is based largely on convention and if a new process works well, it could harden into a constitutional convention.

There is a certain lack of clarity and controversy over how constitutional conventions emerge and become recognized as binding. The accumulation of precedents over time is the most usual way for conventions to be established, but formal agreement among political actors at one point in time is another possible avenue for the creation of a new convention on how Senators ought to be appointed. Achieving the greatest understanding and widest consent possible for a new convention is important because ongoing political controversy over the constitutionality and legitimacy of new procedures may undermine their effectiveness in restraining prime ministers of the future and in winning public support.

Moving beyond agreement in principle to end patronage, arrival at a broad consensus on the design of new selection process will require answers to a host of questions, such as:

- Should the prime minister alone appoint the selection body or should opposition party consent be involved?
- Should there be one selection body or perhaps a core membership with members when vacancies occur in each province?
- What criteria should be given to the selection body to guide its recruitment and advisory process?

- How should the selection process engage with Canadians to identify nominees with appropriate backgrounds, knowledge and skills to add value to the national policy process?

It would be helpful if constitutional lawyers and political scientists could tell a selection body how the constitutional functions of the Senate, its powers and its composition should be aligned to achieve maximum effectiveness in terms of performance and greater legitimacy for its efforts. I would say that unfortunately we lack the knowledge to make such precise calibrations. Even seemingly minor, incremental changes to a particular institution can have unforeseen consequences within the interdependent parts of the political system.

## **VI Changing the Institutional Culture**

By his removal of Senators from the Liberal caucus, Mr. Trudeau has already precipitated a process of cultural change within the Senate. Without offering a lengthy discussion of potential components of culture, let me simply declare that culture consists of shared understandings based on experience about how things are done within an institution.

A strong shared culture takes time to develop. Cultural change tends to be a slow, evolutionary process that is difficult to foster in a planned deliberate manner. This is especially true of an institution like the contemporary Senate that has become in the last few decades more partisan and confrontational, making the creation of unified identity and culture far more difficult to achieve.

Mr. Trudeau's announced goal was "to end partisanship in the Senate." Not only would this respond to public cynicism, he argued, it would also allow the Senate to do a better job of representing regional concerns, reviewing legislation and conducting independent policy studies. In the current anti-politics mood within the country, fuelled by the recent Senate scandal, the idea of eliminating partisanship was bound to be well received. It has served the useful purpose of opening up debate about how to obtain greater value from the Senate.

In my view the elimination of partisanship from the Senate is neither desirable nor possible. If by partisanship Mr. Trudeau meant excessive control over the Senate by the prime minister and the PMO, then I support the aim of curbing such influence.

If he meant a reduction in the more adversarial, negative and theatrical tactics that dominate the culture of the Senate at certain times, then I would favour that as well. Opinion surveys tell us that a large majority of Canadians are fed up with mindless, emotional partisan attacks on political opponents and their ideas. They would like to see a more evidence-based, constructive type of partisanship exhibited by MPs and Senators.

In defense of partisanship, I would offer the following condensed comments. The Senate is first and foremost a political institution whose identity and culture reflects the wider cabinet-parliamentary system of government and the fundamental nature of competitive, partisan politics. Organized political parties are central to that system of government.

They perform a series of essential tasks and provide the energy that drives the system. In the most general terms, debates within political parties ideally serve to identify and to aggregate diverse values and interests found within society into a broad agenda of policy ideas for the future direction of the country. By presenting these ideas to the electorate, and in office acting in a cohesive manner to implement them, parties focus responsibility and accountability. No one would claim that they do this in anything like a perfect manner.

Even in supposedly non-partisan political systems, like most municipal governments, like-minded people in elected office form groups and agree to policy approaches in order to move ideas into practice. Sitting in proximity to one another, participating in meetings together and maintaining political friendships will mean that Senators who were formerly in the Liberal national caucus will continue to think “liberally” and to take cues from Liberal colleagues on how to interpret issues that are not within their area of expertise.

Parties and partisanship are integral to political life. It is not partisanship per se that is the problem, but rather how it has been practiced, especially in recent decades when a more vitriolic, win-at-all cost type of partisanship has gained ascendancy within the upper house. On some issues where fundamental value differences exist, partisanship is appropriate. However, on many challenges facing contemporary governments, ideological perspectives offer little or no guidance. The aim should be promote a more selective reliance upon partisanship and to make that partisanship more positive and constructive rather than mainly negative and all about blaming.

