CONSTITUTIONAL CONSTRAINTS: A CASE AGAINST SENATE REFORM IN CANADA

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In the wake of Prime Minister Stephen Harper's appointment of three defeated Conservative candidates to the Senate in May 2011, arguments for Senate reform continue to generate political discourse. Apart from the political obstacles that confront the issue of Senate reform, significant constitutional realities cannot be overlooked. In the winning entry for the *Policy Options* Constitutional Affairs Essay Competition, University of Ottawa common law student Alexander Wilkinson argues that "constitutional constraints make meaningful Senate reform an unfeasible undertaking." By applying Harper's recent reform proposals involving Senate tenure and consultative elections to part V of the *Constitution Act, 1867*, and a Supreme Court Reference from 1980, the constitutional debate that follows prompts Wilkinson to conclude that any attempt at major Senate reform is implausible.

En nommant en mai 2011 trois candidats conservateurs défaits au Sénat, le premier ministre Stephen Harper n'a fait qu'aviver le débat sur la réforme de cette institution. Mais au-delà des obstacles politiques liés à cet enjeu, d'importantes réalités constitutionnelles doivent être prises en compte. Premier prix du Concours de dissertations sur les questions constitutionnelles d'*Options politiques*, l'étudiant en droit de l'Université d'Ottawa Alexander Wilkinson soutient ainsi que « des contraintes constitutionnelles rendent irréalisable une véritable réforme du Sénat ». Il est arrivé à cette conclusion en évaluant les récentes propositions du premier ministre sur la durée du mandat des sénateurs et la tenue d'élections consultatives à la lumière de la partie V de la *Loi constitutionnelle de 1867* et du renvoi à la Cour suprême datant de 1980.

Since Confederation, discussions about Senate reform have been a large part of political discourse in Canada. In fact, "the faults, merits, and possible alteration of the Senate were discussed even before its creation." (See *Constitutional Issues in Canada: 1900-1930,* edited by R. M. Dawson.) More recently, in advocating his plans for Senate reform, Prime Minister Stephen Harper has often quoted a 1926 book entitled *The Unreformed Senate of Canada,* which purports a necessity for Senate reform. The goal of this paper is to scrutinize the issue of Senate reform in Canada through a constitutional lens. By examining Prime Minister Harper's two recent reform proposals, this paper proposes that any significant Senate reform is unlikely to pass muster. In so doing, I argue that constitutional constraints make meaningful Senate reform an unfeasible undertaking.

The reform proposals in the 1980s and 1990s lost momentum because of the inability to make constitutional amendments, but the issue of Senate reform was revived when the Conservative Party of Canada came to power in 2006. Upon entering office, Stephen Harper underscored the importance of Senate reform. At a Senate Committee meeting in 2006, the Prime Minister cited his belief in an upper house that provides sober and effective second thought, gives voice to our diverse regions and conveys democratic legitimacy. Accordingly, the Harper government proposed two changes to the Senate dealing with term limits and Senate appointment consultations via the electorate.

The first proposal, originally introduced as Bill S-4 on May 30, 2006, was designed to limit the senatorial term in office to one nonrenewable eight-year term; after Parliament was prorogued twice, the main thrust of the Bill was re-introduced in Bills S-7 and C-19. Under the current rules, senators can occupy a seat in the upper chamber from their appointment (minimum age of 30) until the age of 75, the mandatory retirement age; therefore, a term could last a maximum of 45 years. Bills C-19 and S-7 retained the mandatory retirement age of 75 for existing senators. According to Jack Stilborn, the purported effect of this change would be to "reduce the average term from approximately 9.7 years (since 1975) to somewhat less than eight (depending on the rate of early departures among eight-year senators)."

Prime Minister Harper's second proposal involving consultative elections of senators addressed the more controversial issue of electing the upper chamber. Bill C-20, known as the Senate Appointment Consultations Act and formerly introduced as Bill C-43, established a procedure for electing senatorial candidates whereby voters would rank candidates in order of preference; in turn, the prime minister would appoint candidates to vacancies based on electoral preferences. As André Barnes noted, "[t]he premise of the Bill C-20 was that the proposed change in the method of selecting senators would remain within the ambit of the powers of Parliament, and therefore would not require a constitutional amendment." Once Parliament dissolved on September 7, 2008, Bill C-20 died on the Order Paper.

