

AN ELECTED SENATE FOR CANADA?
Clues from the Australian Experience

by

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PREFACE

It is now widely acknowledged that institutions do not transplant easily to a new social context. A state structure that works well for one country may be quite unsuited to another. Essentially what this means is that one should be cautious about importing foreign constitutions, or bits and pieces of a complex constitutional jigsaw puzzle. On the other hand, a scrutiny of comparative experience is certainly valuable before one embarks upon constitutional innovation. This is especially so in cases where foreign practice has revealed that a particular combination of institutional forms runs into difficulties that the constitution-maker would be wise to avoid.

In the study now in your hands, Donald Smiley demonstrates his skill as an intellectual sleuth, tracking down "clues from the Australian experience" that anyone contemplating the creation of an elected Senate for Canada would be well to mark. It makes a valuable companion to Roger Gibbins' 1983 Institute Discussion Paper (number 16): *Senate Reform: Moving Towards the Slippery Slope*. This paper rested, as Professor Gibbins noted, "...upon the assumption that Senate reform is worthy of pursuit because the national interest can best be served through the more effective

representation of regional interests within national institutions by popularly elected national politicians." However, Gibbins added: "Senate reform confronts some horrendous problems of institutional design", as well as facing opposition from entrenched interests. For an examination of a few such problems, encountered in a foreign setting, read on!

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Institute Discussion papers are designed to provide an opportunity for informed comment on important issues in federalism and intergovernmental relations. The views expressed are those of the individual author.

Peter M. Leslie
Director
January 1985

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1 INTRODUCTION

In considering the reform of the governmental institutions of one country it is perverse and parochial not to have some regard to what has happened in others. Yet it takes the most subtle political judgment - something I am aware I do not possess - to assess in any adequate way the relevance of other nations' experience for one's own homeland. Like the kangaroo, the Australian Senate as it now exists is only in small part the result of deliberate design and is just as likely to resist transplantation in its original form from its indigenous habitat to the banks of the Ottawa River.

Australia and Canada offer a fertile field for students of comparative government. Here are two modern federations with the common inheritance of British parliamentary institutions which have adapted this inheritance to their differing needs and circumstances. In terms of this study, the Australian Senate has become a powerful institution, there are elected legislative councils in five of the six states and in recent years these latter bodies have to varying degrees been revitalized. On the Canadian side, the Fathers of Confederation decided not to incorporate into the design of the new Dominion the provisions for an elected second chamber which had been adopted in the United Province of Canada in 1856. The

existing Senate is a somewhat marginal institution and the last of the appointed provincial legislative councils was abolished in 1969. Significantly too, Australians and Canadians are both engaged in debates about their respective Senates, although, as we shall see, from quite different premises and perspectives.

In the period since the coming to power of the Parti Québécois government in 1976, all the schemes for the comprehensive reform of the Canadian constitution have given prominent place to the replacement of the Senate by some kind of new institution which would give more adequate representation to regional values and interests. The constitutional debate as it developed from the emergence of the new Québec in the early 1960s to November 1976 was preoccupied with new patterns of accommodation between the anglophone and francophone communities and was largely centred on a redistribution of powers and functions between Ottawa and the provinces. The more recent development has been from "interstate" to "intrastate" federalism, from a single-minded concern with federal-provincial powers to a new emphasis on making the institutions of the central government more representative of and responsive to the regions of Canada.

There have been two major alternative sets of proposals for the establishment of a new kind of second chamber of the Parliament of Canada. The first recommends the replacement of the existing Senate by a House of the Provinces or Federal Council composed of persons appointed by and acting under the instructions of their respective provincial governments. This alternative which featured prominently in the constitutional debate of the late 1970s and into the first year or two of the next decade was

patterned after the Bundesrat of the Federal Republic of Germany. The second option asserts that it is not the governments but the people of the provinces which require representation in a reformed second chamber and on this basis the reformed Senate should be chosen through popular election. This alternative now has become the more prominent one in the constitutional debate and in this connection the Australian experience becomes of direct relevance.

These are the kinds of broad questions to which the Australian record of elective bicameralism might give Canadians clues as we consider the establishment of a Senate chosen by popular election:

- does the very existence of an elected Senate offer a standing challenge to the principle of responsible government?
- if there is a contradiction here, how may it appropriately be dealt with?
- is it inevitable that an elected Senate will be a body in which provincial and regional interests will be subordinated to those of political parties?
- how might an elected Canadian Senate be expected to affect the respective legitimacies of the federal and provincial governments and the relations between these two orders of government?
- how well could an elected Senate be expected to play the house of review role?

Apart from these broad considerations, specific matters of institutional design would be involved in the establishment of an elected Canadian Senate:

- the powers of the Senate;
- procedures for the resolution of conflicts between the Senate and the House of Commons;

- the electoral system by which members of the Senate are chosen;
- the terms of office of members of the Senate;
- the possible impact of an elected Senate on the reserve powers of the Governor-General.

In this paper I avoid the question of whether it is reasonable to believe the establishment of an elected Senate would be possible under the requirements for amending the Canadian Constitution which came into effect in 1982. Such a reform would require the consent of Parliament - with the Senate having only a 180-day suspensory veto - and the legislatures of at least seven of the provinces having in aggregate at least half the Canadian population. A plausible case can be made that this degree of provincial consent is unlikely. However, the proposal for Senate reform might well be included as part of a more comprehensive constitutional package which would include items favourable to the provinces and other involved actors. And Senate reform is more likely than otherwise because almost no one appears to be willing to defend the Senate as it now exists.

2 THE AUSTRALIAN SENATE: BASIC CONSTITUTIONAL PROVISIONS¹

The Australian Senate as elected in 1983 is composed of 10 members elected from each of the six States and two Senators elected from each of the Australian Capital Territory and the Northern Territory. Legislation which will govern future elections provides for 12 Senators from each State. According to Section 7 of the Constitution, the Parliament may increase or decrease the size of the Senate with the restrictions that the equality of membership of the "Original States" (in fact all the existing States) be preserved and that no State shall have fewer than six Senators. This power was exercised in 1948 to increase the number of Senators from six to ten and more recently to 12, and in 1973 to provide representation for the Northern Territory and the Australian Capital Territory. Section 24 provides that the number of members of the House of Representatives shall be "as nearly as practicable" twice the number of Senators. The effect of this "nexus provision" has been to erect a limitation on increasing the size of the House as is deemed desirable by many informed Australians. The rationale for this provision is not clear, although it may be connected with procedures in Section 57 to be discussed below according to which deadlocks between the House and the Senate may be resolved by a joint sitting of both chambers following a double dissolution.

Section 13 of the Constitution provides that Senators shall be elected for terms of six years with half of the membership retiring every three years. However, the continuing nature of Senate membership - patterned after provisions of the United States Constitution - is subject to the double dissolution clause of the same Section which contains a procedure for resolving disagreements between the House and the Senate. There was only one such double dissolution prior to this generation - that of 1914 - but in recent years the procedure has come into play in 1951, 1974, 1975 and 1983. According to practice those candidates who lead the polls in their respective States or Territories are given six-year terms, those elected but who do less well, three-year terms.

Senators are elected according to the Single Transferable Vote system of Proportional Representation. In Senate elections in the States, the State is the constituency, although Section 7 provides that Parliament may establish Senate constituencies within any State and in the case of Queensland a similar power is given to the Parliament of that State. Up until the 1940s the members of the Senate were chosen, except for one occasion, in elections simultaneous with those of the House of Representatives. However, in more recent times the synchronization of House and Senate elections has been destroyed, largely as a result of double dissolutions, and since 1951 the following elections have been held:

- four involving the election of half the Senate alone;
- five involving the election of the House of Representatives alone;

- five involving the election of the House of Representatives and half the Senate;
- four after double dissolutions involving the memberships of the House of Representatives and the whole membership of the Senate.

In 1974 and 1977 there were national referenda on the proposal that there should be simultaneous elections for both chambers but in both instances these proposals failed to secure the assent of a majority of votes in a majority of the States as required for constitutional amendment by Section 128.

Section 14 provides for the filling of what the Australians call "casual vacancies" in the Senate:

If the place of a senator becomes vacant before the expiration of his term of service, the Houses of the Parliament of the State, sitting and voting together, or, if there is only one House of that Parliament, that House shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

A 1977 amendment of Section 14 provides in effect that the State authorities are required to fill casual vacancies by a member of a political party which is the same as that of the former incumbent - the only case to my knowledge where a country in the English-speaking tradition has a constitutional provision explicitly recognizing the existence of parties. This amendment was put in place in the wake of the constitutional crisis of 1975, one of whose elements was the departure of two States from the practice that casual vacancies were filled by members of the same political party as the former incumbents. Although the intent and effect

of this provision is to prevent the State governments from disturbing the party balance in the Senate, it leaves unspecified what rules are to govern the filling of casual vacancies - whether, for example, the choice is to be made by the State executive of the party concerned, or the person of the party who came closest to being elected at the last Senate election, or whether the State authorities have the discretion to choose from a list of names submitted by the State party executive.²

Except for financial legislation, the last clause of Section 53 provides that "the State shall have equal power with the House of Representatives in respect of all proposed laws." The exceptions are contained in the following clauses of the Section:

Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys or to impose taxation, by reason only of its continuing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand of payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modification.

Taxation and appropriation bills may thus not originate in the Senate, the Senate may not amend tax laws or laws appropriating moneys for "the ordinary annual services of government" and the Senate may not increase

"any proposed charge or burden on the people". But on the positive side, all proposed laws, whether money bills or otherwise, must receive the assent of the Senate before becoming law - apart from measures passed by the joint sitting of the two houses under the procedure discussed below. Further, the Senate has the power to return bills to the House for that body's reconsideration.

Section 57 of the Constitution provides a complex procedure for resolving disagreements between the Senate and the House of Representatives.

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the days of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments, which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of members of the Senate and the House of

Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's Assent.

There have been five double dissolutions under the provisions of Section 57, three of these in the past decade. Of these double dissolutions only one, that of 1914, involved disagreement about a single bill and those of 1974 and 1975 were brought about by Senate opposition to many major elements of the Whitlam government's legislative program, including four proposed constitutional amendments. In partisan-political terms, the elections following double dissolutions had the following results:

- in 1914 and 1951 the governments were sustained with majorities in both chambers;
- in 1974 the Whitlam government was re-elected but remained in a minority position in the Senate;
- in 1975 the Whitlam government, which held office with a majority in the House until dismissed by the Governor-General and replaced by the caretaker Fraser government which requested an immediate dissolution, was defeated and the Liberal-Country Party group received a Senate majority in the ensuing election;
- in 1983 the Fraser government was defeated and none of the major party groupings had a majority in the Senate.

On only one occasion, in 1974, has a double dissolution been followed by a joint sitting of the two chambers. In this circumstance the Whitlam government's majority in the House of Representatives resulting from the preceding general election was employed to overcome Senate resistance to the proposed legislation which had precipitated the double dissolution.

It may be noted also that the provisions of Section 57 are ill-adapted to resolving disagreements between the two chambers when the Senate has refused a government supply. The requirement of Section 57 that a double dissolution can take only after an interval of three months in which the

House of Representatives sustains a measure rejected by the Senate means that in most circumstances a government would have run out of funds if denied supply by the latter body.

