The Politics of the Senate Reform Reference: Fidelity, Frustration, and Federal Unilateralism

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Democracy, Federalism, and Rule of Law: The Senate Reference Revisited

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Résumé de l’article

THE POLITICS OF THE SENATE REFORM REFERENCE:
FIDELITY, FRUSTRATION, AND FEDERAL UNILATERALISM

Adam Dodek*

References are the most political of cases, almost always involving high profile public policy issues. Frequently, references are brought to obtain rulings on the relationship between the federal government and the provinces. Less frequently, references involve questions of interbranch relations, that is, between two or more of the executive, legislative, and judicial branches of government. The Senate Reform Reference was one of the rare cases that featured each of these three elements. This article analyzes the Senate Reform Reference on several political levels. First, it situates the reference in terms of megaconstitutional politics, the long-held Canadian practice of attempting to resolve constitutional issues through formal and often high-profile negotiations between the federal and provincial governments. Such interactions have been anathema to the Harper government which has preferred unilateral political action to negotiated political agreement. The article then examines inter-party politics or the relationship between the Harper government and the opposition parties during the period of minority government (2006–2011). This is the period during which one would have expected the government to bring a reference because of its inability to obtain support from the other parties in the House of Commons and the Senate for its proposed legislation on the Senate. However, it did not. This leads to an examination of the third issue: intra-party politics or the politics within the governing party, the Conservative Party of Canada. Finally, the article discusses legal politics and how the government of Quebec essentially forced the federal government’s hand by bringing its own reference to the Quebec Court of Appeal. The overarching framework of interbranch politics—the relationship between the executive, legislative and judicial branches of government—is examined throughout the article.

* Public Law Group, Faculty of Law, University of Ottawa. This paper originated in a presentation at a public forum on “Senate Reform and The Senate Reference” held by the Public Law Group at the University of Ottawa on November 5, 2013. Thanks to Michael Behiels, Stephen Bindman, Vanessa MacDonnell, Carissima Mathen, Peter Oliver and two anonymous reviewers for reading earlier drafts of this paper and providing helpful comments. Great appreciation to University of Ottawa law student Emily Alderson for her superb research assistance.

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Introduction

In the Senate Reform Reference, the Supreme Court established the legal framework within the Constitution for reforms to the Senate. The case is important on many levels: for addressing the constitutionality of Prime Minister Stephen Harper’s government (“the Harper Government”) Senate reform proposals; for setting out the framework for constitutional amendment under Part V of the Constitution Act, 1982; and for relations between the different branches of government. The reference did not arise in a vacuum, however. It came to be heard by the Supreme Court in a particular political context. Examining that political context is necessary in order to fully appreciate the ramifications of the Senate Reform Reference and to better understand the nature of references more generally.

Three dominant interwoven themes emerge from examining the politics of the Senate Reform Reference: fidelity, frustration and federal unilateralism. Prime Minister Harper displayed remarkable fidelity to the cause of Senate reform. It is, in fact, surprising that he persisted with his commitment to the issue over the course of seven years in office despite being frustrated by the opposition parties in the House of Commons, by a Liberal-dominated Senate, by Senators within his own caucus, by resistant provincial premiers, and ultimately by the courts. The frustration of Prime Minister Harper’s Senate reform efforts is explained in part by his unwavering fidelity to federal unilateralism: The Harper Government was simply unwilling to sit down with the provinces to discuss Senate reform. These three themes provided the context for the Prime Minister’s decision to refer his Senate reform questions to the Supreme Court in February 2013. The Supreme Court’s decision struck a decisive blow against the Harper Government, further frustrating its strategy of federal unilateralism. The Government’s reaction to the Supreme Court’s ruling showed the limits of its fidelity to the cause of Senate reform. When faced with the choice of abandoning its unilateral efforts or abandoning Senate reform, it chose the latter.