As I have argued in previous research studies, partisanship is not always antithetical to the expression of regional concerns within the Senate. (Thomas, 1991). In that study I also argue that the primary regional role of the Senate is to represent the diversities and concerns of provincial societies in the national policy process. It is not the first and foremost job of Senators to represent the institutional concerns of provincial governments who have the organizational capacity and other channels of representation, such as federal-provincial conferences, the use of the courts to arbitrate inter-governmental disputes over jurisdiction and easy access to the media, to broadcast their complaints about actions and inactions of the national government. Instead the Senate should serve to strengthen and amplify regional voices in relation to national laws and programs that are seen to have negative impacts on segments of provincial societies. Often these concerns will also be supported by actions of provincial governments.

In the past when the governing party lacked balanced regional representation within the Commons Senators have assumed a more visible role as regional spokesperson. When more ministers from the Senate were part of cabinet, it meant there was at least the potential for regional voices to be heard at the center of the governing process. Unfortunately for the reputation of the Senate, the confidentiality of cabinet and caucus processes meant that the media and the public never saw regionalism in action so they presumed the worst. Now that Prime Minister Harper has dropped the practice of appointing the Government Leader in the Senate to cabinet and Mr. Trudeau has barred

former Liberal Senators from national and regional caucuses, those voices will not be heard directly in forums where policy and political matters are being discussed.

On the Senate's roles as a chamber of 'sober second thought', Professors Lawlor and Crandall (2013) provided an interesting longitudinal analysis for the 34<sup>th</sup> to 40<sup>th</sup> Parliament (1988-2011) of the tendency of the Senate to amend bills previously passed by the Commons. Their main finding was that the Senate amended relatively few bills. They detected no discernible trend in terms of frequency of amendment over the period under study, but they did identify a number of hypotheses about factors that might affect the inclination to attempt amendments. For example, they discovered a greater tendency to amend bills dealing with law and crime and with government operations. They also emphasized that talking about the Senate as a unified body for legislative review is misleading because certain committees, especially the Standing Committee on Legal and Constitutional Affairs, do the bulk of the work of detailed scrutiny of bills.

As suggested earlier the frequency of amendment of bills is an incomplete measure of the potential policy impacts of the Senate. It ignores more submerged process of influence such as the rule of anticipated reactions by ministers who sense they will have trouble passing legislation unchanged based on informal soundings of opinions in caucus and the Senate. It is also important to note that the limited creativity of the Senate in terms of proposing amendments could be due to a number of other factors, such as:

- Control, pressures and potential sanctions by the prime minister, the PMO and party whips;
- Psychological bonds of party loyalty rather than threats of discipline
- the belief among Senators that it is illegitimate to challenge the popularly elected House of Commons;
- better drafting within government, including the process of "Charter proofing" bills by justice officials;
- less time and resources within the Senate to do a thorough job;
- less capacity and commitment among Senators to the difficult task of legislative review.

If, over time, a new appointment process produced fewer Senators with backgrounds in "politics" and little experience with the "give-and-take" of lawmaking, the sober second thought process in the Senate might become even less important. There could also be a need for a greater orientation and "training" for new Senators who are subject matter, not process, specialists in their previous lives.

It is in relation to policy studies by Senate committees that Senators have been most willing to adopt a more non-partisan approach. For such studies there is not a government bill and the reputation of a minister at stake. At times the government is genuinely looking for advice. Often the topic involves issues that will arise in the intermediate future rather than immediately. The relative continuity of the membership of the Senate and its committees compared to the House of Commons has facilitated the adoption of longer-term perspective and enabled the development of greater policy expertise among Senators. Working together over time on a topic allows for shared understandings, trust and friendships to develop and Senators relate more to the evidence than to partisan

positions. The reports of Senate committees on health policy, national defence and security and the evaluation of departments and programs are examples of committee studies that have garnered praise. It is easy to dismiss such reports as the product of busy work that leads nowhere because governments do not act immediately on the recommendations, but this ignores the potential longer term influence on policy thinking.

For the future a broad political compromise might be proposed between the understandable demand of governments to have their legislative business completed expeditiously and the important role of challenge and scrutiny that the Senate can perform, especially through a more active and autonomous committee system. The compromise would start with recognition that in any session only a small number of bills are the subject of strong partisan disagreement. Accordingly the Senate rules should be tightened to prevent undue delay on most bills. In return for this benefit, governments should allow Senate committees more freedom to poke and pry around in subjects of their choosing and to take the reports from such committees more seriously, perhaps by a requirement for a formal response within a specified time period.

## **VII The Structures and Rules of the Senate**

Although we have left them to last here, the structure and rules of legislatures are often where would be reformers begin if they wish to enhance the role of the legislature within the policy process. In some ways this is understandable. Tinkering with structures and rules is seen as technical and more easily accomplished because fundamental issues of balance between the executive and the legislature do not usually arise beyond the boundaries of the institution itself. Unfortunately, for reformers structural and procedural changes tend to have marginal impacts because they reflect and operate within the context of a wider set of power relationships.

