

End the Never-endum with a Referendum: A Path Forward on Senate Reform

“Change or vanish!”

That was the message from the Prime Minister that was brought to the Manning Foundation symposium by his Minister of State for Democratic Reform, Pierre Poilievre. This view on the Senate’s future is important not just because it’s the PM’s view, but because it represents a much broader shift in elite and public opinion. Until recently, support for abolishing the Senate was mostly an NDP position. Today, it is shared by many Western Canadians and Conservatives across the country—the former bedrocks of support for a reformed Senate. This crisis, if you will, thus creates a window of opportunity: “Change or vanish!” But how?

There was an almost unanimous consensus that a reformed Senate would be better than either the status quo or abolishing the Senate. But of course there was no consensus on what these reforms should be, much less on how to implement them. This was precisely the point made by Scott Hennig of the CTF in support of abolishing the Senate and thereby ending the Senate-reform “never-endum.”

The shape of the problem is this: The risk of continuing to pursue reform is that we end up with another 30 years of the status quo—which almost no one wants. But the risk of embracing abolition is that we will never get a reformed Senate, which almost everyone would prefer. The challenge then is how to channel the current the current popular anger and support for abolition into support for constructive do-able reforms.

While this was not discussed in any depth at the symposium (Hennig and Knopff mentioned it in passing), my own view is that this would require a national referendum as part of the next federal election, presumably in 2015. Hennig and the CTF also want a referendum in 2015, but they want only two options: status quo or immediate abolition. I disagree. The referendum should give Canadians in each province a choice between the status quo and deferred abolition.

Deferred abolition could be achieved by passing an amendment now that the Senate shall cease to exist in 10 years unless this amendment is first itself repealed and replaced with an amendment to reform, rather than abolish, the Senate. This “deferred abolition” option, if chosen by voters, would put significant pressure on Senate reformers while giving them some breathing room to reach a new consensus on what a reformed Senate would look like. Perhaps reformers would succeed in coming up with a new and improved Senate before the abolition deadline. Perhaps they would not. Either way, the Senate as we know it would be gone for good.

The referendum would achieve several positive results. First, it would seize the opportunity that the current crisis creates. Second, it would create a focus—something that would give Canadians a concrete and tangible way to express their current discontent

with the status quo. Finally, if there was a clear preference for deferred abolition, it would put pressure on reluctant provincial governments (think Quebec and/or the Atlantic Provinces) to agree to a subsequent constitutional amendment that implemented the deferred abolition option.

I would hope that a majority of Canadians would opt for the latter. It links abolition and reform in a single amendment. Deferred abolition could create a coalition—potentially a majority—of reformers and abolitionists. While not the first choice of either, both would prefer it to the status quo. At the same time, it threads the needle—at least potentially—between the twin risks of status quo versus abolition.

What would happen in the intervening ten years? There's a good chance that nothing would. The current constitutional stalemate could continue, and on January 1, 2025, the Canadian Senate would cease to exist. If that's the case, good riddance! It would be better than the status quo. And we reformers would have had our opportunity.

But there is much that could happen. The certainty of abolition in 2025 would remove the current incentives for some provinces to block change in order to defend their current allocation. It would also give the Harper government—or its successor—the freedom to be not just more assertive but also more creative in its Senate reform proposals.

Here's where much of what was discussed at the Manning Symposium becomes relevant to this opportunity. Senators Black and Unger, and former Senator Dan Hays, identified at least seven internal reforms that the current Senators could initiate on their own—without any constitutional change or even the support of the House of Commons. These would all be worth pursuing, but I doubt that, by themselves, they would persuade Canadians that the Senate was worth rescuing in 2025.

Tom Flanagan, a former chief of staff to Prime Minister Harper, advanced the idea of “merit appointments”—to transfer the function of nominating Senators to a select committee that would seek out successful and talented people from all walks of Canadian life—bringing more diversity and talent into the Senate, and sweeping out the cronyism and political sleaze of the status quo. Something like this has been adopted in England for appointments to the House of Lords. Its virtue is that it would rid the Senate of patronage. But it would also have an elitist and undemocratic air about it. It would be an easy target for democrats and populists, as witnessed in Minister Poilievre's stinging critique.

Minister Poilievre and Ian Brodie (another former Harper chief of staff) made a strong case for an incremental approach – term limits for senators (6, 9 or 12 years) and consultative provincial elections from which the PM would appoint the winners (the current Alberta model) – under Ottawa's unilateral power of amendment. They both obviously think and hope that the Court will find that term limits and consultative elections fall under Ottawa's unilateral amending authority (section 44). Brodie also recommended that the PM stop making new appointments as current Senators retire, die, or hit the mandatory retirement age of 75. Mandatory retirement alone would create 16 vacancies by the end of 2016.