Not many decades ago, the prevailing legal ethos included the belief that a separation existed between the worlds of law and politics. Legal formalists dominated and asserted that there was a single right answer that could be divined for almost any legal problem and that this answer was separate from, distinct and impermeable to politics. If we accept Har-
old Lasswell's famous definition of politics as "who gets what, when, and how", then the judicial role is inescapably political. However, the suggestion that politics influenced legal interpretation and judicial decisions was anathema to most judges and many lawyers because "politics" was something that political parties, not judges and lawyers, did. Today, however, the proposition that law succeeded in erecting a cordon sanitaire between it and politics has largely faded from the collective Canadian legal consciousness. It is now widely accepted that the Supreme Court of Canada is a "political" institution in the sense of deciding important public policy issues. On this basis, the Court has rightly attracted the attention and the analysis of many political scientists, some legal scholars, and has even

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4 See Canadian Oxford Dictionary, 2nd ed, sub verbo "political" ("of or concerning the state or its government, or public affairs generally"). See also The Hon Bertha Wilson, “We Didn't Volunteer” (April 1999) Policy Options 8 (expressing complete agreement with those who see decision making under the Charter as involving a mix of law and policy); Rosalie Silberman Abella, “Public Policy and the Judicial Role” (1989) 34:4 McGill LJ 1021 ("judges have always been involved with public policy" at 1022; “[t]he Charter has simply spotlighted, rather than created, a judicial role, and what we are seeing, because of the public nature of the Charter’s impact and issues, is a difference in degree in judicial decision-making and the role of public policy, and not in kind” at 1023).

been the subject of a popular treatment.\textsuperscript{7} In this world of legal politics, the Supreme Court’s reference jurisdiction\textsuperscript{8} is widely considered to bring the high court into the heart of the political arena.\textsuperscript{9}

References are important legal and political tools for governments.\textsuperscript{10} When references are used, it is often to address high-profile political issues, including the appointment of women to the Senate,\textsuperscript{11} patriation of the Constitution,\textsuperscript{12} Québec secession,\textsuperscript{13} same-sex marriage,\textsuperscript{14} and the eligi-

\begin{footnotesize}
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\item[\textsuperscript{7}] See Philip Slayton, \textit{Mighty Judgment: How the Supreme Court of Canada Runs Your Life} (Toronto: Allen Lane, 2011).
\item[\textsuperscript{8}] See \textit{Supreme Court Act}, RSC 1985, c S-26, s 53.
\item[\textsuperscript{9}] See e.g. Grant Huscroft, “Politics and the Reference Power” (Paper delivered at the Canadian Political Science Association Annual Conference, Montréal, 1 June 2010) [unpublished] at 1 (cited with permission) [Huscroft, “Politics and the Reference Power”].
\item[\textsuperscript{10}] Only governments have the power to initiate a reference: the Governor-in-Council at the federal level (see \textit{Supreme Court Act}, supra note 8, s 53) and the Lieutenant-Governor-in-Council at the provincial level (see \textit{Constitutional Question Act}, RSBC 1996, c 68, s 1; \textit{Constitutional Questions Act}, RSNS 1989, c 89, s 3; \textit{Court of Appeal Reference Act}, RSQ 1977, c R-23, s 1; \textit{Courts of Justice Act}, RSO 1990, c C-43, s 8(1); \textit{Judicature Act}, RSA 2000, c J-2, s 26(1); \textit{Judicature Act}, RSNB 1973, c J-2, s 23(1); \textit{Judicature Act}, RSNL 1990, c J-4, s 13; \textit{Judicature Act}, RSPEI 1988, c J-2, s 7(1); \textit{The Constitutional Questions Act}, CCSM 2002, c C180, s 1; \textit{The Constitutional Questions Act}, 2012, SS 2012, c C-29.01, s 2(1)). At the federal level, the Senate and the House of Commons each have a very limited power to initiate references on private bills or petitions for private bills (not private members bills); see \textit{Supreme Court Act}, supra note 8, s 54.
\item[\textsuperscript{11}] \textit{Edwards v Canada (Attorney General)}, [1930] AC 124, 1929 UKPC 86 [\textit{The Persons Case}] .
\item[\textsuperscript{12}] See \textit{Reference Re Resolution to Amend the Constitution}, [1981] 1 SCR 753, 125 DLR (3d) 1 [\textit{Patriation Reference}]. See also \textit{Reference Re Objection to a Resolution to Amend the Constitution}, [1982] 2 SCR 793, 150 DLR (3d) 385 [\textit{Quebec Veto Reference}] .
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bility of an impugned Supreme Court appointment. Moreover, as Carissima Mathen has written, “[t]he reference jurisdiction is an important and distinguishing feature of the Canadian Constitution. It commonly is cited as a key difference between Canada and the United States.” However, jurisprudential and political analyses of references remain underdeveloped in Canada. This dearth of analysis is all the more concerning precisely because of the importance of references, both legally and politically.