Section 57 has given rise, particularly in the context of the constitutional controversies of the past decade, to several complex and for the most part unresolved questions:

- does constitutional convention accord the Governor-General a reserve power to determine whether the requirements of Section 57 have been met and, in particular, whether Senate action is resulting in an intolerable obstruction to the governmental and parliamentary process?
- is the decision of the Governor-General to bring about a double dissolution reviewable by the courts?
- may the government "stockpile" bills rejected by the Senate before the Prime Minister requests a double dissolution or do the provisions of Section 57 relate only to a single bill?

There is a considerable amount of debate in Australia about constitutional changes in the powers of the Senate.³ Some of the reform proposals are these:

1. The Constitution should be amended to eliminate the Senate's power to deny the government supply. The former Leader of the Opposition Gough Whitlam proposed in 1978 that if the Senate rejected or deferred any measure appropriating revenue or imposing taxation passed by the House of Representatives the House might after a month direct that the measure be sent to the Governor-General for Royal Assent. The Australian Labor Party up until 1979 was officially committed to the abolition of the Senate, although it was widely recognized that sufficient support to enact an amendment to this effect under the terms of Section 128 of the Constitution was unlikely at any time in the foreseeable future. Apart from the ALP there is a considerable body of Australian opinion which argues that the power of the Senate to block supply is incompatible with responsible government and should be eliminated.

2. There should be a constitutional amendment to the effect that if the Senate rejected supply there should be a double dissolution. Under the existing Section 57 a Senate might refuse supply and bring down a government without affecting its own tenure; the refusal of supply in the 1975 constitutional crisis, whose elements will be outlined in the next chapter, was followed by a double dissolution only because of the fortuitous circumstances that there was already a backlog of bills which had been rejected by the Senate. There are various proposals which would remove the possibility that the Senate might bring down a government without affecting its own tenure by providing for an automatic double dissolution after this occurred.

3. There should be fixed terms for the House of Representatives and the Senate.⁴ There is considerable discussion in Australia of the proposals that there should be a fixed term of three or four years for members of the House of Representatives and that the term of Senators be changed from six years to the life of two Parliaments. Some of the recommendations for fixed terms for the House of Representatives qualify this by providing that an earlier dissolution might occur if a government lost the confidence of the House, other variants support the constructive vote of non-confidence procedure prevailing in the Federal Republic of Germany according to which an early dissolution can occur only if the House is unable to find another government in which it has confidence. Taken together, the fixed-term proposals would eliminate what many informed Australians believe to be defects in the existing Constitution. The discretion of the Prime Minister to manipulate the timing of elections for partisan ends would be abolished, along with the reserve powers of the Governor-General to refuse such dissolutions. There would be fewer elections as half-Senate elections occurring at other times than those for the House of Representatives would end and elections for members of the two chambers would always occur at the same time. Further, the power of the Senate to force a government to an early election by deferring or refusing supply would end.

3 ELECTIVE BICAMERALISM AND RESPONSIBLE GOVERNMENT WITH SPECIAL REFERENCE TO THE AUSTRALIAN CONSTITUTIONAL CRISIS OF 1975

The existence of an elected second chamber is not easy to reconcile with the operating principles of British-style responsible government. According to the norms of responsible government, the government has a democratic mandate to govern derived from the results of the preceding general election and subsequent by-elections and from its continuing capacity to sustain majority support in the confidence chamber. An elected Senate is composed of persons with another and potentially competing democratic mandate. Some at least of the Fathers of the Australian Constitution were aware of this possible conflict and scholars of the Constitution often quote one of them, J.W. Hackett of Western Australia, to the effect that "... either responsible government will kill federation, or federation in the form which we shall, I hope, be prepared to accept it, will kill responsible government." Hackett's assertion was within the context of his argument for a powerful Senate to curb the powers of national majorities in the interests of the States, particularly the smaller ones. Despite this, Australians were able until the constitutional crisis of 1975 to make a tolerable reconciliation between elective bicameralism and responsible government.

The basic facts of the 1975 situation can be outlined briefly.⁵ The Whitlam Labor government was returned to power in 1974 in an election of the House of Representatives and, because of a double dissolution under the terms of Section 57, all the members of the Senate. The government's majority had been reduced from nine to five in the House and it failed to gain control of the Senate with the standings in the latter being ALP 29, Liberals and Country Party 29, Independent one, and Liberal Movement one. In the ensuing 18 months one Labor Senator was appointed to the High Court of Australia and another died. Breaking with established practice, the Opposition governments in power in New South Wales and Queensland appointed replacements who were not members or supporters of the ALP. In September and October 1975 the Opposition forces decided to use their majority in the Senate to force the government to an early election and when appropriation bills came before the Senate, that body declined to pass those bills unless the government agreed to such an election, a course of action that Prime Minister Whitlam and his party refused to take. On November 11 the Governor-General dismissed the government and installed in its place a caretaker government under the former Opposition leader Malcolm Fraser under the condition that the new ministry would not introduce new legislative measures into Parliament prior to a general election. On the same day the Senate granted supply and Parliament was dissolved, with a double dissolution occurring by way of Senate refusal to pass some 21 bills sponsored by the Whitlam government and passed by the House of Representatives. At the ensuing general election the Liberal/Country Party forces won majorities in both the House of Representatives and the Senate.

The 1975 crisis demonstrates the extent to which political stability in nations operating under British parliamentary traditions depends on the adherence of constitutional actors to established practices and conventions and how when partisan passions reach a high level of intensity such rules of conduct will be abrogated.⁶ Thus:

- two of the State governments filled casual vacancies in the Senate with persons not of the same party as the previous incumbents;
- the Senate refused the government supply;
- government representatives entered into discussions with the heads of the private banking system about measures to tide the government over temporarily in the event of a crisis in supply;
- without consulting the Prime Minister, the Governor-General sought and received the written advice of the Chief Justice of Australia about his, the Governor-General's, legal powers to deal with the crisis;
- the Governor-General dismissed the Whitlam government, installed in its place a government which did not have the confidence of the House of Representatives and granted this latter government a double dissolution;
- subsequent to the dissolution, the Speaker of the recently dissolved House of Representatives petitioned the Queen against the actions of the Governor-General.

The Senate, or more accurately the Opposition majority in that body, was acting neither as a house of review nor a body whose chief responsibility was to the rights of the States but rather as a party house. The actions of the majority was manifestly not based on opposition to the substance of the Whitlam government's requests for supply, and once the caretaker Fraser government was installed in office the Senate immediately granted supply on the terms it had originally been requested. Although this statement is subject to some qualification, the action of the Senate majority was based much more largely on party interests in an early

election than on the interests of the State authorities as such against the radically centralist measures of the Whitlam government. From 1918 to 1971 the platform of the Australian Labor Party explicitly called for the abolition of federalism.⁷ In the latter year the platform was altered to contain recognition of the appropriateness of federalism with emphasis on cooperation among the Commonwealth, State and local authorities. However, the Whitlam government in 1972-75 was aggressive in pressing the powers of the Commonwealth to their outermost limits and unlike the circumstance faced by previous Labor administrations the courts did not impose significant barriers to these measures.⁸ The control of Canberra over the State governments was increased through the expansion of grants-in-aid along with detailed and stringent conditions attached to such financial assistance. For a Canadian observer the measures of the Whitlam administration most threatening to the States were those to create new regional authorities with direct access to the Commonwealth government and to give local governments access to the Commonwealth Grants Commission and an explicit role in the process of constitutional review. This centralism had some role in the resistance of the Senate opposition to the government in 1975 but this resistance appears to have been based primarily on partisan considerations and G.A. Sawyer has written:

The decision whether or not to defer supply in April 1974 was taken not in the Senate by Senators; it was taken by the joint Liberal-Country Party parliamentary organization, in the second case after consideration as well as by the Liberal party extra-parliamentary organization; in each case the decision was announced not by any Senator but by the Liberal leader in the [House of] Representatives. In other words, the practical reality is that the Senate is an instrument in the hands of parties in the parliament as a whole.⁹

The tumultuous events of 1975 have given rise to a voluminous literature of analysis and polemic and have had a double-edged effect on the review and reform of the Australian Constitution. On the one hand, these events have impelled a much more widespread and sustained constitutional debate than occurred in Australia before. Yet the enduring bitterness that 1975 engendered makes it almost impossible to arrive at any consensus about what changes, if any, are needed and the past experience demonstrates that the requirements of Section 128 of the Constitution regulating constitutional amendment can be met only when all the major political groupings in the nation are in agreement about reforms. At any rate, only one issue has been authoritatively resolved as a result of the 1975 crisis - an amendment to the Constitution in 1977 which in effect requires the State authorities to fill casual vacancies in the Senate by appointing persons who are members of the same political parties as the previous incumbents.

There are three possible evaluations of the 1975 crisis as it concerned the relation between elective bicameralism and responsible government:

First, 1975 was an aberration in the Australian constitutional experience. Up to that time responsible government and the existence of an elected Senate had been reconciled and there has been no clash between the two since then. Although there is no guarantee that future minority groupings will accept the same position, the Australian Democrats who now hold the balance of power in the Senate are pledged not to defer or refuse supply.

Secondly, 1975 was a manifestation of the exercise of the legitimate powers of those who resisted the Whitlam government in preventing the tyranny of a national government which had lost the confidence of the Australian electorate. The Labor administration had undertaken radical reforms from coming to power in 1972 onward and the decline of Labor in public favour in the House and Senate elections of 1974 demonstrated a relative lack of support for such measures. The general election following the double dissolution of 1975 which returned opposition majorities to both chambers gave a post hoc justification for the exercise of both the reserve powers of the Governor-General in dismissing the government and the power of the Senate in deferring supply.

Third, the resistance to the Whitlam administration in 1975 - resistance by the Governor-General, the Senate majority, the State authorities who filled casual vacancies by persons not members of the ALP - was a wholly illegitimate challenge to the operative principle of responsible government. Those who hold this view combine constitutional argumentation with an egalitarian theory of democracy. This general line of argument has direct relevance to proposals for an elected Canadian Senate and deserves some considerable elaboration.

A major element of the 1975 crisis was of course the action of the Senate majority in deferring supply. In his account of the crisis, Gough Whitlam wrote in his book published in 1979, "I was determined to uphold the ancient and fundamental principle that it is the lower House which must control the supply of money to the elected government, to the ministers who

are the constitutional advisors of the Crown precisely and solely because they have the confidence of the lower House."¹⁰ A contrary view was stated by the Chief Justice in his communication to the Governor-General referred to above and the latter appears to have accepted as accurate this formulation of the law and conventions of the Australian Constitution:

... the Senate has constitutional power to refuse to pass a money bill; it has power to refuse supply to the Government of the day ... a Prime Minister who cannot ensure supply to the Crown, including funds for carrying on the ordinary services of Government must either advise a general election ... or resign ... There is no analogy in respect of a Prime Minister's duty between the situation of the Parliament under the federal Constitution of Australia and the relationship between the House of Commons, a popularly elected body, and the House of Lords, a non-elected body, in the unitary form of government functioning in the United Kingdom. Under that system, a Government having the confidence of the House of Commons can secure supply, despite a recalcitrant House of Lords. But it is otherwise under our federal Constitution. A Government having the confidence of the House of Representatives but not that of the Senate, both elected Houses, cannot secure supply to the Crown.¹¹

It should be noted that Whitlam did not argue that the Senate had exceeded its legal powers in denying supply and the burden of expert opinion appears to be that the Senate has such power. If supply is refused, a government which decided to remain in office would, in a very short period of time, have to resort to illegal actions and Section 83 of the Australian Constitution provides "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law." Thus the effect of the Senate refusing or deferring supply is the same as that of the House of Representatives withdrawing its confidence from a government. It is significant that the dissolution of the Senate as well as the House of Representatives in November 1975 occurred because the Senate had refused assent to some 21 bills of the Whitlam government which

had passed the House and thus the requirements for a double dissolution under Section 57 were met. If this fortuitous circumstance had not existed, the Senate majority would have been able to force the House of Representatives to an election without themselves having their own tenure affected.

