
Don't Throw the Senate Out With the Bath Water

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The Senate's lack of popular legitimacy gives disproportionate significance to the other problems besetting the institution. Relying on the so-called 'democratic deficit' argument, many ask for its abolition or want it to become elective. This article suggests that both these solutions would exacerbate the democratic deficit by extending to all our parliamentary institutions the strong hold of political parties and the Prime Minister. If the Prime Minister would agree to delegate power to recommend the appointment of senators to a House of Commons' committee whose decisions would be taken by consensus, the risk of radical solutions would be avoided, and the Upper Chamber would gain in popular legitimacy. It could thus continue to contribute to Canadian democracy through the independence of mind and non-partisanship of parliamentarians chosen for their eminence and the sincerity of their commitment to the well-being of all Canadians.

The Senate has only one problem, but it is considerable: it has no popular legitimacy. This amplifies the severity of its other imperfections. For instance, the inappropriate use of their allowances by some senators has called into question the very existence of the Upper House, whereas when MPs commit similar offenses, their distractedness is rightly condemned but without any claim to abolishing the House of Commons.

Since Confederation, most critiques of the Senate have essentially been variations on the argument that our parliamentary institutions suffer from an alleged "democratic deficit." The typical argument is as follows: Senators have roughly the same powers as MPs even though they are not elected. It is impossible to get rid of even the worst senators before they reach the age of 75, unless they commit "any infamous Crime," to use the phrasing of the *Constitution Act, 1967*. If they were at least appointed on the recommendation of a democratic institution, as are officers of Parliament or cabinet secretaries in the United States, we might tolerate them. Alas, no, their appointments are recommended to the Governor General—who is no

more legitimate—because they are loyal and partisan friends of the Prime Minister, who also suffers from a democratic deficit given that he or she can count on the submission of the elected chamber even when 60% of voters have not chosen candidates from the party he or she is running.

Faced with the Upper House's genuine image problem, Canada's political minds have come up with only two solutions: abolish the Senate or elect senators.

If the Senate had no powers, cost nothing and was as virtuous as a monastery, its abolition would have no significance. But the Senate has real powers, and their evaporation would enhance the already considerable power wielded by the Prime Minister. Indeed, the House of Commons would become the sole source of legislative power, and in a majority government, there would no longer be a counterweight to the allegiance most MPs are compelled to give the Prime Minister to boost their chances of promotion and re-election. Paradoxically, the voices we hear calling for the Senate's abolition are very often the same ones lamenting the powerlessness of MPs, even though the former would exacerbate the latter.

As for Senate elections, they would have three major negative effects. First, electing senators would consolidate the stranglehold political parties—and therefore, their leaders—have on Canada's parliamentary institutions. The absolute domination

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of the elected Australian Senate by political parties is proof of this risk. Because they are not running for re-election, Canadian senators, unlike MPs, do not owe unconditional allegiance to the party of the Prime Minister who recommended their appointment. They can “choose” to be partisan, but they cannot be constrained by the threat of losing their seat. Senate elections would dry up this last oasis of independence once and for all.

Second, Senate elections would call into question the constitutional convention of responsible government. Under this convention, the House of Commons grants or denies the Prime Minister and Cabinet the right to govern in the name of the Queen by giving or withholding its confidence. The House of Commons enjoys this privilege because it is the only one of the three components of Parliament that is elected. If the Senate were elected, it could rapidly claim for itself the right to make or break the government or, at the very least, more brazenly oppose financial measures. Since close election results would be possible in both houses, the risk of gridlock would grow. Decisive results, on the other hand, would give the leader of the winning party such firm control of both houses that Parliament would become irrelevant until the next election. Some will counter with the long list of potential arrangements that would mitigate these risks: delineating the respective powers of the two houses, setting different mandate lengths, etc. Granted, we can live in hope, but all of these possibilities would entail reopening the Constitution, which is in itself a problem, and would also carry the risk that the well-intentioned wisdom of the initial endeavour would get lost in the political maneuvering of the actual negotiations.

Third—and here is where the argument will meet the most resistance—the Senate will cease to attract as many high-quality individuals if it is elected. Compared with the less flattering examples who many would pleasantly enumerate, the list is much longer of senators who have rendered and continue to render invaluable services and dedicate themselves to their country with a sincerity and intelligence that would be difficult in an elected house.