References frequently inject the Supreme Court squarely into the political arena. Grant Huscroft has noted that Supreme Court decisions in references are often “celebrated in many quarters as acts of great wisdom and statecraft. The Court is often complimented for the political judgment it exercises in the context of the reference power.”

With the Senate Reform Reference, most of the response—media, legal, and political—was positive in the sense that the Supreme Court delivered a verdict that was largely expected. The Supreme Court rejected most of the federal government’s contentions that it could change various aspects of the Senate—notably, the appointments process and the tenure of Senators—by ordinary legislation. It held that any changes that alter the “fundamental nature and role” of the Senate must proceed by way of the general amending formula which requires the consent of seven of the provinces with at least fifty percent of the Canadian population. The Court further held that abolition of the Senate would require the unanimous approval of all federal and provincial governments.

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15 Reference Re Supreme Court Act, ss 5 and 6, 2014 SCC 21, [2004] 1 SCR 433 [Supreme Court Act Reference].

16 Carissima Mathen, “The Question Calls for an Answer, and I Propose to Answer It”: The Patration Reference as Constitutional Method” (2011) 54 SCLR (2d) 143 at 144 [Mathen, “The Question”].


18 Huscroft, “Politics and the Reference Power”, supra note 9 at 1. Huscroft argues that the reference power has a “distorting effect on the political processes and the role of the [Supreme] Court” and believes that many of these disputes are more properly dealt with by the executive branch of government and the legislature (ibid).
While there were critics of the Supreme Court’s decision, there were few people who would celebrate the Senate Reform Reference as an act of “great wisdom and statecraft.” However, in order to understand the constitutional dispute at the center of the Senate Reform Reference we must appreciate its political antecedents, including the political movement that gave rise to the dispute. It is of course impossible to conduct a comprehensive analysis of the history of Senate reform initiatives; that is worthy of a paper of its own. However, it is necessary to present a synopsis of this political history because politics informed the constitutional law in the Senate Reform Reference and vice versa. Moreover, politics both compelled and constrained the constitutional resolution of the reference questions.

The Senate Reform Reference featured several actors who were potentially in conflict as a result of the matter before the court. Such is the nature of references. References are often brought to obtain rulings on the relationship between the federal and the provincial levels of government, as was the case in the Patriation Reference, the Quebec Secession Reference, and the Securities Reference. Less frequently, references involve questions of interbranch relations, that is, relations between two or more of the executive, legislative, and judicial branches of government. The Person’s Case, the Provincial Judges Reference, and the Supreme Court Act Reference are examples. References may also involve proposals for institutional reform (e.g. Reference Re Representation in the House of

19 Ibid.

20 See Chevrette & Webber, supra note 17 at 763–64 where the authors created a typology of references as follows: (1) when the advisory opinion itself is the object (of the reference); (2) individual questions and allegations of judicial error; (3) the advisory opinion and institutional reforms; (4) the advisory opinion and the jurisdictional review; and (5) constitutional reforms [translated by author]. Chevrette & Webber reviewed 130 advisory opinions (i.e. references) submitted to the Supreme Court since its creation in 1875 to create the above typology. The examples given in the text above would fall into their category (4) the advisory opinion and the jurisdictional review. I do not necessarily agree with the authors’ typology but use it in this section to demonstrate how the Senate Reform Reference raised multiple, intersecting issues.