The 1975 crisis involved not only the exercise of the powers of the Senate but also the reserve powers of the Governor-General, i.e. the powers that that official exercises on his discretion rather than on the advice of his responsible ministers. The action of the Opposition majority in deferring supply was based on its judgment, which turned out to be accurate, that if the government would not yield to this pressure for an early election the Governor-General would at some stage dismiss the Prime Minister. Yet Sir John Kerr exercised another dimension of the reserve power of the Crown in granting Prime Minister Fraser a double dissolution and requiring all the members of the Senate, who had been elected in the double dissolution of only the year before, to face the voters. In more general terms, the reserve powers of the Governor-General extend to a determination of whether or not the deadlock-breaking requirements of Section 57 have been met when the Prime Minister advises a double dissolution. In 1983 Prime Minister Fraser requested a double dissolution and it appears that the Governor-General refused this advice until Fraser had provided further evidence that the government's legislation held up by the Senate was critical.¹²

The interpretation of the 1975 crisis by members of the ALP and its intellectual supporters combines constitutional argument with political

theory in what one might designate as the democratic-parliamentary sovereignty norm. This norm asserts that the aim of the constitution should be to facilitate government by the popular will as this will is embodied in legislative majorities chosen in free and popular elections. Such a principle in its undiluted form is obviously incompatible with a federal regime in which the will of the people is expressed through two sets of political institutions each responsible for a different set of governmental functions. However, in a proximate sense the democratic-parliamentary sovereignty norm can be harmonized with federalism by what lawyers call an "exhaustive" distribution in the constitution of the powers of government between the national and state/provincial authorities.

Supporters of the democratic-parliamentary sovereignty theory either reject bicameralism outright or would restrict the powers of a second chamber to narrowly-defined review functions. (The platform of the Australian Labor Party called for the abolition of federalism up to 1971 and of the Senate up to 1979, although these reforms were somewhat impractical because of the conditions of Section 128 related to constitutional amendment.) There is no place in the democratic-parliamentary sovereignty principle for a second chamber, even one chosen by popular election, which possesses and exercises the power to frustrate governments in respect to fundamental matters when these governments are sustained by majorities in the confidence chamber and thus, according to this ideology, reflect the popular will. In his vigorous criticism of the Senate, L.F. Crisp has attacked that body's democratic credentials:

The fact that the Senate is directly elected by adult suffrage does not mean ... that any ... action taken by a Senate majority hostile to the Government of the day is any the less an affront against the essential principles of majority rule. First, the Senate electorate (i.e. the several States) are notoriously and vastly unequal. Secondly, whereas, after a general election, the majority in the House of representatives has a single new mandate for its declared policy, only half of the Senate had ordinarily been to the people. Since a Senate majority hostile to the Government of the day is usually made up, as to more than half, of Senators whose return occurred at an election three years earlier than that which yielded the Government and its House majority their mandate, the moral authority behind the Senate majority is open to serious question.¹³

In comparison with the Canadian House of Commons, the Australian House of Representatives and the governments sustained by it have better credentials as embodiments of the popular will:

- the maximum term of the House of Representatives is three years as against five for the House of Commons. However, in the years since 1957 the election of minority governments in Canada has resulted in elections with about the same frequency as in Australia.
- compulsory voting in Australia has resulted in a situation in which about 95 per cent of those on the electoral rolls cast valid ballots compared with about two-thirds to three-fourths in Canadian elections.
- the two major Australian party groupings (ALP and Liberal-Country Party) are important electoral contenders in every State whereas, as is well known, this is not so in Canada. Despite this dispersion of party support throughout Australia however, about half the seats in the House can be considered safe for one of the three parties, although the proportion of safe seats appears to be in decline.¹⁴
- the transferable vote system in constituencies for the House of Representatives gives the Australian voter an opportunity to register his or her preferences more exactly than does the Canadian procedure. Under the Australian provisions the voter ranks the candidates one, two, three, four, and so on. If a candidate has more than half the first-choice preferences on the first count, he or she is declared elected but if not the candidate with the fewest first choices is eliminated with his or her second choices being awarded to the others and the process is repeated until one candidate has received a majority.

- Australians do not, like Canadians, elect minority governments and in all the elections since the Second World War either the Liberal-Country Party group or the ALP have had majorities in the House of Representatives.
- Australian procedures for electoral redistribution are less tolerant than those of Canada of population differences among constituencies. The provisions in both countries are complicated, but in general it can be said that the principle of what the Austalians call "one vote, one value" is taken more seriously in that country than in Canada, redistributions occur more often and the range of tolerance between the population of rural and urban constituencies is more restricted.¹⁵

On the basis of democratic/majoritarian criteria alone, Crisp's arguments about the illegitimacy of Senate obstruction of the fundamental objectives of Australian government are well taken. Further, on those criteria there can be no justification of the enormous powers of independents and members of minor parties in the Senate. If we assume that the most reliable indicator of the electors' partisan preferences are their first-choice votes in Senate races, the minor-party and Independent Senators do not do well as is indicated in the following figures of those elected in 1983:

Table 3:1

	A.D. and Independent elected, first choice as % of valid votes	First choice ballots won by leading candidates as % of valid votes
N.S.W.	8.5	47.0
Victoria	11.9	46.3
Queensland	7.9	38.2
South Australia	11.9	43.9
Western Australia	6.9	48.8
Tasmania	17.1	30.3

Yet there are two complications to the general proposition that legislative bicameralism as it has developed in the Commonwealth government of Australia and popular democracy are incompatible. First, Section 57 of the Constitution contains a procedure by which a popular majority may get its way against a recalcitrant Senate. Under this Section a deadlock between the two chambers resulting in a double dissolution and a general election may be followed by a joint sitting of the two chambers in which the will of the majority of the legislators will prevail. The House has the advantage here because of its numbers and this device was used by the Whitlam government in 1974 to overcome the resistance of the Senate to several of the government's legislative measures. Secondly, the actions of a Senate majority in refusing supply or in otherwise frustrating government measures and risking a double dissolution will almost always be based on the judgment that the incumbent government has fallen from public favour. This was clearly the view of the anti-Labor senators when they deferred supply in 1975 and this assessment was decisively validated by the defeat of the Whitlam government in the succeeding general election. One cannot on the basis of democratic premises alone deduce the convention that within the maximum duration of a parliament specified by the constitution the prime minister has the unfettered discretion to determine the times at which the popular will is to be ascertained.

Despite the fundamental disagreements among observers of the Australian Constitution, there appears to be a consensus that the most crucial elements of British style responsible government should be preserved and no one to my knowledge has suggested a United States kind of

separation of legislative and executive powers, although the emphasis on checks and balances among conservative thinkers may be more in harmony with American traditions than those of nations operating under the Westminster model. Thus it is elections for the House of Representatives and not the Senate which determine which party is to form a government. The Prime Minister and his Deputy are always members of the House and about three-quarters of the members of the cabinet sit in the House. The continuance in office of a government rests in most circumstances on its continuing capacity to secure majority support in the Representatives alone. What is at issue are the appropriate powers of other constitutional actors in resisting the will of governments backed by majorities in the confidence chamber.

Responsible government in nations operating within the Westminster model is inextricably intertwined with a justificatory theory of democracy. Like other political theories, this has both normative and empirical elements. The normative premise is that those who govern derive their right to do so from success in free and periodic elections based on the adult franchise. The empirical assumption is that governmental power may be made responsive to the will of the governed only if such power is concentrated in a unified and collective political executive and that the following circumstances prevail:

1. Ministers individually and collectively exercise control over the appointed elements of the executive.
2. The confidence chamber of Parliament exercises effective control over the prime minister and his ministerial colleagues.

3. The people through free and popular elections and through debate, pressure, the operation of competitive partisan politics and so on between elections exercise effective control over those whom they elect to govern.

Informed observers of government in Canada and other nations operating within the tradition of British style parliamentary government assert that one or more of those conditions is not met - that the appointed bureaucracy is outside the effective control of the political executive, that in an era of big government the confidence chamber does not and perhaps cannot make the executive effectively accountable, that for a myriad of reasons the governmental process is unresponsive to the will and interests of the governed. If such critiques are even broadly accurate the credentials of the parliamentary sovereignty-democratic norm are very much compromised.

In my view, to defend the principle of responsible government as it now operates in nations working within the framework of the Westminster model is to defend the power of the elected and appointed elements of the executive to govern as they choose subject only to the checks imposed through periodic popular elections. The distinguished English Conservative politician and political thinker Lord Hailsham in a 1978 book has argued that the United Kingdom has become an "elective dictatorship" in which "... a government elected by a small minority of votes, and with a slight majority in the House, regards itself as entitled, and, according to its more extreme supporters bound, to carry out every proposal in its election manifesto."¹⁶ He suggests that in such circumstances "... it is prudent to return to the theory of the separation of powers, adopted by the American fathers in conscious imitation of what they believed to be the original British practice" and on the basis recommends a battery of very

un-British reforms - federalism, a constitutionally entrenched charter of rights, a written constitution, proportional representation and an elected second chamber of Parliament. In Canada the extra-parliamentary elements of the parties have much less influence in policy matters than do their counterparts in the United Kingdom - and in Australia in the Labor Party - and general elections give the voters less opportunity than in either Britain or Australia to choose between distinctive policy alternatives and ideologies distinguishing the major parties. In a recent article, Mark Sproule-Jones argues that in both political practice and in normative political theory Canada remains an "enduring colony" in its steadfast support of executive dominance.¹⁷ He argues that from the sixteenth to the eighteenth century the theory of parliamentary sovereignty developed in Britain as a justificatory manifestation of the mixed constitution with effective institutional checks on arbitrary power. However:

During the nineteenth and twentieth centuries, this concept of parliamentary sovereignty gradually disappeared. Concurrently the normative assumptions underlying the theory and practice of Parliament waned. The institutional forms became that of ministerial and collective responsibility of a supreme lower house. The normative concerns behind this shift were ones of popular representation and administrative efficiency. The older concerns with political liberties and the limits to arbitrary powers were gradually eroded. Parliamentary sovereignty as a representative, functionally effective, and mixed and balanced system of government became tired and archaic in party-dominated Britain.¹⁸

Sproule-Jones maintains that both Canadian political thought and practice uncritically support legislative supremacy, i.e. executive dominance rather than the older goals related to representation and the limitations on governmental power which underlay the older theory of parliamentary sovereignty. Thus in Canadian political science, "the purposes of legislative supremacy receive little scrutiny. The dispersal and

deconcentration of political authority, with the aim of promoting political liberties and limiting the arbitrary powers of government, do not appear to enter seriously the preconceptions and assumptions of many writings on Canadian federalism."¹⁹

In general then, legislative supremacy should not be made a shibboleth. There is no a priori reason based on the premises of normative constitutional and political theory why an elected Canadian Senate should not be given the power to obstruct the will of governments sustained by majorities in the House of Commons. Canadians have in fact been less consistent in upholding legislative supremacy than Sproule-Jones suggests. The Charter of Rights and Freedoms of course imposes limitations on such supremacy whose precise scope and nature will be determined by the courts in the ongoing judicial review of the constitution. And, particularly at the federal, level there is a large number of executive officials whose powers are conferred by statute and who serve doing "good behaviour" for fixed terms or otherwise - the Chief Electoral Officer, the Commissioners of Human Rights and Official Languages, the Auditor-General and the Comptroller-General, the Privacy Commissioner and so on - although this independence of executive control is of course dependent on Parliament's will in not changing the statutory authority under which such officials operate. With these caveats it may be maintained that Canadian political thought and practice have been disposed to sustain legislative supremacy.