Let us not confuse elections with democracy. In a democracy, citizens must be able to get rid of leaders who do not satisfy them. This condition is admirably met in Canada through the government’s obligation to keep the confidence of the House of Commons in order to govern. The Senate in no way impinges on this democratic exercise, as it cannot defeat the government. Moreover, the Senate’s less partisan oversight of government activities and senators’ ability

to examine bills in more detail enable the Upper House to compensate for the deficiencies of the inevitably partisan dynamic in the elected house.

If the Senate were abolished or elected, the sky would not fall. However, in either case, our Parliament would become even more partisan, submissive to the Prime Minister and repressive of MPs’ expressions of independent judgment—exactly what we have criticized it for becoming over the past 40 years. If we listed everything we criticize MPs for failing to be, we would realize that we are basically condemning them for not being what senators should be in an ideal parliament: freethinking, competent, respectful, accomplished in that their past achievements clearly show that they are genuinely committed to the well-being of all Canadians, supportive of their party but proud to affirm their independence on matters of principle, and eager to openly discuss the public policy issues that matter to them most.

As for MPs, even if they all possessed these attributes, the dynamic of an elected house in our parliamentary system would prevent most from embodying them. These attributes are more compatible with an unelected house, but the way senators are appointed means that the Upper House unfortunately does not fully enjoy that independence. Given that the Governor General is bound by the Prime Minister’s recommendations when the latter has the confidence of the House of Commons, it would defy all logic for the Prime Minister to give up the privilege of recommending that the Governor General appoint to the Senate the individuals most likely to guarantee a short-term political advantage. The result is that senators, even the most independent ones, are suspected of adopting the same partisan logic while having none of the popular legitimacy that would make their partisan behaviour tolerable.

Therefore, the key question is: how can we enhance the Senate’s popular legitimacy and foster senators’ independence without increasing the power of the Prime Minister?

To make such a change, the Prime Minister would have to agree to delegate to another body the power to recommend senators’ appointments. The chances that such openness will happen are slim. By giving up this political advantage, the Prime Minister would create a precedent that could snowball and, if the confidence of the House of Commons became more fragile, force the Prime Minister to delegate recommendation powers in other areas.

A balanced solution would be to delegate the power to recommend the appointment of senators to a

committee of the House of Commons that would meet in camera and make decisions by consensus.

This process would increase senators' popular legitimacy while ensuring that the House of Commons remains the only confidence chamber. Consensus—no one is opposed—would be more practical than unanimity—all are agreed—and would eliminate any suspicion of partisan politics, since, in a majority government situation, a simple majority could be perceived as equivalent to a recommendation by the Prime Minister. The risk of such a process would be that a single committee member could systematically block all recommendations to bargain for a benefit elsewhere or to express opposition in principle to the institution itself. The ways to mitigate this risk are many, but the simplest is to require the opponent to present a reasonable alternative or lose the right to vote. Holding deliberations in camera would lead to better candidates. This might be considered an elitist argument, but there is honour in being selected without having sought the position. The Senate should be composed of distinguished individuals who have been chosen for the sincerity of their commitment to the country. A candidate who declared "I want to be a senator" would arouse suspicions of ambition and opportunism and render the recommendation less honourable. It would therefore be preferable for the discussions to take place behind closed doors and the recommended candidates to be announced only once

they have accepted the position. The committee could take the form of a special committee made up of MPs from the province or region of the Senate vacancy.

Since the debates preceding Confederation, and despite hundreds of articles calling for the abolition of the Senate or the election of senators, no one has in any way successfully demonstrated that the Senate harms Canadian democracy. The problem with the Senate stems from a superficial interpretation of what a democracy should be. Many have concluded that an unelected political institution in a modern democratic state cannot be legitimate. They have confused the means with the end. One of democracy's favoured means is the regular popular election of political leaders. The end of democracy is more freedom, better health and greater prosperity for human beings.

Senators' less partisan behaviour, independence and ability to examine the merits of public policies have helped enhance the freedom, health and prosperity of Canadians. This has never prevented our political leaders from being subjected to the verdict of popular vote. Why not think that this arrangement has favoured Canada's development? It has been said that democracy is the least bad of tried political systems. By enhancing the Senate's popular legitimacy, without denaturing it through elections, it would allow Canada to continue to make the least bad of political systems just a little bit less bad.