21 Supra note 12.

22 Supra note 13.


26 See Supreme Court Act Reference, supra note 15.
Commons,\textsuperscript{27} Saskatchewan Boundary Reference,\textsuperscript{28} and the Upper House Reference\textsuperscript{29} or constitutional reform (e.g. Upper House Reference,\textsuperscript{30} Patriation Reference,\textsuperscript{31} the Quebec Secession Reference\textsuperscript{32}). The Senate Reform Reference\textsuperscript{33} was one of the rare cases that featured each of these elements.\textsuperscript{34}

The Senate Reform Reference was only the second reference initiated by the Harper Government since it was sworn into office in 2006.\textsuperscript{35} It is therefore near impossible to identify, let alone assess, any sort of pattern or strategy by the Harper Government in its use of references. We can, however, attempt to assess the Senate Reform Reference in the context of political classifications developed more generally for references and in the broader political contexts in which this particular reference was situated. For instance, we can ask not only why the Harper Government initiated the reference but also why it brought the reference when it did—in February 2013—when serious questions as to the proposals’ constitutionality were raised almost from the time that they were first introduced in 2006.\textsuperscript{36} Conversely, if the Harper Government was not concerned about

\textsuperscript{27} (1903), 33 SCR 475, 1903 CarswellNat 19 (WL Can). See also Reference Re Representation of Prince Edward Island in the House of Commons (1903), 33 SCR 594, 1903 CarswellNat 20 (WL Can).

\textsuperscript{28} Reference Re Provincial Electoral Boundaries (Sask), [1991] 2 SCR 158, 81 DLR (4th) 16 [Electoral Boundaries Reference].

\textsuperscript{29} Reference Re Authority of Parliament in Relation to the Upper House, [1980] 1 SCR 54, 102 DLR (3d) 1 [Upper House Reference].

\textsuperscript{30} Ibid.

\textsuperscript{31} Supra note 12.

\textsuperscript{32} Supra note 13.

\textsuperscript{33} See Senate Reform Reference, supra note 1.

\textsuperscript{34} Its predecessor, the Upper House Reference, supra note 29, similarly involved each of these elements. The Senate Reform Reference did not involve two of Chevrette & Webber’s five categories: (1) references were the subject of the reference is the reference itself; and (2) individual questions and allegations of judicial error (see Chevrette & Webber, supra note 17).

\textsuperscript{35} The only other reference initiated by the Harper Government was the Securities Reference (Securities Act Reference, supra note 23). After initiating the Senate Reform Reference, the federal government initiated a reference regarding the legality of the appointment of Justice Marc Nadon to the Supreme Court of Canada and the constitutionality of amendments to the Supreme Court Act. While the Supreme Court heard that case after the Senate Reform Reference, it released its decision before the decision in the Senate Reform Reference (see Supreme Court Act Reference, supra note 15).

\textsuperscript{36} See Proceedings of the Special Senate Committee on Senate Reform, 39th Parl, 1st Sess (19, 20, 21 September 2006) (testimony of Andrew Heard, David A Smith, and Gérald Tremblay). Other notable constitutional scholars testified in support of the proposals’ constitutionality. See Proceedings of the Special Senate Committee on Senate Reform, 39th Parl, 1st Sess (19, 20, 21 September 2006) (testimony of Gérald-A Beaudoin, Peter
potential constitutional claims why did it not simply enact its reforms and defend them in the inevitable court challenge that would have followed, as it did with numerous other pieces of legislation? These are some of the questions that this article attempts to answer. This article has five parts including this introduction. Part II analyzes the political context that led the Harper Government to initiate the reference to the Supreme Court of Canada in February 2013. First, it situates the reference in terms of mega-constitutional politics, the long-held Canadian practice of attempting to resolve constitutional issues through formal and often high-profile negotiations between the federal and provincial governments. However, the Harper Government has avoided such interactions, preferring unilateral or bilateral political action to negotiated political agreement. Part II then continues with an analysis of the Reform Party’s influence on the prioritization of Senate reform for the Harper Government. Next, it turns squarely to the Harper Government’s actions on Senate reform between 2006 and February 2013 when it directed the reference to the Supreme Court. This section will also discuss the impact of the Senate scandals and the Harper Government’s preference for top-down Senate reforms as opposed to bottom-up and internal reforms. Finally, this Part ends by explaining why the Harper Government initiated the reference to the Supreme Court in February 2013.