Official sources state that the structure and rules of the Senate exist to enable the completion of its business in an efficient and effective manner. There is a presumed balance in such arrangements: between the interests of the government in the efficient processing of its legislative and spending proposals and the assigned role of the Senate in providing debate, review, scrutiny and accountability. In the more partisan and polarized Senate of recent decades there is a greater tendency to regard structures and rules as political weapons that governments and oppositions use to gain political advantage.

This not the place and I lack the detailed knowledge, to prescribe structural and procedural changes in detail. Some general ideas worth considering include:

- develop a procedure for electing the Speaker;
- grant the Speaker more authority to balance majority and minority rights within the chamber;
- allow the Speaker to order the splitting of omnibus bills;
- create more autonomous committees, through such procedures as a selection committee to appoint and remove members, elections for chairs, provision for minority reports, a requirement for government responses to reports etc.

- create a Standing Committee on Regional Affairs, with a large membership that operates mainly through four subcommittees covering the Atlantic, Quebec, Ontario and Western regions.

Over the years, but with increased frequency during 2014, there have been motions and debates on the need for internal Senate reforms. Such “former Liberal” Senators as Jim Cowan, Terry Mercer and Pierrette Ringuette have offered ideas for change. For the Conservatives, Senators Andreychuck and Nolin (both appointees from the Mulroney era) have engaged in the debates, but the 59 Senators nominated by Prime Minister Harper since 2006 have been committed to the consultative election plan. With the prime minister having declared that the country is “stuck with the status quo” it will be interesting to see how many of the Harper era appointees exhibit an interest in improving the effectiveness and legitimacy of the Senate without touching the constitution.

## **VIII Conclusions**

The paper identified four avenues for reform of the Senate.

The greatest impact on the effectiveness and legitimacy of the Senate would be achieved through constitutional amendments but both legal and political constraints make that option next to impossible for the foreseeable future.

Structural and procedural changes to the existing Senate are the focus of contemporary reform efforts and some interesting ideas are in circulation. Changes on this level are easier to accomplish, but their impacts on the image and reputation of the Senate are likely to be at best marginal. Such changes do little to change the structural components and dynamic of prime ministerial dominance of the policy process, even if that dominance is not as great as labels like one-person rule imply. Also, structural and rules changes will be little noticed outside of the institution. On the other hand, marginal improvements should not be dismissed as unimportant because they may temper the strong majoritarian bias of the House of Commons.

A new process for the appointment of Senators might add to the credibility of the institution over time. If it became more difficult to dismiss appointments as patronage for political hacks (this would still happen), the public might have a less negative view of the institution. Also, Senators with more confidence in their credentials as legitimate public officials might have greater willingness to engage in independent review of legislation and scrutiny of programs.

The Senate will remain an institution whose fundamental purposes are political in nature. It would be wrong to aim for a senate membership consisting solely of politically inexperienced individuals who have no past or present affiliation with a political party. A mixed membership comprised of a majority of Senators with political backgrounds along with other members having diverse social backgrounds and no strong partisan attachments would seem to be the ideal combination for an effective Senate.

Past partisan activity should not disqualify someone from serving in the Senate. People with first hand experience of the political process have knowledge and skills relevant to serve effectively in the Senate. Politicians with previous experience understand the process of representation first hand. They understand that politics and lawmaking involves give and take and the capacity to find a consensus. The best among them have learned to read public opinion, to understand the perspectives of others, and to recognize how far other actors can be moved in order to identify common ground. They accept that not all good is on the side of their party and all bad resides with their political opponents. They take defeat in stride and recognize that they will need to work with their opponents on other occasions. No doubt this description of the attributes of “good politicians” will seem naïve and idealistic to ultra realists in political science and to cynical observers within society at large.

Changing the culture of the Senate in the direction of a more selective, moderate type of partisanship will depend greatly upon leadership from the prime minister and from leaders on all side of the Senate. A new appointment process and new appointees can be levers to achieve cultural change, as can structural and rule changes. By its inherent nature, however, the culture of an institution is difficult and slow to change. It is during periods of intense partisanship that the espoused values of a more effective, constructive Senate will be most tested.

Canadians are disillusioned with politics and politicians. They are fed up with mindless partisanship and games playing in legislatures. This wider malaise spills over on to the Senate, which has its own serious deficiencies as a democratic body. Reforms may improve marginally the image of the Senate but it will take time and demonstrated good works to change the widely held view that the upper house adds value to the policy process comparable to the costs of maintaining the institution.

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