A rigid adherence to legislative supremacy implies a weak second chamber, whether that body is elected or otherwise. This is the alternative chosen by the Special Joint Committee of the Parliament of

Canada on Senate Reform in its Report published on January 31, 1984. The Report opts for an elected Senate but affirms, "Almost all the witnesses who spoke in favour of an elected Senate recommend that the Senate not be able to overturn a government. We agree fully. In a parliamentary system, a government cannot serve two masters whose wills might on occasion be diametrically opposed."²⁰ Thus so far as most legislation was concerned the Senate would have only a suspensory veto which might be overridden by an ordinary majority in the House of Commons after an interval of 120 sitting days of Parliament. The Senate would have no power over appropriation bills as these are related to the main, interim and supplementary estimates. So far as bills related to the French language and culture were concerned, enactment would require the consent of a majority of the francophone members of the Senate. The Senate would also have the power to ratify order-in-council appointments to "federal agencies having important regional implications" with the proviso that if the Senate did not reject an appointment within 30 sitting days it would be deemed to have ratified it.

To repeat, the Joint Committee's Report weights the balance so heavily in favour of the legislative supremacy of the lower House that a weak elected Senate is the inevitable result:

First, in regard to most legislation where the Senate has only a suspensory veto a government might without much difficulty or embarrassment override the veto after this period has elapsed. Such a provision would of course complicate the government's attempts to control the legislative timetable. Under those relatively few circumstances where the government

was urgent about having legislation enacted quickly, for example a bill terminating a strike, the Senate would have very great power. However, in most circumstances the suspensory veto would be a very weak sanction. Further, Parliament as it now operates has developed very considerable powers to obstruct the government's will in respect to ill-considered or politically unpopular legislative measures. Secondly, the requirements related to measures directly related to the French language and culture give little added protection to the francophone community. Parliament enacts very few such measures - the Official Languages Act of 1969 is of course an important exception - and the most important protections of linguistic rights are now contained in the Charter of Rights and Freedoms rather than federal legislation. Further, the provision suggested by the Report might make the extension of francophone rights more difficult than now, particularly if, as the Report hopes, party influences over the behaviour of Senators was weak and anglophone Senators would be free of such pressures.

Third, the Report does not spell out the range of order-in-council appointments with regional implications subject to Senate ratification or the expectations of the Joint Committee about how such powers might be exercised.²¹ The relation between responsible government and the government's power to appoint have been subject to change. It has often been pointed out that the original struggle for responsible government in the British North American colonies was in its fundamentals a struggle for the control of patronage and such principled reasons as were given to oppose civil service reform in the pre-1918 Dominion were framed largely in terms of the incompatibility of such reform with responsible government.²²

Today there is a considerable body of informed Canadian opinion which recommends that governments use the appointing power in a more thoroughgoing way to ensure that persons at the senior levels of the bureaucracy are in harmony with government objectives.

One of the operating rules of responsible government is that a prime minister sustained by a majority in the confidence chamber has the almost unfettered discretion, within the maximum life of a Parliament as determined in Australia and Canada by their respective constitutions, to cause the dissolution of the confidence chamber and to set the date of a subsequent general election. This power to request and in most cases to obtain a dissolution has over a long period passed from being a decision of the cabinet to become the sole prerogative of the prime minister. So far as I am aware, supporters of the democratic-parliamentary sovereignty norm have never advanced a principled defence of vesting the power of dissolution in the hands of the head of government who in almost all conceivable circumstances will be motivated primarily by partisan considerations in the exercise of this power.

An elected Senate is likely to cause some weakening of the power of a prime minister to obtain a dissolution. This might even be so of a weak Senate such as that suggested by the Joint Committee. The Committee recommended that one-third of the members of the Senate be elected each three years and that such elections be held separately from those for the House of Commons. Let us imagine a situation in which such an election is held in the latter part of the third year of the government's term, the major issue of the campaign is the government's record and the government

party sustains a decisive defeat. Under such circumstances it would be very difficult for the prime minister to resist what would undoubtedly be strident calls from the opposition and perhaps other quarters for an early dissolution and election. An elected Senate with even stronger powers is at least capable of further qualifying such prime ministerial powers. After all, the 1975 crisis was in a sense about whether Prime Minister Whitlam alone had the power to determine the length of the life of a Parliament within the 3-year limit prescribed by Section 28 of the Constitution or whether such a term might be terminated by other constitutional actors. Since 1975 there has been a good deal of discussion in Australia of the proposal that the parliamentary term should be fixed by constitutional provision.²³ Most of these schemes recommend that the prime minister and Governor-General be denied the powers to cause an early dissolution except in those circumstances where the government had lost the confidence of the House of Representatives; other proposals would follow Article 67 of the Constitution of the Federal Republic of Germany according to which the head of government (the Chancellor) can be subjected to a want-of-confidence motion by the Bundestag only if that body can elect a successor who receives such confidence. However, even if such provisions had been in effect in 1975 they would not have prevented the Senate majority from making the government's position impossible by the deferring of supply and would of course have denied the Governor-General the power to effect a resolution of the conflict between the majorities controlling the two chambers of Parliament.

An elected Canadian Senate with only the very restricted powers as recommended by the Joint Committee is unlikely to be an effective protector

of regional interests. And a Senate so institutionally crippled is unlikely to attract strong people, as the Honourable Robert Stanfield has recently written, "... an able man or woman is not likely to go to the trouble and expense of contesting a large senatorial constituency unless a Senator has power; more power, I suspect, than the power to delay."²⁴

Yet to argue against a weak elected Senate as proposed by the Joint Committee does not in itself give directions either about the appropriate powers of such a body or the appropriate procedures for giving authoritative resolution to conflicts between that body and a government sustained by majorities in the House of Commons. Other recommendations for an elected Canadian Senate than that made by the Joint Committee provide such a body with significantly stronger powers:

First, the study *Regional Representation* by Gordon Gibson, Ernest G. Manning and Peter McCormick published in 1981 under the auspices of the Canada West Foundation²¹ proposes that an elected Senate should have the powers to:

- ratify government appointments to "designated national boards, agencies and tribunals" such as the Canadian Transport Commission, the CRTC, the Canadian Wheat Board and the National Energy Board.
- ratify the exercise of federal emergency powers after these have been in effect for a designated period.
- ratify the exercise of disallowance and reservation and of the declaratory power.
- veto any projected amendment to the constitution.

Secondly, Senator Michael Pitfield in his presentation to the Joint Committee on Senate Reform on October 18, 1983 provided that a Senate veto

might be overridden by a simple majority of the House of Commons during the same session of Parliament with the exceptions that:

- if the Senate by a two-thirds vote deemed a measure to be of "fundamental regional interest" this Senate action could be overridden only by the House of Commons passing the measure again by a two-thirds vote.
- if the Senate by a majority which included a majority of its francophone members deemed a measure of "special linguistic or cultural significance" and rejected this measure the Senate could be overridden only by a two-thirds majority in the House of Commons.

The Australian crisis of 1975 led to a vigorous debate in that country on the reserve powers of the Governor-General and the efforts of the anti-Labor majority in the Senate to force the Whitlam government to an early election could not have been successful if Sir John Kerr had not dismissed Mr. Whitlam. Despite the valiant efforts of Eugene Forsey over a period of forty years to make it otherwise,²⁶ Canadian constitutional debate has been little concerned with the reserve powers of the Crown and such debate as there has been has involved the refusal by the Governor-General or Lieutenant Governors of requests for dissolution by first ministers. Yet if we assume that deadlocks between an elected Canadian Senate and governments sustained by majorities in the House of Commons are probable, it is likely that in some way or another the Governor-General will be involved as was Sir John Kerr in 1975 and King George V in the United Kingdom constitutional crisis of 1910.

I have argued that no defensible case can be made for an elected Canadian Senate with limited powers or a Senate which can easily be overridden by a government with majority support in the House of Commons. It is also likely that there will be situations in which mediation between

the two chambers will be unsuccessful in resolving such disagreements. A prior question arising from Australian experience under Section 57 of their Constitution concerns who has the power to determine whether the nature and extent of disagreement is such as to make the operations of government impossible. Is this to be a decision of the prime minister alone? Or has the Governor-General a reserve power to interpret the provisions of the constitution relating to the existence of a deadlock independent of ministerial advice? Or should such a determination be subject to final and authoritative determination by the Supreme Court of Canada? Canada unlike Australia makes provisions for references by governments to final appellate courts.

If we reject, as we should, the "rubber-stamp" theory that the Governor-General is constitutionally required to act on the advice of the prime minister in all circumstances, we need to give some consideration to the role of the Governor-General in conflicts between an elected Canadian Senate and majorities in the House of Commons.

The argument of this chapter can be summarized. No case at all can be made for a weak elected Senate in Canada, a body whose powers can easily be overridden by governments sustained by majorities in the House of Commons. Yet the existence of any other kind of elected second chamber is almost impossible to reconcile with the operative rules of responsible government as Canadians have come to understand them. However, responsible government should not be a shibboleth, both the empirical and normative assumptions in which this regime is based are questionable. Thus an elected Senate with the power and assertiveness to protect regional interests effectively will

inevitably challenge legislative supremacy which is in essence a check for executive power. It may be, as I shall suggest in Chapter 5, that an elected Senate would tilt the federal-provincial balance in favour of the provinces precisely because provincial executive power would be subject to no corresponding constraints. One might reasonably then reject the establishment of such an institution for this reason but not because it contradicted the principles and operations of responsible government.

