Scrutiny of Appointments by Parliament

Louis Fisher

On February 16, 1985 I met with a committee from the Canadian House of Commons to discuss the role of the United States Senate in the appointments process. Such requests come with some frequency as the Library of Congress is often visited by members of parliamentary governments interested in studying the ways of Congress. They hope to pick up ideas that can be applied at home.

It is always comforting to know that other countries find some possible merit in our form of government and its operation. It is doubly gratifying when I think of the American scholars and practitioners who despair of our system of separated powers. To them it is chronically and hopelessly incapable of providing effective government. Some of the common epithets bandied about are "deadlock" and "stalemate". These critics urge the United States to move toward a parliamentary model with its supposedly superior virtues of accountability and efficiency.

Despite our apparent deficiencies, other countries remain impressed by the vigor and independence of Congress. They wonder if they can borrow some of its qualities, particularly the strong committee system that permits Congress to closely monitor the activities of administrative agencies. Presumably these were some of the thoughts that inspired the visit from Canadian legislators.

The immediate motivation, however, was the statement of Brian Mulroney during his 1984 campaign for Prime Minister. He proposed that key political appointments be subject to the review of a committee of parliamentarians. After his election, the government established a Special Committee on the Reform of the House of Commons with James A. McGrath as Chairman. Other members included Bill Blaikie, Lise Bourgault, Albert Cooper, Jack Ellis, Benno Friesen, and André Ouellet. This committee visited Washington D.C. to study such congressional operations as the televising of committee meetings, electronic voting, congressional staffing, the House Clerk's office, the Architect's office, and the Senate's responsibility for giving its advice and consent to nominees submitted by the President. I provided assistance for the latter issue.

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When the committee members returned to Ottawa to report to the House of Commons on their trip, I was fascinated to read about the impressions they had picked up. On February 25, 1985, Mr. Cooper told his colleagues in the House that the United States Senate's confirmation process was largely ineffective: "The review process of presidential appointments really startled me. I thought, first of all, the Americans would have been much higher on the process than they were. I was surprised to see them saying that it was not working very well; that they were not very excited about it and not very thrilled; that in fact they would like to move away from it. I think we should still consider it, but probably in a much more limited scope than I had looked at originally."

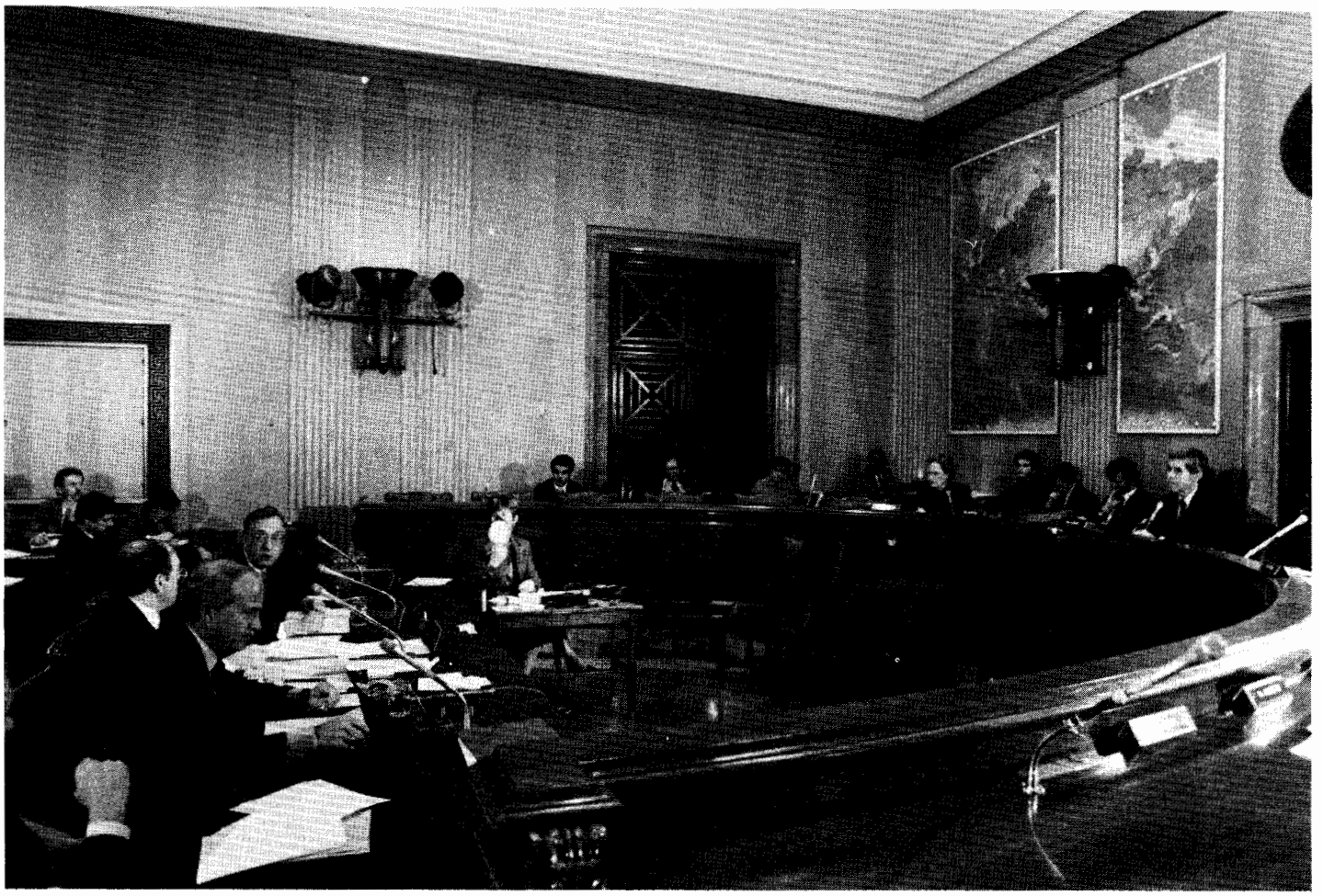
Mrs. Bourgault returned home with a similar impression, part of it apparently drawn from my talk. "According to Mr. Fisher," she said, the Senate committees "did not seem to be so important." The picture appeared to be one of rubber-stamping the President's recommendations: "Over there, it seems already decided, there is no discussion and the committee does not have an important role in the presidential appointments. Everything is already decided." The process is not nearly so passive and mechanical, but more on that later.