The virtue of these proposals is that they would disprove the defeatist attitude that, “You can’t do anything until you do everything.” But I am not sanguine about creating 16 vacancies in the Senate for some future government to fill—perhaps not a Conservative government. This would not have much appeal in the PMO or Government Caucus. It would also be an invitation for some future PM to go patronage crazy—not unlike the way Harper did in 2009 when he filled 18 Senate vacancies with party faithfuls.

Nor am I impressed by continuing with the current Harper policy of asking the provincial governments to hold advisory elections and then appointing the winners. With the exception of Alberta, it hasn’t worked up to now. What is going to change?

If Harper wants to put real pressure on provincial premiers to opt for Senate elections, he should just declare that he is handing over the nomination of Senators to provincial governments to choose however they want—with or without elections. Initially some (maybe most) premiers might use this new power to reward party friends and donors. But those who did would quickly come under fire from other provincial political parties and local media for replacing federal patronage with provincial patronage—with the same political stench. The solution, of course, would be to elect them. Today there is no political cost to premiers for ignoring Harper’s plea for provincial senate elections. Not so if the call came from provincial opposition parties. What party leader wants to campaign against democratic elections? This, it may be recalled, is how the United States evolved from an appointed to an elected Senate—through the partisan dynamics of state politics, not pressure from Washington.

But even this approach would have its attendant risks. I was persuaded by McCormick’s argument that this model of “Senate reform by installment” risks a creeping legitimization of the status quo, or worse. Dealing with the “easy E”—elected—first and the more “difficult E”—equality—later has clear risks to the Western provinces, which collectively hold only 24 Senators, compared to Quebec’s 24 and Atlantic Canada’s 30. Giving up Senate seats today when Senators wield no real power is not that big a deal. (24 times 0 is still zero.) Giving up Senate seats tomorrow when some/many/most senators are elected and the Senate is now exercising its constitutional powers would be a huge deal for Atlantic Canada and Quebec.

The two most innovative and promising ideas for Senate reform came from Roger Gibbins and Link Byfield. Gibbins, recently retired from Director of the Canada West Foundation, argues persuasively that for Senate reform to gain any traction with the public, it has to jettison the old 1980s banners of regional representation and “the West wants in.” That may have worked then, but it won’t any longer. The West is in—both with Harper as PM and with the new redistribution of seats in the House of Commons. Instead, Senate reform should be seen as a way to improve Canada’s federal democracy. It would put a much-needed check on the powers of the PMO. If some form of voting other than first-past-the-post were adopted to select Senators, it would result in a more diverse and representative senate. The current Australian Senate embodies both these

characteristics. I agree with Gibbins that it is a model that could breath new life into the flagging sails of Canadian Senate Reform.

Byfield did not formally present at the symposium, but in subsequent emails laid out a compromise plan for the redistribution of Senate seats that could come close to pleasing all interested parties. Quebec, Ontario and the Atlantic Provinces would all keep their existing allocations, thus preserving the deal done at Confederation. Byfield would then allocate an additional six senators to the four Western provinces, bringing their total to 30—the same as Atlantic Canada. Each territory would get one Senator. This preserves the founding principle of regional representation that animated the design of the original Senate, but brings the Western provinces up to a par with Atlantic Canada. While under this design Quebec and Ontario have fewer Senators than the Atlantic or Western regions, they would still have a more effective voice since all 24 of their respective senators represent only their home province. This division also achieves rough equality between the more productive regions of Canada West of the Ottawa River, and the so-called “have not” provinces to the East. It also provides a rough balance between resource and non-resource-based regional economies.

Both Gibbins’ and Byfield’s proposals could add new momentum to the Senate reform movement. But that’s to be worked out over the next ten years. We still need a referendum NOW--as part of the 2015 federal election—to break the current stalemate. Given that under normal circumstances constitutional obstacles to change—be it abolition or reform—are “near insurmountable” (in the words of Rainer Knopff’s presentation), now is the time to act via referendum.

A crisis creates opportunity. But the opportunity must be seized. A properly worded referendum question could channel the popular energy created by the current scandals into a mandate for change. We don’t need another 30 years of talk. If voters opted for Deferred Abolition, pressuring legislatures to approve the appropriate amendment, it would put a gun to the head of the status quo: you have ten years to achieve reform ... or it’s lights out in the Red Chamber. It’s a risk, but a risk well worth taking, both for the Harper Conservatives and for the rest of the country.

“Change or vanish” would no longer be a threat, but the new reality.