4 AN ELECTED SENATE: STATE/PROVINCIAL HOUSE OR PARTY HOUSE?

Roger Gibbins has accurately pointed out that, "The objectives of Senate reform cluster around a single core, that of enhancing the quality of regional representation within national political institutions by national politicians."²⁷ It is a corollary assumption of most supporters of an elected Senate for Canada that party influence in that body should be weak, that the representation of regional interests and party interests are incompatible. After stating that the existence of an elected Senate must be harmonized with the circumstances of responsible government, the Report of the Joint Committee stated, "Another of our major concerns was to ensure that senators have the desired measure of independence. If they are perceived as purely partisan, their credibility as people speaking on behalf of regional interests will be diminished, and we will have failed to meet one of the goals of reform."²⁸ To this end the Committee proposed that Senators be elected from single-member constituencies on the general grounds that PR enhances the influences of party and that Senators be elected for long - nine-year - and non-renewable terms. The scheme for an elected Senate contained in *Regional Representation* by Peter McCormick, Ernest C. Manning and Gordon Gibson shows a similar distrust of partisan

influences and suggests several ways of minimizing them - Senators are to be elected by the Single Transferable Vote system of PR which minimizes the power of parties over the nominating process, cabinet ministers are debarred from having seats in the Senate, the parties in the Senate are to caucus separately from their partisan colleagues in the House of Commons and Senators are to caucus regularly on cross-party regional lines, all Senate votes are to be free votes.²⁹ The authors of this study are disposed towards Senators being political notables who presumably would have enough public reputation to withstand party pressures, "... any individual who had established a public reputation and a significant personal following would provide a very credible Senatorial candidate. Mayors and aldermen of large cities would be obvious examples, as would former provincial or federal cabinet ministers and popular MPs."³⁰

With the concern for partisan influences over an elected Canadian Senate, the Australian experience is of considerable relevance.

The Australian Electoral System and the Parties

There is agreement among Australian scholars that the role of the Senate was fundamentally altered by the system for electing its members enacted by Commonwealth law in 1948. Before 1919 the first-past-the-post procedure was used in which the voter placed a cross in the squares opposite his or her preferred candidates' names up to the number of Senators to be elected. In that year a system of preferential voting was introduced in which voters ranked the candidates. The electoral arrangements in effect up to 1948 resulted in a situation in which very

large Senate majorities coinciding with those in the House of Representatives were returned. Although this was hardly typical, the results in the last half-Senate elections under the old method in 1946 was Labor with 33 of the 36 Senate seats.³¹

The 1982 Parliamentary Handbook gives an account of the electoral system for the Senate:

The Commonwealth Electoral Officer ascertains the total number of voted first preference votes given for each candidate and the total of all such votes. A quota is then determined by dividing the said total by one more than the total of candidates required to be elected, and by increasing the total so obtained by one. Any candidate who has received a number of first preference equal to or greater than the quota is elected. Surplus votes of elected candidates (that is, the number in excess of the quota) are then transferred to the continuing candidates, in proportion to the voters' preferences on the whole of the elected candidates' votes. If, after the count of the first preference votes, or after the transfer of the surplus votes of the elected candidates, no candidate has received a number of votes equal to the quota, the candidate who has the fewest votes is excluded and his ballot papers are transferred to the continuing candidates next in order of the voters' available preferences. If no continuing candidate receives a number of votes equal to the quota, the process of excluding the candidate with the fewest votes and the transferring of his ballot papers to the continuing candidates is repeated, until the continuing candidate has received a number of votes equal to the quota, or, in respect to the last vacancy, a majority of the votes. In respect to the last vacancy, the candidate who receives a majority of the votes is elected notwithstanding that the number of votes by him is not equal to the quota.

In the Senate election of October 1980 there were the following numbers of distribution of preferences after the candidates attaining the quota for election through first preferences had been recorded.

Table 4:1

N.S.W.	2
Victoria	3
Queensland	4
South Australia	3
West Australia	4
Tasmania	1
Northern Territory	0
Australian Capital Territory	0

There was no State in which the fifth person elected did not attain the quota.

Despite the apparent anti-party bias of the PR-STV system, the Australian parties have gone a very long distance in establishing party dominance over the process by which members of the Senate are chosen. The parties have taken advantage of these circumstances:

- First, candidates of the various parties or party groupings are grouped together on the ballot.
- Second, the State party authorities have asserted the right to rank the candidates of their respective parties on the ballot.
- Third, the parties distribute cards advising their supporters how to rank their preferences among Senate candidates.

Unlike their Canadian counterparts, the major Australian party groupings draw significant voter support from every State in the nation. In the 1983 Senate elections of candidates from the States, the Australian Labor Party ranged in first preference votes from 49.3 per cent in Western

Australia to 32.8 per cent in Tasmania, the Liberal/National Party grouping from 44.2 per cent in Queensland to 38.1 per cent in New South Wales. This distribution of voter support as translated into seats by the electoral system results in a situation in which each of these party groups almost always receives at least two but not more than three of the seats in each State in a half-Senate election and at least four but not more than six of the seats in an election following a double dissolution.

To maximize their choices of success, the parties nominate not more than three candidates for the five seats at stake in each State in a half-Senate election, not more than six candidates in an election choosing all members of the Senate. The consequences of this nominating process will be discussed later.

The distribution of voter support as translated into seats by the electoral system has made the Senate relatively evenly balanced between the two major parties and on several recent occasions has resulted in the election of enough Independents and members of minor parties to deny either the ALP or the Liberal/National Party group a Senate majority. Under the Senate rules of procedure, an equal vote is decided in the negative, the President (Speaker) has a deliberative but not a casting vote and thus in a Senate of 64 members the support of 33 is needed to carry a motion. Although both the Fraser government elected in 1980 and the incumbent Hawke government elected in 1983 had comfortable majorities in the House of Representatives, they had only 31 and 30 seats respectively in the Senate.

The aim of all PR systems is to facilitate the choosing of an assembly which mirrors electoral opinion more exactly than does the results of the first-past-the-post procedure. Within this general objective some such systems are oriented towards maximizing the responsiveness of voting arrangements to the preferences of electors for political parties, others for individual candidates. An example of the first is the party-list system in which half of the members of the Bundestag of the Federal Republic of Germany are chosen. The single transferable vote system by which members of the Australian Senate are elected would seem on the surface to have a profoundly anti-party bias which would minimize the preferences of voters for individual candidates. The party affiliations of candidates do not appear on the ballot. To cast a valid ballot the voter must express his or her preferences in order for all of the candidates, although there is an informal practice that the voters' last preferences need not be recorded.

The major recent beneficiary of the system by which Senators are elected has been the Australian Democrats who elected five members in each of the elections in 1980 and 1983 and who now have a seat in each State except Tasmania where an Independent holds a seat.³² The ADs were formed in 1977 following the resignation of a former Liberal minister from his party. They are more loosely organized than either of the major parties and, as one AD Senator explained to me, are free to oppose party policies as long as they make it explicitly known that they are doing so. They pride themselves on their freedom from ideology and party dogma and their innovativeness in respect to specific policies. In the 1980 election they

ran on the slogan "Keep the Bastards Honest" which was, as one observer remarked, considerably more catchy than "Raise the Standard" (ALP) or "Lead on Liberal".

In terms of effective electoral strength the Australian Democrats are a Senate party alone and the major beneficiary of the electoral system by which Senators are chosen. The ADs in the 1983 elections ran candidates in all but nine of the 125 House of Representatives constituencies but received only 5.0 per cent of national first preference votes and in no constituency did the AD candidate receive more than 10.9 per cent of such votes. The same election saw the party with 9.6 per cent of first preference votes for the Senate which, as we have seen, yielded five seats.

The nomination of Senate candidates is made by the State executives of the parties and, to repeat, there are always fewer nominees from each party than the number of seats at stake. The control of the State executives over the electoral process is enormously enhanced by their power to rank their respective party candidates on the ballot and to distribute the how-to-vote cards to party organizers. In a half-Senate election the candidates ranked first and second in each State are virtually assured of election, the third-ranked candidate's position is always risky.

An outsider cannot fail to be impressed by the willingness of Australians to acquiesce in the requirements of their governments that they vote and, in Senate elections, the cues given to them by their respective parties. About 95 per cent of the enrolled voters turn up at the polls in

national elections. Despite the complexity of this exercise, only 9.8 per cent of voters cast "informal votes" in the 1983 Senate elections - refused or spoiled ballots - and to cast a valid ballot the citizen must rank all the candidates. Australians talk of the "donkey vote" - the actions of citizens who respond to the complexity of the electoral process in confusion or cantankerousness by ranking candidates in a random way as, for example, in terms of the order their names appear on the ballot. However, the relatively small number of votes given to candidates other than those of the three major parties (5.0 per cent in the 1983 Senate elections) would indicate that such random voting is not widespread. The complexity of the exercise is increased by the permissive provisions of the law in respect to Senate candidacy³³ - a deposit of \$200.00 is required which is refundable if the candidate or group in which the candidate is included polls more than 1/10 of the first preference votes of the candidates who are elected. Thus fringe parties and candidates proliferate - Call to Australia, Concerned Christian Candidates, Australian Marijuana Party and so on, and, Canadians will be interested to know, a Progressive Conservative Party which in the 1980 Senate elections fielded four candidates and received 0.08 per cent of the national first preference votes. In the 1983 Senate elections there were the following number of candidates for the ten seats in each State:

Table 4:2

New South Wales	62
Victoria	50
Queensland	42
South Australia	35
Western Australia	30
Tasmania	17

Facing the necessity of making this large number of choices, most voters not surprisingly follow the cues given to them by their preferred parties.

To repeat, the electoral arrangements related to the Senate give enormous power to the executives of the State parties. The parties limit such nominations to a number fewer than the seats at stake. The prerogative of the State executives in ranking Senate candidates is also a powerful sanction, particularly against incumbent Senators. For example, in the 1980 elections the second-ranked ALP candidate in Victoria, Ray, received 1,712 first-preference votes against the third-ranked candidate and incumbent, Meltzer, who received 46,452 such votes, the most of any candidate in the country not ranked first in a party group. Yet Ray was elected on the first distribution of preferences and Meltzer eliminated on the last distribution. Similarly, in the nominating procedures leading up to the 1983 elections the Queensland Liberal Senator Neville Bonner, the only aboriginal ever to be elected to the Commonwealth Parliament, was dropped in his party's rankings and then resigned from the party and was defeated as an Independent candidate. Campbell Sharman has pointed out that in Senate elections "... there has been no case on record where a number two candidate has been displaced by ... [a] third candidate."³⁴ As in Canada, a member of the House of Representatives may build up a local following and retain his political position through effective and visible service to the individuals and communities in his constituency. For a Senator this is not so, the constituency is the State executive of the party. Thus the overtly individualistic and anti-party bias of the electoral system for the Senate has reinforced the dominance of the parties over the electoral process.

State House or Party House?

In the contriving of the Australian Constitution the representatives of the smaller States were successful in bringing about the creation of a Senate with equal State representation. Yet most recent students of Australian government have asserted that the Senate is not and has never been in any genuine sense a State house but rather is a party house. This conventional wisdom was so stated in the Report of an All-Party Joint Committee of Constitutional Review in 1958-59:

The Commonwealth body politic has been profoundly affected since Federation by the emergence and entrenchment of nationally organized political parties with sufficient strength individually or in combination to form and maintain a government. In particular, the evolution of political parties has upset the speculations of many of the Founders as to how the Senate would function. The Senate has for many years been as susceptible to party political influences as the House of Representatives and proceedings in the Senate usually find party divisions corresponding to those in the House of Representatives. The history of deadlocks between the two Houses is, for example, one of conflicting policies of the national parties. The loyalty of senators to their parties has been largely responsible for the sublimation of the original conception of the Senate as a States House and House of Review.³⁵

In contrast, the former Clerk of the Senate has made a vigorous defence of the Senate as a State House in these terms:³⁶

- the equal representation of all States in the Senate "must exercise a restraining influence on any government which might be tempted to propose measures harmful to the welfare of the less populated states." It is of course impossible to measure the extent of such potential resistance of the Senate to measures detrimental to the small States but "The power of the Senate to assume its role of protector of State interests is ever present, and if the Senate does not invoke it frequently that is a tribute to a wise government rather than a criticism that the Senate does not fulfill its function as a States House. Without a States House to reckon with, governments may not be so wise."