Mr. Ouellet pointed out that Senators supported the confirmation process but admitted that the volume of appointments was too great to give each nominee individual attention. There was no question about the general importance of the Senate's role. "I would like to see the day," said Mr. Ouellet, "when the President of the United States would try and remove from the American Senate the opportunity to advise him on those nominations. It would trigger a formidable constitutional crisis. In fact, I think that the Senate, since there are too many nominations, only spends its energies on a few important ones."

With these remarks as an introduction, I want to concentrate on two key issues: how the appointments process operates in the American Senate, and what relevance that process might have for the Canadian Parliament.

U.S. Senate Action on Appointments

The power of appointment is shared between the President and the Senate because the framers of the Constitution feared the concentration of power. They objected to placing the power of



Senators such as those on the Foreign Relations Committee shown above have the power to advise and consent to a great number of executive appointments.

appointment solely in the Executive, recalling the excesses of the British system where the King not only appointed officers but created offices as well. The framers wanted to avoid what they considered a corrupting influence. The American Constitution added two checks. First, Congress would create offices by statute. Second, the President and the Senate would share in the appointment of the officer. The Constitution also allowed Congress, by statute, to place the power of appointment directly in the hands of the President, departmental heads, and the courts.

For major offices the President *nominates* and the Senate *confirms*. The framers hoped to assure accountability by placing the power of nomination in one person, who they felt would more likely make responsible recommendations than having that duty divided among many. They believed that the President would feel a sense of duty in selecting the most qualified candidates and would not be moved as much as the Senate by sentiments of friendship and personal attachments.

However, the framers did not expect angels in office — even at the presidential level. They knew that Executives would have an inclination to reward friends. Indeed, loyalty has always ranked high among White House values. Debts (both personal and financial) are considerable after a long and expensive political campaign. Moreover, the number of nominations has grown so rapidly that it is impractical to expect the President to personally know and vouch for the integrity, competence, and credentials of each nominee. Finally, although the power to nominate is theoretically vested exclusively in the President, on a more practical level it has come to be shared with legislators, interest groups, professional organizations, and other bodies.

The framers supplied political accountability by adding a second check: Senate confirmation. The purpose of Senate involvement was to catch mistakes. As Alexander Hamilton noted in *Federalist Paper No. 76*, Senate confirmation would be an excellent check "upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." Hamilton reasoned that someone who had "sole disposition" in awarding offices "would be governed much more by his private inclinations and interests than when he was found to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature." The President would take special care because of the risk of rejection and embarrassment.