The idea of consultative elections is not a novel one. In fact, Alberta enacted its *Senatorial Selection Act* in order for direct election of candidates for the Senate. According to Neil Craik and Craig Forcese, "[o]nce selected by election, the provincial government is to submit the nominees' names to the federal government, identifying these individuals as persons who may be summoned to the Senate for the purpose of filling vacancies relating to Alberta." Despite its purpose, the law has not been respected by prime ministers, who by constitutional convention have the power to appoint whomever they want, assuming the qualifications are met. For example, Jean Chrétien decided not to summon two "senators-in-waiting" after they were elected in 1999, one of whom sued the Government of Alberta. Taken together, the proposals were directed at making the Senate more democratic and, thus, more accountable. Nadia Verelli states, "[t]he government argued that these reforms would enable the provinces and the electorate to play an ongoing role in the selection process of the senators, thereby rendering the Senate independent, efficient, effective and, most importantly, fully democratic."

Proposals for Senate reform have largely ignored the realities of this complex issue. The complexities of Senate reform are primarily related to its constitutional aspects as well as the varied political landscape across the country. In fact, the proposals from the 1980s and early 1990s were unattainable because of the difficulty posed by constitutional negotiations between the provinces. As a result, Prime Minister Harper turned to what proponents of Senate reform have deemed nonconstitutional options in the form of the two proposals outline above. Without the government's ability to engage in major reform, however, critics of Senate reform suggest that these modest changes would be largely insignificant to the stated purposes of Senate reform. In turn, the rest of this paper scrutinizes the constitutionality of significant Senate reform.

In order to appreciate the constitutional requirements that are necessary for major Senate reform, it is necessary to explain the different classes of constitutional change and what amending formula applies to each. Part V of the *Constitution Act, 1982* established a formal amending process for the Canadian Constitution, something that did not exist until 1982. There are five distinct amending formulas set out in part V that apply in different circumstances:

1. The general formula for all amendments not falling within formulas (2) through (5), which requires the agreement of Parliament and the legislatures of at least two-thirds of the provinces having at least 50 percent of the population of Canada (s. 38);
2. Unanimity of Parliament and all provincial legislatures (s. 41);
3. Parliament, and the legislatures of just those provinces affected by an amendment (s. 43);
4. Parliament alone, with respect to its own institutions (s. 44); and
5. A provincial legislature alone, with respect to the provincial constitution (s. 45).

With respect to Senate reform, different amending formulas may apply. For instance, Jack Stilborn states, "changes to the powers of the Senate, the method of selecting senators, the number of senators to which a province is entitled, or the residency requirement of senators can be made only under the general amending formula." Thus, proposals from the 1980s and 1990s would largely be at the mercy of the general formula, which makes amendments to the Constitution a daunting task. Regarding reforms addressing the terms of senators, this has been interpreted by commentators as being a change that does not require provincial consent because it is not mentioned in the amending procedures.

Before the amending formulas were articulated, questions related to Senate reform were guided by the Supreme Court of Canada's opinion in the *Upper House Reference*. The federal government asked the Court a series of questions related to whether, on its own, Parliament could abolish the Senate,

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change the method of selection of senators by providing for direct elections or by having a hybrid selection process involving both the House of Commons and provincial legislatures, and reduce the tenure of senators. In response to these questions, the Court first observed that Parliament could not act alone in abolishing the Senate because the role of the Senate as contemplated by the founders at Confederation was one that included the all-important function of representing regional interests. To the second question, the Court said Parliament could not unanimously amend the Constitution in instituting direct elections for senatorial positions since this constituted "a radical change in the nature of one of the component parts of Parliament." The Supreme Court declined to answer the final two questions because it did not have the factual context in the case of the hybrid selection process and because it was not given a specific term of reduction regarding senate tenure. While the Court declined to answer this last question, it did suggest that a "reduction in Senate tenure could affect the role of the Senate as envisaged at the time of Confederation." As a corollary, such a change might be considered a fundamental feature of the Senate, requiring provincial consent.

The combined effect of the *Upper House Reference* and the amending formulas listed in part V of the *Constitution Act, 1867* has resulted in some debate over which rule prevails. As Jack Stilborn noted, "[s]ome have argued that the written text supersedes the 1980 decision, while others argue that the Supreme Court would continue to employ its 1980 decision in interpreting the provisions of the *Constitution Act, 1982*." Since the amending formulas do not speak to term limits and other matters, the question as to whether the *Upper House Reference* applies in these situations has bothered many legal scholars. The constitutionality of Harper's most recent proposals illuminates this debate.

As was stated earlier, Bill C-19: *An Act to amend the Constitution Act, 1867* (Senate tenure) and its predecessors proposed limiting Senate terms to eight years. The constitutional question with respect to this Bill was whether Parliament could act unilaterally in scaling back the tenure of senators or whether at least seven of the provincial legislatures making up at least 50 percent of the population also had to agree. Not surprisingly, the government argued that s. 44 applied in this case, enabling it with the exclusive authority to make such a change. Proponents of this textual approach, including constitutional law expert Peter Hogg, have said that "the 1982 amending procedures now say explicitly which changes to the Senate cannot be accomplished unilaterally by the Parliament of Canada." Barring those four matters referred to above, Hogg argued that other aspects of the Senate can be changed by invoking s. 44.