Part III analyzes the politics of the Senate Reform Reference itself. This part will examine some of the political challenges both for the government and for the Supreme Court in dealing with the reference. Specifically, in the reference the government was forced to perform a difficult balancing act between its legal arguments regarding consultative elections and its political statements and actions. Ultimately, it was not successful. The Supreme Court faced its own challenges in dealing with a highly charged political issue. It chose to prioritize the case, fast tracking

both the hearing and the decision. By producing a unanimous decision, the Court generally avoided charges of politicization. This part also examines how both the Government and the Supreme Court treated the Senate during the reference, contrasting three images of the Upper Chamber: the intended Senate that the Fathers of Confederation desired to create, the actual Senate that emerged since 1867, and an idealized Senate that plays a critical role in our constitutional order.

This article then turns to the political aftermath of the reference. Part IV examines the initial political response of the Harper Government which was to declare Senate reform dead and take no action, even on the matters that the Supreme Court had held they could proceed unilaterally or with the approval only of Québec. This part then analyzes the subsequent conflict between the Harper Government and the Supreme Court of Canada in May 2014 with the unparalleled attack on the Chief Justice by the Prime Minister and by the Minister of Justice and Attorney General of Canada. This part then ends with a consideration of the political implications of the Senate Reform Reference on specific policy proposals and on constitutional politics more generally.

Finally, this paper ends with a brief conclusion in Part V which considers different political narratives that can explain the political role played by the Senate Reform Reference in the ongoing saga of Senate reform.

I. The Political Context for the Senate Reform Reference

A. Senate Reform and Megaconstitutional Politics

As a political issue, Senate reform is as old as Confederation itself. The opening line of the factum of the Attorney General of Canada in the Senate Reform Reference declared that “Senate reform has been discussed almost from the moment in 1867 when the ink dried on the British North America Act.” 37 In 1926, Henri Bourassa, the Québec nationalist and founder of Le Devoir, described Senate reform as “that famous question ... which comes periodically, like other forms of epidemics and current fevers.” 38 The same year, Robert MacKay wrote The Unreformed Senate of

37 Senate Reform Reference, supra note 1 (Factum of the Attorney General of Canada) at para 1 [FOAG].

38 House of Commons Debates, 15th Parl, 1st Sess, vol 1 (2 February 1926) at 648 (Hon Henri Bourassa).
Canada\textsuperscript{39} which was reissued (with minimal updates) in 1963 as part of the Carleton Library Series.\textsuperscript{40} Accordingly, dissatisfaction with the Senate has been a chronic feature of Canadian politics. Proposals to reform the Senate have been frequent but have not stood a serious chance of adoption\textsuperscript{41} until they became part of the larger constitutional proposals during the era of what has become known as \textit{megaconstitutional politics} in Canada.