The Senate rarely rejects a nomination to the Cabinet. The last occasion was in 1959, when it defeated the nomination of Lewis L. Strauss to be Secretary of Commerce. Only seven other Cabinet nominees had been rejected before that. The Senate's reluctance to contest presidential choices for the Cabinet was anticipated by Hamilton: "as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the Chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal." Joseph Story, one of the most distinguished commentators on the U.S. Constitution, correctly predicted that Senate rejections would be rare: "The more common error, (if there shall be any) will be too great a facility to yield to the executive wishes, as a means of personal, or popular favour."

When Ed Meese was confirmed as Attorney General, many of his supporters explained that the presumption favoured the President's choice for the Cabinet. That has indeed been the custom. Other supporters argued that if the Senate cannot discover activities by the nominee that are criminal, unethical, or improper, it is their duty to confirm.

There were 31 votes against Meese, an unusually heavy opposition to a Cabinet nomination. Opponents charged that Meese had shown a lack of ethical sensitivity, fell short of professional qualifications, and possessed unacceptable philosophical and political views. Several Senators argued that the Attorney General was fundamentally different from other Cabinet officers and that higher standards of ethics and professionalism should prevail, particularly because of the serious abuses that can flow from an agency engaged in prosecution.

The Senate does not defer as much for other presidential nominations. Challenges are more frequent for subcabinet positions. Although Meese was confirmed, the Senate refused to support William Bradford Reynolds to be Associate Attorney General. The nomination was killed by the Senate Judiciary Committee in June 1985. The Senate is also more vigorous in reviewing nominations for the federal courts, independent agencies, and regulatory commissions.

The number of actual rejections by the Senate is quite small, but this statistical record misses subtle kinds of rejections: names that are never submitted by the White House because of likely opposition; names withdrawn after a Senator or several Senators object; names withdrawn after a committee refused to report or is about to report adversely; names never sent up because of statutory standards regarding qualifications, political balance, and financial disclosure; names dropped because of interest group opposition; and names deleted because of unfavorable reviews by the American Bar Association.

The Senate periodically reexamines its function in confirming officers. To simply defer to the President, on the ground that he has a right to select his own assistants, would make a nullity of the Senate's advice-and-consent role. Department heads and their assistants are not mere staff support for the President. They are called upon to administer programs that Congress has enacted into law. A lack of interest by an administrator, or overt hostility to a legislative program, can undercut the policies that Congress has taken pains to announce as national law. Administrators so disposed can shatter agency morale and create uncertainty for career personnel, who may not know whether they are supposed to implement White House or statutory objectives. Nowhere in the letter or the spirit of the Constitution is there an obligation on the part of the Senate to confirm presidential nominees. On the contrary, the burden should be on the President to select and submit a candidate with acceptable credentials.

Especially sensitive is the Senate's responsibility for reviewing nominations to the Supreme Court. After the Senate's rejection of two names submitted by President Nixon, a Senate study in 1976 tried to sharpen the criteria for Court nominees. The study regarded lawyers with broad experience (including political experience) as best suited to handle the responsibilities thrust upon members of the judiciary. Senators, for their part, are justified in considering not merely a nominee's political and constitutional philosophy but also the balance of views present on the Court.

Application to the Canadian System

Although there are fundamental differences between the congressional and parliamentary models, there are also many important similarities and parallels. The power vested in the U.S. Senate could not be so easily placed in the Canadian Senate, which is an appointive rather than elective body. Moreover, the Canadian Prime Minister depends to a much greater extent on the support and confidence of the Parliament than the American President does on the coequal and independent Congress. As noted during discussion in committee on February 25, 1985, "there is the problem, if you give Parliament the power to turn down an appointment, of what that does to the issue of confidence."

American Presidents are not subject to formal votes of confidence and may remain in office after crucial proposals are resoundingly defeated. Still, the need for confidence in the Executive is not alien to the system of separated powers. The Senate generally defers to presidential recommendations for Cabinet nominations and often subcabinet selections as well. That principle has less application when the agency is not directly under the President's control. There are a number of regulatory agencies and independent commissions that are headed by a multimember body of five or seven members. These bodies are insulated from presidential control though long terms, staggered appointments, and restrictions on presidential removal. Clearly these bodies are not supposed to be responsive to White House policies in the same manner as executive departments within the Cabinet. The Senate is therefore expected to play a stronger and more assertive role in reviewing nominations.

Similarly in the Canadian system, there are a number of Crown corporations and quasi-judicial agencies that are expected to pursue long-term and independent policies, representing not so much the views of the particular party in power but rather broader regional and national interests. It would do minimal violence to the principle of confidence in the Prime Minister to subject these officers to some kind of scrutiny by the House of Commons. Furthermore, the House of Commons could vote on appointments for "legislative officers" who report not through Ministers but directly to Parliament. These officers include the Auditor General, the Human Rights Commissioner, the Privacy Commissioner, and the Official Languages Commissioner. The principle of confidence in the Prime Minister is not directly at stake in the appointment of such officials as the Clerk of the House, the Clerk-Assistants, and the Parliamentary Librarian.