- the Senators in caucus - what Australians call "the party room" - undoubtedly act as defenders of State interests. Those who view the Senate as preeminently a party house do not take this into account:

To expect open rebellion on the floor of the Senate as between party members from differing States, presupposes legislation which is opposed to certain State interests. It must not be forgotten that before being brought up in the Parliament, legislative proposals are carefully considered at joint meetings of supporters of the Government in both Houses. There, out of the public spotlight, Senators can, and undoubtedly do, act as real guardians of State interests, particularly those of the less populated States.³⁷

- there are a number of circumstances on the public record where Senators have supported state interests over party interests. Odgers points particularly to tariff questions which are traditionally free votes in the Senate. He gives a number of other examples as well.
- individual Senators have the opportunity and use them to act as advocates of State interests. "The attention of members of the House of Representatives is to a large extent on the demands of their particular constituents while Senators, not being to the same extent at the 'beck and call' of electors, have more time to devote to the consideration of broader questions of general state and national interest and to the advancement of such causes." Further, individual citizens whose members of the House of Representatives are of contrary political persuasions or philosophies may find Senators a more adequate channel for "parliamentary assistance or redress."

In an article published in 1977, Campbell Sharman turned his attention to the Senate as a protection of the interests of the persons in the less populated States.³⁸ He took issue with the conventional wisdom in these terms:

Many approaches to the study of the Senate as a States house have been based on the mistaken assumption that if the Senate has a State house function this must necessarily be at the expense of its role as a forum for national issues and the nationalizing influence of partisan solidarity ... An alternative perspective is that one element of the Senate's structure may moderate the way in which the Senate discharges many of its functions, that is, that the State basis of Senate

representation may sensitize its operations to State concerns and may put a distinctive bias on the way in which the Senate participates in the national political process.

On the basis of what he designated as "tentative and exploratory evidence"

Sharman concluded

... the Senate does behave as a States house in the sense that it provides a political bonus to the residents of the smaller States. This bonus is likely to be specially sensitive to the concerns of the smaller States and as such creates a political resource for these States to deploy against rival groups with claims on the national government.³⁹

Sharman suggests that the structure of the Senate, and in particular the over-representation of the smaller States, modifies the parties by providing a conduit for State interests. There is some scattered evidence of an increase in bloc voting by members of small States regardless of party affiliations. In the Question Period, Senators from the small States ask more State-oriented questions than do their colleagues from the larger States. Both in elections for the Senate and House of Representatives and in constitutional referenda on proposals to weaken the Senate, electors in small States show some tendency to regard the Senate as a protector of their interests. Although the evidence in respect to Western Australia, South Australia and Queensland - which in terms of population are over-represented in the Senate - is equivocal, it is quite clear that the Senate is a major protector of the rights of the smallest State, Tasmania, and is regarded as such by Tasmanians.

The role of the Senate as a States House has three analytically distinct elements - the Senate as a protector of the rights of State governments, of State parties, of the people in the smaller States.

The Senate and the Interests of State Governments

The available evidence suggests that the Senate is not a primary vehicle by which State governments advance their interests. These interests are pressed by the devices of executive federalism familiar to Canadians and L.F. Crisp has written "It has not been Senators but State Premiers and other senior State ministers and officials and party officials at Premiers' Conferences, Loan Councils and a hundred other governmental conferences, before the Grants Commission, at meetings of party executives, and in personal lobbying forays into the National Capital, who have done most effective work for the States as such."⁴⁰ The Senate has not established a Standing Committee to review Commonwealth-State Relations or the more specific co-operative and consultative bodies involved in such relations. Crisp points out that in a number of issues crucial to the State governments the Senators have followed the party lines and have been ineffective as defenders of State interests. From my own reading of the challenges by the Senate majority to the Commonwealth Government in the Whitlam period, it appears that this resistance was based on issues other than the administration's policies hostile to the States, even though Labor's course of action was of a highly centralizing variety.

A Liberal Senator for Victoria, David Hamer, has subjected to empirical test the assertion of Odgers that "Senators are constantly forming deputations to Ministers to safeguard and promote the interests of their States."⁴¹ Hamer submitted a questionnaire to twelve Ministers of each of the Whitlam and Fraser governments asking them to respond to Odgers' statement and thus summarized the responses:

None felt that the statement ... was reasonable: five found it 'exaggerated' and nineteen found it 'absurd'. On the question of the source of most parliamentary pressure on issues which safeguard and promote State interests, no Ministers felt that it came mainly from Senators. Five thought it came equally from Representatives and Senators, eleven felt that it came mainly from Representatives and eight said they had never experienced any such pressures.⁴²

In general then, the evidence suggests that the Senate is not a crucial instrument through which the interests of State governments are pursued.

The Senate as "State Party House"

In a paper presented in 1982 Joan Rydon has described the Senate as a "state party house" in which the members are "creatures of the State executives of their parties without the amelioration of local electorate pressures to which Representatives may be subject."⁴³ The structures of the Australian parties are federalized and Dean Jaensch has recently written "There is a formal entity called the Australian Labor Party, but this is a composite, and an unstable one, of the six state parties, a Northern Territory party and the ACT party. The national party is formed from the regional parties, dependent in many ways on them, and has minimal organization of its own. The Liberal Party is even more a federal party ... The National Country Party, despite its name, is the most horizontally divided of all three. Its state branches are autonomous to the greatest degree, and its national organization almost non-existent."⁴⁴ Although the State executives share control over aspects of party activity with other party elements like the parliamentary caucuses, the cabinet, the national party organization and so on these executives have undivided control over the processes for nominating and ranking candidates for the Senate.

The Senate as a Protector of the Rights of the Small States

To the extent that the Senate is an influential participant in the Australian political process, the equality of State representation in that body gives the population of the small States a significant advantage. Sharman has presented significant evidence to the effect that the Senate is - and is perceived by the people of the smaller jurisdiction to be - a small-States House. This is most pronounced in the case of the smallest State, Tasmania, and somewhat less so in South Australia, Western Australia and Queensland.⁴⁵

The interests of State governments, State party executives and Australian people as they live in the various States are distinct only for purely analytical purposes and a detailed account of the Senate would include some consideration of how these interests are related in the working of that chamber. It appears to me that some Australians have drawn too sharp a line between the State-house and party-house roles of the Senate and concluded that the cohesion and discipline of parties in the Senate is incompatible with the effective representation of State interests. Yet it has been almost inevitable that the parties themselves will be shaped by the constitutional and institutional structures. Australian parties are themselves federalized and the parties of the smaller States are more powerful than they would otherwise be because of equal State representation in the Senate.

An Elected Canadian Senate: Regional House or Party House?

The Australian experience would indicate that the procedures by which members of an elected Senate are nominated and elected are crucial determinants of the ways they will behave. It is naive to contemplate an elected Canadian Senate of Independents - of persons who in a judicious and forceful way press the interests of their provinces and regions unencumbered by party ties and allegiances. Aspirants for the Senate, even those who are well-known in their respective provinces and who can draw on considerable personal resources to mount a campaign, would in all likelihood find it impossible to advance their causes successfully without the endorsement of and access to the much greater resources of one of the parties. And if the Senate emerges as a powerful institution it is unreasonable to believe that the parties themselves will refrain from attempting to determine the persons who compose it. Yet to say that Canadian Senators will in all likelihood be elected exclusively or almost exclusively from the ranks of nominees of the established parties does not relieve us of some attempt to examine the procedures by which what Australians call "pre-selection" are accomplished - both American and Australian Senators are party nominees but their respective legislative roles are powerfully shaped by differing ways of nomination.

There are two polar alternatives by which candidates for the Canadian Senate might be nominated - by federal party organizations or by provincial party organizations. There has been a growing tendency towards what I have elsewhere called the "confederalization" of the organization of the

Canadian political parties - a movement towards the organizational separation of the federal and provincial wings of the Liberals and Progressive Conservatives into elements directed to electoral success in the two political arenas.⁴⁶ While the constitutional provisions related to an elected Canadian Senate will not determine the procedure by which candidates for that body are nominated, the Australian experience indicates that this procedure is of decisive importance in determining the way that the Senate will operate.

The nomination of senatorial candidates by the provincial wings of the political parties would result in a considerable strengthening of the provinces in the operations of the federal government. Canadian parties are more under the control of their parliamentary elements than are their Australian counterparts, and if successful candidates for the Senate were nominees of governing parties in the provinces it is reasonable to expect that those governments would have a direct channel they do not now possess to influence the national government.

It is more difficult to estimate the probable impact of senatorial nominations being under the control of those elements of the parties exclusively or exclusively concerned with electoral success in the federal political arena. However, as is the case with the provinces, it is reasonable to suppose that this would give the prime minister and his more influential ministerial colleagues a channel to influence the operations of the Senate.

Although the situation varies from province to province, among constituencies within particular provinces and among the parties, the process by which candidates for the House of Commons are selected is relatively decentralized.⁴⁷ Thus it is not infrequent that individuals will win such nominations through personal effort at the level of the local constituency. Almost inevitably, nominations for the Senate will be more centralized and in some circumstances at least more directly under the control of those who hold power in governments, federal or provincial.

So far as the system for electing Senators is concerned, there is little to be said for a first-past-the-post system for electing members of a new Canadian Senate. According to this procedure voters would put crosses beside the names of Senators to be elected in each province up to the number of such persons to be chosen. Particularly if Senate elections coincided with those for members of the House of Commons this would almost inevitably result in the same party balance in both chambers, as happened in the earlier period in Australia, and the Senate would be in large measure redundant.

There are, as we have seen, two polar alternatives among Proportional Representation systems. The party list system maximizes the role of the parties in selecting candidates and restricts the voter to the choice among party tickets so contrived. The single transferable vote procedure is explicitly designed to enhance the power of the voter and decrease that of the parties by permitting, or in the Australian case requiring, the elector to rank individual candidates. The Australian experience seems to suggest

that the results of adopting either of these systems would not be very different. It is too much to expect more than a small minority of Canadian voters, or those of any other nation, to assign rankings to long lists of candidates in an independent and judicious way. Under such circumstances most electors will either abstain from voting, as the law does not permit them to do in Australia, or follow the leads given to them by the parties of their choice.

Current debate about a reformed Canadian Senate is preoccupied with provincial and regional representation. Yet apart from this, the adoption of any one of the variants of PR for choosing such a body might well have an effect on the enhanced representation of women, members of minority ethnic groups and so on as the parties worked to balance their respective tickets.

5 AN ELECTED SENATE AS HOUSE OF REVIEW

Until recently, and to some extent even today, bicameralism in nations operating within the framework of liberal constitutionalism was sustained and defended as a device to moderate the pressures of popular democracy. Various procedures in the composition of the second chamber have here and there been created to this general anti-majoritarian end - hereditary membership, appointment for either life or relatively long terms, indirect election, the special protection of ethnic and other minorities and so on. In federal constitutions there is invariably an over-representation of the smaller states and provinces in the second chamber as a protection for those jurisdictions and their people against the majoritarian dispositions of the lower house elected on the basis of population.