On the other hand, a second approach supports the reasoning in the *Upper House Reference,* which stated that if the subject matter of reform affects the fundamental features or essential characteristics of the Senate, Parliament cannot act unilaterally. Proponents of this approach, such as the Special Committee on Senate Reform, have argued that changes to Senate tenure "could undermine a central role of the Senate in providing 'sober second thought' within the legislative process." As a consequence, provincial interests could also be negatively affected. Another argument in favour of this second approach considered the effect of fixed, eight-year terms in the Senate, which would mean that "a government would only have to win two successive majorities in order to have the opportunity to recommend the appointment of every single senator, probably from its own party." Although the Constitution does not address this particular circumstance, the Senate would undoubtedly become a partisan body in lieu of representing regional interests. Others have said that the constitutionality of Senate tenure reform is a question of degree. In other words, said the Special Committee on Senate Reform, "it is a matter of degree whether a reduction of Senate terms would affect an essential characteristic of the Senate, and thus require the more complex amending formula in section 38(1) of the 1982 Act." For example, a one-year term would surely require the general amending formula.

Harper's second proposal involving consultative elections as set out in Bill C-20 also raised constitutional doubts. Professor Andrew Heard states that proponents of C-20 argued that the Bill did "not disturb the relevant provisions of the *Constitution Act, 1867*, and therefore [did] not require a constitutional amendment." More specifically, the argument in favour of the proposed legislation was that in serving only an advisory purpose, C-20 would not actually constitute an alteration to the selection procedure and thus no constitutional amendment would be needed. Yet another argument for the constitutionality of the Bill has been that because it did not provide for the direct election of senators, it would have allowed the Governor General to retain his or her legal powers and discretion under sections 24 and 32 of the *Constitution Act, 1867*. In other words, the consultative element of these elections would not mean a change in the method of selection of senators. As with Alberta's *Senatorial Selection Act,* proponents have claimed that Bill C-20 would not invoke a legal obligation on the prime minister to appoint the senatorial nominees chosen in these elections.

In contrast, opponents of Bill C-20 have suggested that the measures introduced meant changes to the method of selecting senators, thus requiring constitutional amendment under the general amending formula. Much like the opponents of Bill C-19, those who raised constitutional doubts about Bill C-20, as Heard did, held that the *Upper House Reference* "still stands and that the election of Senate nominees amounts to an invalid scheme to create an elected Senate." In response to the argument that the prime minister has no legal obligation to appoint the candidates elected, critics of C-20 pointed out that the difference between these elections and those enacted by provincial

Senate of Canada photo

Senate reform remains on Stephen Harper's agenda, but there are serious constitutional obstacles in the way.

legislatures, like Alberta, was that the Parliament of Canada was playing a role here, giving the proposed legislation much more clout. Moreover, Heard has argued that "the Supreme Court is highly unlikely to endorse the view that a prime minister is free to ignore the results of even 'consultative' elections and recommend some other individuals to the governor general." On a related note, Professor David Smith argued that elections, consultative or not, challenge the assumption that senators are independent decision-makers because they would link senators to a constituency, making them accountable representatives. Smith said further that "such a change fundamentally alters the federal system and the arrangement of Parliament's parts as set down by the Fathers of Confederation." In arguing these points, Smith suggested that these were reasons that the Supreme Court should have been asked for an opinion on Bill C-20.

In closing, the significance of placing Harper's proposals through constitutional scrutiny is to show that there is debate surrounding even modest reform proposals. While proponents of both Bill C-19 and C-20 have said that Parliament has the ability to act on its own initiative in making such reforms, the other camp has raised constitutional doubts of these proposals mainly by invoking the *Upper House Reference*. Apart from the constitutional debate surrounding Harper's proposals, it is understood that major reform options would require the general amending formula in s. 38. Furthermore, since the general amending formula requires substantial support from the provinces, political realities serve to complicate the matter even further.

In the wake of Harper's most recent appointment of three defeated Conservative candidates to the Senate, talk of Senate reform remains pertinent. Despite Prime Minister Harper's statement that the "government will continue to push for a more democratic, accountable and effective Senate," his critics have denounced the appointments as being "completely undemocratic." From a constitutional standpoint, such appointments might also reflect the difficulty in instituting the scope of reform that Harper has advocated. Thus, with even modest changes prompting questions about their constitutionality, any substantial efforts at reform are unworkable because they would invoke the general amending formula, which requires significant provincial support; whether or not such reforms could garner enough provincial support poses an entire host of new questions and uncertainties that cannot be explored in this paper. At the end of the day, senate reform will persist as an item of political discourse, but all it is likely to amount to is chatter.

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