Some of these ideas are reflected in the June 1985 report of the Special Committee on Reform of the House of Commons. Noting that Prime Ministers had come under increasing criticism regarding some of their nominations, the Committee stated its belief that "it is in the long-term interest of everyone (prime ministers, opposition parties, private members, and the individuals appointed) to find a mechanism whereby MPs and others can have some role in this process without contradicting any fundamental principle of our system of government." After

reviewing some of the problems experienced by the American Senate, such as the heavy volume of nominations considered, the Committee concluded that the potential benefits of a confirmation process in the House of Commons "would outweigh the problems." Potential benefits included the following points: "It should result in greater prior consultation by governments to avoid embarrassment. This type of informal mechanism is the hallmark and strength of responsible government. Parliament's traditional relationship with the executive comes not only through approval, rejection or alteration but also through the deterrent effect of bad publicity. The House of Commons exists to represent the people of Canada, to legitimize the rule of the executive and to hold the government accountable. It must receive the tools to pursue that mandate. One of those tools is the scrutiny of government appointments."

The Committee recommended different types of scrutiny, depending on the office. Standing committees would have the power to call for public questioning of individuals appointed as deputy minister. To avoid the possibility that an appointee would be asked to disclose ministerial confidences, "we suggest that this committee appearance occur as soon as possible after the appointment." The name of the person appointed would be laid upon the table of the House of Commons immediately after the appointment is made, and the committee could call the appointee for questioning within 30 sitting days. The inquiry would include the "appropriateness of the appointment," followed by a report to the House.

Appointments to Crown corporations would be subject to the same procedure. For regulatory agencies over which the executive had little control, including specifically the Canadian Radio-Television and Telecommunications Commission, the Canadian Transport Commission, and the National Energy Board, the Committee recommended a stronger role for Parliament. Not only would the names be submitted to the appropriate committee of the House of Commons, but an adverse report from the committee within a 30-day review period "should constitute a veto of the nomination."

Finally, the Committee recommended that appointment for House of Commons officers, such as the Clerk and the Sergeant-at-Arms, should be submitted to a committee of the House and subject to the same approval procedure as for regulatory agencies described above. Nominations of all officials reporting to the House of Commons or to Parliament such as the Auditor General, the Privacy Commissioner, the Information Commissioner, the Human Rights Commissioner, the Commissioner of Official Languages, and several others would be handled the same way.

The Committee recognized that it was heading into "uncharted waters" but if the recommendations worked well it suggested the House of Commons might consider extending the confirmation process to other regulatory agencies or to the Crown corporations. It also urged members of the House to regard scrutiny of appointments as only a "partial answer" to Parliament's struggle to hold the executive accountable.

The Government Response

The Government response to the Report of the Special Committee on Reform of the House was tabled on October 9, 1985 by the Government House Leader Ray Hnatyshyn. He said the government fully endorsed the direction recommended by the committee concerning Order-in-Council appointments but proposed three very different principles as the basis for detailed discussion with opposition parties in order to implement the reform. These were that:

1. All government Order-in-Council appointments past and future, except Judges, be eligible for scrutiny by appropriate Standing Committees of the House of Commons on an experimental basis;
2. Individuals could be called for scrutiny *after* their appointment except for nominees to quasi-judicial positions who could be called for scrutiny *before* they are appointed;
3. Standing Committees will not have a veto over appointments.

Speaking in the House immediately after tabling of the Government response the spokesman for the Official Opposition Jean-Robert Gauthier, called the government position on appointments a paper tiger without teeth. "The Government has yet to provide details on how it sees the system working. More important, it does not propose that the committee reviewing appointments can do anything substantial about the bad choices which this Government makes. It borrows from the American system and says that all Order in Council appointments will be reviewed by the committee. The Government knows that the committee cannot do that."

It is now more than a year since the Canadian reform committee visited Washington and during the past few months the question of scrutiny of these appointments has received a good deal of attention. It is perhaps too early to make any definitive pronouncements but it would seem that Canada has no intention of adopting an American style "advise and consent" procedure. That is not surprising considering the substantial differences between Canadian and American political systems. Nevertheless, the task of keeping unelected agency officials accountable to elected representatives is a vital and continuing challenge to both Parliament and Congress. The exchange of information and ideas among legislators and staff on both sides of the border can only assist in this process. ■