Professor Peter Russell coined the term \textit{megaconstitutional politics} to distinguish this phenomenon from “ordinary” constitutional politics which involves “piecemeal, small-scale efforts to reform” aspects of a country’s constitution.\textsuperscript{42} Conversely, \textit{megaconstitutional politics} “goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based.”\textsuperscript{43} It thus tends to be “exceptionally emotional and intense. When a country’s constitutional politics reaches this level, the constitutional question tends to dwarf all other public concerns.”\textsuperscript{44} According to Russell, Canada’s first round of \textit{megaconstitutional politics} began when Pierre Trudeau emerged on the political scene as Prime Minister in 1968.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{39} Robert A MacKay, \textit{The Unreformed Senate of Canada} (London: Oxford University Press, 1926). The book was quoted by the Attorney General of Canada in its factum in the reference (see FOAG, supra note 37 at para 56).
\item \textsuperscript{40} Robert A MacKay, \textit{The Unreformed Senate of Canada}, revised ed (Toronto: McClelland and Stewart, 1963).
\item \textsuperscript{41} There has only been a limited number of amendments to the Constitution relating to the number of Senators. When each new province was admitted to Confederation, they were granted representation in the Senate. A constitutional amendment in 1915 redefined the divisions of the Senate to create a fourth section consisting of the western provinces of British Columbia, Alberta, Saskatchewan and Manitoba. See \textit{Constitution Act, 1915} (British North America Act, 1915 (UK), 5-6 Geo V, c 45). See also \textit{Newfoundland Act} (British North America Act, 1949 (UK), 12-13 Geo VI, c 22) (adding Senate seats for Newfoundland); \textit{Constitution Act (No 2), 1975}, SC 1974-75-76, c 53, s 1 (adding seats for the Yukon and Northwest Territories); and \textit{Constitution Act, 1999 (Nunavut)}, SC 1998, c 15, s 43 (adding seat for Nunavut). The only other constitutional change to the Senate occurred in 1965 when life tenure of Senators was replaced with mandatory retirement at age 75 (see \textit{Constitution Act, 1965}, SC 1965, c 4, s 1c4). It is notable that each of these amendments was done by the federal Government unilaterally, without provincial consultation.
\item \textsuperscript{42} Peter H Russell, \textit{Constitutional Odyssey: Can Canadians Become a Sovereign People?}, 3rd ed (Toronto: University of Toronto Press, 2004) at 75 [Russell, \textit{Constitutional Odyssey}].
\item \textsuperscript{43} Ibid.
\item \textsuperscript{44} Ibid.
\item \textsuperscript{45} Ibid at 76. A First Ministers Conference involving constitutional issues took place in February 1968 while Lester B Pearson was still Prime Minister and Pierre Trudeau was Minister of Justice. As Minister of Justice, Trudeau had released \textit{A Canadian...}
Trudeau’s tenure as Prime Minister from 1968 until patriation in 1982 (except for Joe Clark’s brief term) was a time of continual constitutional discussions between the federal government and the provinces. This is perhaps best symbolized by the existence of the Continuing Conference of Ministers on the Constitution (CCMC), which functioned between 1978 and 1980 and produced more proposals, counter-proposals and correspondence on constitutional reform between the federal government and the provinces than in any other period of Canada’s history since Confederation. The various constitutional proposals, responses, and communiqués during Trudeau’s tenure between 1968 and 1982 fill two volumes.46 During this period, proposals to reform the Senate were often part of a package of proposals,47 although generally not the top priority.48

The most expansive or radical49 proposal was contained in the federal government’s 1978 white paper on the Constitution entitled A Time for Action50 which was subsequently translated into legislative form in Bill C-60.51 The federal government’s proposal would have abolished the Senate and replaced it with a new House of the Federation, consisting of 59 members selected by the House of Commons and another 59 selected by

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46 See generally Bayefsky, vols 1–2, supra note 45. The nearly one thousand pages of these two volumes begin with the Conference of Attorneys General on Constitutional Amendment in 1960 and end with the Meech Lake Accord in June 1987. However, the pre-1968 and post-1982 documents only consist of approximately fifty pages each. Close to ninety per cent of the book contains documents from the 1968–1982 period.


48 There was a point where BC made Senate reform its top priority. See generally Roy Romanow, John Whyte & Howard Leeson, Canada ... Notwithstanding: The Making of the Constitution 1976–1982 (Toronto: Thomson Carswell, 2007) at 32–35.