A proximate reconciliation of the Westminster model of popular democracy with bicameralism is to sustain a second chamber as primarily a house of review. This formulation was spelled out most concretely in the report of a British all-party committee on the appropriate functions of a second chamber in the United Kingdom which was chaired by Lord Bryce and deliberated in 1917-18.⁴⁸ These functions as formulated by the Bryce

committee may thus be summarized: (1) a more leisurely and thorough examination of bills which would of necessity be dealt with more hastily by the House of Commons; (2) the initiation of relatively uncontroversial bills in order to economize the time of the lower house; (3) "interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it"; and (4) full and free discussion of large and important questions under circumstances which do not involve the tenure of the government. A more recent emphasis sees the house-of-review role of a second chamber primarily in terms of an institutional safeguard against the excesses of executive power. In his account of the Senate of Canada, F.A. Kunz puts the case in this way: "[Second chambers] should maintain a suspicious watch over any attempt on the part of the executive to act arbitrarily or to by-pass the Parliament by sheer force of administrative habit or bureaucratic usage and thus unduly further increase its grip over branches of Government ... Through an effective discharge of their substantive functions ... second chambers may offer a modest yet important service. Instead of being a primary institutional check, as they used to be, upon the people's house, they are now an auxiliary check upon an inflated executive dominating the people's house."⁴⁹

The Australian political scientist Joan Rydon has perceptively argued that the effective performance of the house-of-review function does not make bicameralism necessary. She writes

... it is difficult to perceive of any functions claimed for a second chamber as a house of review which could not be performed within one (if necessary enlarged) second chamber. It would be possible to devise rules for delay between the stages of

legislation, to prescribe that certain matters must be sent to investigative committees, that on others interested bodies must be given time to submit opinions, that special majorities be required for certain types of decision, etc. A system of rules and procedures might be created within a single chamber which would guarantee a closer review of legislation than any second chamber has ever provided.⁵⁰

Yet the Australian House of Representatives has been ineffective as a house of review. The committee system is relatively underdeveloped and is not like that of the Canadian House of Commons organized along the functional lines of government activity. Party discipline is very strict and the intensity of partisan conflict very high. The House is in session for an average of only 60-70 days per year - sittings are usually on Tuesday, Wednesday and Thursday of each week - and MPs have been successful in their general disposition towards spending a relatively small portion of their time in Canberra.

A legislative chamber - even such a relatively small body as the Australian Senate - can perform the house of review role effectively only if it exercises this role through committees, and there is general agreement among students of the Senate that vital and influential role now played by that body is in large measure a result of its committee organization effected in the late 1960s and early 1970s largely under the leadership of the then Labor leader in the Senate Lionel Murphy and the Clerk J.R. Odgers. One writer summarized the results of the successful Murphy-Odgers initiatives in these terms:

All this activity had transformed the Senate's public image. From being a dreary old men's home it had suddenly become the centre of the parliament's committee activity, with seven standing committees capable of looking at legislation, petitions and subject matter of concern to the Commonwealth. It had five estimates committees, which twice a year would subject the

appropriation bills to a secretary they never had before ... It also had a series of select committees inquiring into highly political subjects. It was little wonder that the House of Representatives was spurred by its backbench members into considering whether or not its committees' role ought to be greatly increased.⁵¹

Solomon goes on to describe how both government and opposition leaders in the House were able to thwart the establishment of a more effective committee system in that chamber and thus the Senate is subjected to little challenge in its performance of the house-of-review function.

Apart from a number of domestic committees concerned with the affairs of Parliament as such (Standing Orders, Privileges, Library, etc.) the Senate system of committees is organized along these lines:⁵²

1. **Legislative and General Purpose Standing Committees.** There are eight committees covering all the major areas of government activity which are appointed at the beginning of each Parliament and inquire into matters referred to them by the Senate. These are the present committees:

- Constitutional and Legal Affairs
- Education and the Arts
- Finance and Government Operations
- Foreign Affairs and Defence
- National Resources
- Science and the Environment
- Social Welfare
- Trade and Commerce

2. **Regulation and Ordinances Committee.** This Committee was established in 1932 and on the basis of its record since that time there is no reason to challenge the statement of the Committee itself in its 1982 Report that "the Australian Senate is the world path-finder in the area of parliamentary control of executive acts under delegated authority." Under Australian law there is the requirement that regulations, ordinances and

regulations made under statutory authority must be laid before parliament within fifteen sitting days after such regulation is made and that either House may disallow the measure within a further fifteen day period. The general principle under which the Committee scrutinizes delegated legislation is to ensure:

- a) that it is in accord with the statute;
- b) that it does not trespass unduly on personal rights and liberties;
- c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a political or other independent tribunal; and
- d) that it does not contain material more appropriate for Parliamentary enactment.

There are several proposals under discussion by the Regulations and Ordinances Committee to make that body's control over delegated legislation even more effective. These proposals include:

- the more extensive use of the affirmative resolution by which statutory instruments would come into effect by an affirmative vote of both houses.
- the examination by the Committee of delegated legislation in draft form before this comes into effect.
- a procedure by which the Committee would formally recommend amendments to delegated legislation as a substitute for the disallowance procedure.
- a provision under which the Committee's recommendations in respect to delegated legislation must be accepted in periods when Parliament is not sitting.
- the extension of the power of disallowance to allow either House to disallow part of a regulation or ordinance.

3. **Scrutiny of Bills Committee.** This Committee was established in 1981 with the purpose of scrutinizing proposed legislation according to basic civil liberties criteria. The Committee's terms of reference are to draw the attention of the Senate to revision of bills which might be regarded as

- a) trespassing unduly on personal rights and liberties;
- b) making rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
- c) making rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

- d) inappropriately delegating legislative power; or
- e) insufficiently subjecting the exercise of legislative power to parliamentary scrutiny.

Although the Committee does not recommend to the Senate whether the provisions it highlights be amended or rejected, a number of amendments have been made to bills as a result of its scrutiny.

4. **Estimates Committee.** There are now eight such committees set up to inquire into expenditure proposals in the major areas of government.

5. **Select Committees.** These committees are set up to inquire into particular matters and report to the Senate within a stated time.

6. **Joint House-Senate Committees.** There are at present six standing committees with representatives of both chambers (Public Accounts, Public Works, Broadcasting of Parliamentary Proceedings, Foreign Affairs and Defence, Australian Capital Territory and New Parliament House.) As well there are select joint committees and in mid-1983 such a committee on election law was meeting.

The house-of-review role as performed by the Senate through its committees is the central element in that body's work. Like the House of Representatives, the sittings of the Senate are relatively short - between 60 and 80 days each year - which leaves Senators ample time for committee activity. The Committees normally consist of six members, three government and three non-government, named by the Leader of the Government in the Senate with the chairperson being a government member and the deputy an opposition member.⁵³ Those Senators whom I interviewed - none of them ministers - testified that committee work was a satisfying activity and despite their differences about the appropriate role of the Senate in its power to frustrate or even bring down the elected government all believed that that body was playing a valuable role as a house of review. According to these views, Senate committees developed a high degree of collegiality in which partisan divisions played little importance.

The house-or-review view assumes that the second chamber is and should be a reactive body, a body which responds to the exercise or proposed exercise of governmental power. It is also one of the most crucial elements of the contemporary variants of the Westminster model that the executive virtually monopolizes the initiation of measures of public importance. Harry Evans, the Principal Parliamentary Officer (Procedure) of the Senate, has written in a recent article that the Senate in 1981-82 had begun to take action which passed beyond even the most aggressive exercise of the house-of-review function.⁵⁴ In this period the non-government majority of Labor and Australian Democrats showed a disposition to frame their proposals as bills and to demand an increasing amount of the time of the Senate for non-government business. This was a radical break with the past. In the period between 1901 and 1980 there were only 111 private Senator's bills and of these only four were enacted into law but in 1981 there were 21 such bills and in 1982 there were 15. Some of these involved contentions and important matters and eight were passed by the Senate and sent to the House of Representatives. Also one of three sitting days each week was devoted to non-government business. Evans concludes:

It is not clear whether the enthusiasm of the Senate for initiating and dealing with its own business will continue into the next Parliament or whether it will prove to have been merely a passing phase. There is no doubt that, as long as the Senate is elected on a different basis from that of the House of Representatives ... governments will find themselves without a majority in the Senate, and it may well be that they will also find that they are unable to secure what they regard as sufficient time for the consideration of government business and will be forced to spend a great deal of time debating opposition business.⁵⁵

The difficulty according to Evans' analysis is that Australians have attempted to combine the strict party discipline of the "de facto unicameralism" of Britain with the separation of powers formula of American congressionalism and he concludes rather pessimistically:

In Australia, it now seems that something will have to give, for it will prove extremely difficult to conduct a quasi-congressional system with a House of Parliament which wants to initiate its own legislation, in the context of a British-style party system. Politics will have to adjust to the Constitution, or the Constitution will have to adjust to politics, and it is difficult to adjust the Constitution without the vital ingredient of interparty agreement which is so conspicuously absent.⁵⁶

I remain somewhat puzzled about why the Australian Senate through its committees has been so effective in the house-of-review role. Senators are successful party politicians very much dependent because of the nature of the nominating process on their respective State parties and partisan conflict in Australia is vigorous, often bitter and unending. My very tentative hypothesis after questioning several Senators on this matter is that the reconciliation between the partisan and review roles is effected because of the relation between those people and their State party executives. The trade-off essentially is that the Senators find the review function one which is both personally satisfying and which they believe crucial to the governmental process and for their part the State party executives are prepared to tolerate Senators devoting a considerable proportion of their time to this role, although there are few partisan advantages in it, so long as Senators are available for party activities. I was very much impressed with the collective esprit de corps of the Senate based largely on a conviction about the review functioned and combined with a certain disrespect for the House of Representatives as a chamber whose members are much too subject to party discipline.⁵⁷

Supporters of an elected Canadian Senate have been almost totally preoccupied with more effective regional representation in the central government and have had little concern with the house-of-review role. It seems to me impossible to predict how effectively such a body would perform such a role, although the following can be said:

First, if the review function is to be performed well, the powers of the Senate should extend to virtually all the functions of government.

Secondly, the provision for nine-year non-renewable terms for Senators as proposed by the Joint Committee on Senate Reform in its 1984 Report would seem to work against the review function being carried out effectively. Under this proposal, one-third of the Senators would retire each three years and this combined with vacancies occurring because of deaths and retirements would result in turnovers of membership frustrating both collegiality in committees and the attainment of specialized expertise by Senators essential to adequate review of proposed legislation and other government activities.

6 AN ELECTED SENATE AND THE FEDERAL BALANCE

These conclusions can be drawn about the role of the Australian Senate related to the Commonwealth-State balance:

First, because of the equal representation of the States in the Senate the smaller States have been advantaged in their capacity to influence the workings of the national government. Campbell Sharman has demonstrated how this advantage has worked and particularly how residents of the smallest State, Tasmania, have regarded the Senate as an important bulwark for their interests.⁵⁸

Secondly, the State governments as such do not press their interests through the Senate to any considerable degree. These State interests are advanced and defended in the kinds of intergovernmental interactions familiar to observers of executive federalism in Canada.

The Australian experience does not in my view give definitive clues about how an elected Canadian Senate would be likely to affect the federal-provincial balance and relations between the federal and provincial

governments. All the schemes for a new kind of Senate provide for some over-representation of the smaller provinces in terms of their respective populations, although only the McCormick-Manning-Gibson study recommends equal provincial representation. If, as suggested by this study and by the Report of the Joint Committee on Senate Reform, Senators acted in a relatively non-partisan way the present influence of Western Liberal Senators in the parliamentary caucus of their party and of Progressive Conservative Senators from Québec in theirs would be largely eliminated and the present regional imbalances would be exacerbated. Further, the proposals which would make Senators ineligible for cabinet posts would deny prime ministers the freedom to attempt to remedy such imbalances by appointing Senators from regions of party weakness as did Joe Clark in 1979 and Pierre Trudeau in 1980.

Supporters of an elected Canadian Senate, and of other reforms to make the central government more representative of and responsive to regional interests, argue that such changes would enhance the power and legitimacy of the federal government in its relations with the provinces. According to this line of analysis, Ottawa is relatively weak because it is unrepresentative of Canada's regional diversities and the provinces are strong largely because this deficiency permits the provincial governments to assume the almost exclusive franchise of speaking for regional interests.⁵⁹ Alan Cairns has submitted this argument to searching criticism - the federal government has on many recent occasions acted decisively even in situations where regional interests were engaged and the province's strength is not a by-product of Ottawa's weakness but of their own considerable resources of jurisdiction, money, bureaucratic competence and

political skill.⁶⁰ To the extent that many Canadians are alienated from the federal government and believe it is hostile or indifferent to their interests one should reasonably expect little from the establishment of an elected Senate alone in restoring confidence of citizens in their national political institutions. An assertive Senate with adequate powers to obstruct federal governments sustained by majorities in the House of Commons - and there is no case for a weak Senate - would give regional interests some protection they do not now have. To be specific, an elected Senate might well have prevented the NEP from being put in effect or at least would have caused certain changes to be made to conform with Western interests. Yet this kind of obstruction might well have resulted in a consequent decline in Ottawa's legitimacy among residents of regions which benefitted from NEP.

In the short run at least an elected Senate might have a provincializing effect. One of the circumstances of executive federalism in Canada is that the participants, most importantly of course the first ministers, can speak for and commit their respective governments. So far as the provinces are concerned this would still be so with an elected Senate in place but the federal authorities would have to proceed under a constraint that does not now exist. And it is also possible that in some circumstances the provinces would collaborate with groups of Senators to gain concessions from Ottawa unattainable in government-to-government negotiations. One can only conjecture about how provincial interests would be channeled through an elected Senate but it is safe to say that less than at present the federal executive would be able to speak for and commit the national government.

NOTES

1. A non-technical account of the Australian Constitutional system is contained in Colin Howard, *Australia's Constitution*, Canberra: The Australian Government Publishing Service, 1975.
2. In commenting on an earlier draft of this paper an Australian scholar argues that the intent of Section 15 is to give State party machines a veto over nominations.
3. For a balanced analysis of recent proposals for constitutional change in Australia see John McMillan, Gareth Evans and Haddon Storey, *Australia's Constitution: Time for Change?*, Sydney: Law Foundation of New South Wales and George Allen and Unwin Australia, 1983. The collection *Change the Rules! Towards a Democratic Constitution* Sol Encel, Donald Horne and Elaine Thompson, eds. Melbourne: Penguin Books Australia, 1977, is from left-wing perspectives. For a non-Labor collection, see *The Constitutional Challenge*, M. James, ed., Sydney: Centre for Independent Studies, 1982.
4. The results of a symposium on these proposals are contained in *Fixed Term Parliaments*, Alan Cumming Thom and Anne Lynch, eds. Proceeding of the Third Annual Meeting of the Study of Parliament Group, University of Tasmania, Hobart, 1982 (mimeo).
5. I have read only a small portion of the voluminous analytical and polemical literature about the 1975 crisis. I found two books to be particularly helpful: 1) Geoffrey Sawer, *Federation under Strain: Australia 1972-1975*, Melbourne: Melbourne University Press, 1977 and 2), Gareth Evans, ed. *Labor and the Constitution 1972-1975, The Whitlam Years in Australian Government*, Melbourne: Heinemann, 1977. See also L.J.M. Cooray, *Conventions, the Australian Constitution and the Future*, Sydney: Legal Books, 1979. Accounts of the crisis by the major protagonists are contained in Gough Whitlam, *The Truth of the Matter*, Melbourne: Penguin Books Australia, 1979 and John Kerr, *Matters for Judgment: An Autobiography, with an Epilogue by Eugene Forsey*, Melbourne: Macmillan of Australia, 1978.

6. Cooray and Sawyer, *op. cit.*, deal extensively with the matter of constitutional convention in the 1975 crisis. It is unfortunate perhaps that the law/convention debate which occurred in Canada in 1980-81 was carried on with almost no reference to the Australian controversy of the previous decade.
7. See Sawyer, *op. cit.*, Chapter 1, "Federalism and the Australian Labor Party."
8. Sawyer, pp. 15-24.
9. p. 128.
10. *The Truth of the Matter*, *op. cit.*, p. 74.
11. The letter is published in Kerr's autobiography, *op. cit.*, pp. 342-344.
12. Anne Summers, *Gamble for Power*, Melbourne: Nelson, 1983, pp. 9 - 12. The correspondence between the Governor-General and the Prime Minister is reprinted on pp. 203 - 213.
13. L.F. Crisp, *Australian National Government*, Fourth Edition, Melbourne: Longman Australia, 1983, p. 336.
14. Dean Jaensch, *The Australian Party System*, Sydney: George Allen and Unwin, 1983, p. 99.
15. For the provisions see *Electoral Redistribution*, Current Issues Brief No. 6, Legislative Research Service, Canberra: Department of the Parliament Library, 1983.
16. Lord Hailsham, *The Dilemma of Democracy*, Glasgow: William Collins and Sons, 1978.
17. Mark Sproule-Jones, "The Enduring Colony? Political Institutions and Political Science in Canada", 14 *Publius* (Winter 1984), pp. 93-108.
18. p. 96.
19. p. 104.
20. Report for the Special Joint Committee of the Senate and of the House of Commons on Senate Reform, Ottawa: Supply and Services, 1984, p. 29.
21. In their study *Regional Representation*, Calgary: Canada West Foundation, 1981, Peter McCormick, Ernest C. Manning and Gordon Gibson suggest at p. 120 that their version of an elected Senate might develop an American-type tradition of "Senatorial courtesy" in respect to the ratification of appointments of special concern to particular provinces or regions.

22. See generally Robert MacGregor Dawson, *The Civil Service of Canada*, London: Oxford University Press, 1929.
23. The results of a symposium on these proposals are contained in Alan Cumming Thom and Anne Lynch, eds. *Fixed Term Parliaments*, Hobart, University of Tasmania, 1982, (mimeo).
24. Robert Stanfield, "The Role of National Parties", *50 Options*, (No. 4, July/August 1984), p. 9.
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28. Report of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform, Ottawa: Supply and Services, 1984, p. 23.
29. Peter McCormick, Ernest C. Manning and Gordon Gibson, *Regional Representation*, Calgary: Canada West Foundation, pp. 115-133.
30. p. 116.
31. For an account of the electoral provisions governing the Senate until 1948 see J.R. Odgers, *Australian Senate Practice*, Fifth Edition, Canberra: Australian Government Publishing Service, 1976, p. 94.
32. On the Australian Democrats see (1) Paul Reynolds, "The Australian Democrats" in Howard R. Penniman, ed., *The Australian General Elections of 1977*, Canberra: Australian University Press, 1979, pp. 125-140 and (2) Denis Strangman "The Australian Democrats and the Senate" in Richard Lucy, ed., *The Pieces of Politics*, Third Edition, Melbourne: Macmillan of Australia, 1983, pp. 91-105. The ADs are on record as promising to oppose the refusal of supply to a government by a Senate majority.
33. Dean Jaensch given an example of the extreme tolerance of Australian practice in this regard. "In 1973 [in the South Australian elections] a single individual nominated himself for election as the Happy Birthday Party having changed his name by deed poll to Susie Creamcheese." *The Australian Party System*, Sydney: George Allen and Unwin, 1983, p. 15.
34. Campbell Sharman, "Diversity, Constitutionalism and Proportional Representation", in Michael James, ed., *The Constitutional Challenge*, Sydney: Centre for Independent Studies, 1982, p. 104.
35. Quoted in L.F. Crisp, *Australian National Government*, Fourth Edition, Melbourne: Longman Cheshire, 1978, p. 324.

36. Odgers, op. cit., pp. 5-14.
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38. Campbell Sharman, "The Australian Senate as a States House", 2 Politics, November 1977, pp. 64-75.
39. p. 73.
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41. "Towards a Valuable Senate", in The Constitutional Challenge, op. cit, p. 61.
42. op. cit.
43. Joan Rydon, "Upper Houses - The Australian Experience", Paper presented to the Australian Study of Parliament Group, Perth: 1982, (mimeo), p. 11.
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46. Donald V. Smiley, Canada in Question: Federalism in the Eighties, Third Edition, Toronto: McGraw-Hill Ryerson, 1980, Chapter 5.
47. See Robert J. Williams, "Candidate Selection" in Howard R. Penniman, ed., Canada at the Polls, 1979 and 1980, Washington: American Enterprise Institute, 1981, pp. 86-120.
48. See W. Ivor Jennings, Parliament, Second Edition, Cambridge: Cambridge University Press, 1957, p. 445.
49. F.A. Kunz, The Modern Senate of Canada 1923-1963: A Re-appraisal, Toronto: University of Toronto Press, 1965, p. 23.
50. Joan Rydon, "Upper Houses - The Australian Experience", Perth: Australian Study of Parliament Group, 1982, (mimeo), p. 13.
51. David Solomon, Inside the Australian Parliament, Sydney: George Allen and Unwin, 1978, p. 84.
52. The following material on the organization of Senate committees is from the pamphlet Senate Committees, Issued by the Authority of the President of the Senate, Canberra: Commonwealth Government Printer, November, 1982.
53. The important Regulation and Ordinance Committee has seven members, four of them from the government party.
54. Harry Evans, "The Australian Senate 1981-82: Taking the Initiative", Canberra: 1983, (mimeo). To be published in an early issue of The Parliamentarian.

55. p. 7.
56. op. cit.
57. Any systematic account of the development of the modern Australian Senate would give prominent place to the career of J.R. Odgers who served on the staff of the Senate from the 1930s onward and was its Clerk from the early 1950s until his retirement in 1977. Odgers was an influential participant in the development of the modern committee system in the Senate and forthright defender of that body's powers. His enduring monument in *Australian Senate Practice* whose Fifth Edition was published in 1976 - a detailed account of the history of the Senate, its rules and practices and conventions along with a feisty defence of its role. I am much indebted to Mr. Odgers for granting me a long interview in July 1983.
58. Campbell Sharman, "The Australian Senate as a States House", 2 *Politics*, (November 1977), pp. 64-75.
59. Peter McCormick, Ernest C. Manning and Gordon Gibson, *Regional Representation*, Calgary: Canada West Foundation, 1981, p. IX.
60. Alan C. Cairns, *From Interstate to Intrastate Federalism*, Institute of Intergovernmental Relations Discussion Paper, Kingston: Queen's University, 1981, pp. 6-9.

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