49 See ibid at 9.

50 Supra, note 47.

51 Bill C-60, An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters, 3rd Sess, 30th Parl, 1978 [Bill C-60]. See also Canada, The Constitutional Amendment Bill Text and Explanatory Notes (Ottawa: Government of Canada, 1978) [Explanatory Notes]). On Bill C-60, see generally Barry L Strayer, Canada’s Constitutional Revolution (Edmonton: University of Alberta Press, 2013) at 91–106.
the provincial legislatures according to proportional party representation. The new body would be given a limited veto power over specified subjects. Following Bill C-60, “the constitutional clouds burst and a torrent of constitutional proposals rained down on the land” from provincial governments, political parties and private sector organizations.

Strong opposition to Bill C-60 emerged both in the Senate and from the provinces. Writing in 1982, Romanow, Whyte & Leeson stated: “Part of the opposition was based on allegations that what the federal government was purporting to do by an ordinary act of Parliament was beyond Parliament’s powers.” Assistant Deputy Minister of Justice Barry Strayer felt strongly that Parliament had the power to reform the Senate and should proceed unilaterally. He expressed concerns to Trudeau and Minister of Justice Otto Lang that referring the matter to the Supreme Court would force the Court into the political thicket. Trudeau, however, felt that it was not politically possible to proceed without a reference. Thus, in response to this opposition, the federal Government decided in November 1978 to refer the question of its power to unilaterally alter the Senate to the Supreme Court for consideration.

The Upper House Reference—as the 1979 case was styled—is an important precursor and point of comparison with the Senate Reform Reference. The Upper House Reference was heard over two days in March 1979 and a unanimous “opinion” authored by “The Court” was rendered nine months later, on December 21, 1979. The Supreme Court ruled against the federal government’s attempt to proceed unilaterally to change the Senate without provincial approval. The Court stated that it was “not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process.” The Court further stated that the Senate’s “fundamental char-

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52 Bill C-60, supra note 50. See also Explanatory Notes, supra, note 51 at 27.). These subjects included the power of veto over federal legislation affecting certain relations between the federal government and the provinces and also on French and English language matters (subject to a “dual majority” requirement, i.e. the veto would only be effective if supported by each of a majority of Francophone and Anglophone House of the Federation members). See generally Romanow, Whyte & Leeson, supra note 48 at 9, 33; Strayer, supra note 51 at 94–96.
53 Russell, Constitutional Odyssey, supra note 42 at 100–101.
54 Romanow, Whyte & Leeson, supra note 48 at 157.
55 Strayer, supra note 51 at 104.
57 Supra note 29.
58 Ibid at 78.
acter cannot be altered by unilateral action by the Parliament of Cana-

da.”59 These aspects of the Upper House Reference would become im-

potent points of contention in the Senate Reform Reference thirty-four

years later.

As a result of the Supreme Court’s decision in the Upper House Refer-

ence and other political events, the federal Government put aside Senate

reform (and other issues such as reform of the Supreme Court of Canada) and proceeded with a more narrow, though still momentous set of constitutio-
nal reforms consisting chiefly of (1) patriation; (2) enactment of a domestic amending formula; and (3) enactment of a Charter of Rights and Freedoms. This package of constitutional reforms was consequently en-

acted in the Constitution Act, 1982.60

Patriation of the constitution and the enactment of the Constitution

Act, 1982 was not viewed as the end of constitutional reform, but rather as the completion of the first phase. It was clearly envisioned that Senate

reform, among other issues, would be dealt with in the next phase, which was to occur within the first five years of proclamation of the new Consti-
tution.61 Indeed, the federal government and Parliament produced several proposals for a reformed Senate during this time.62 During this period, a Select Committee on Upper House Reform of the Alberta Legislature pro-

duced a report which was the first to officially endorse the idea of a “Tri-

ple E Senate”: a Senate that would be “elected, equal, and effective”.63 The

59 Ibid.
60 See generally Romanow, Whyte & Leeson, supra note 48; Russell, Constitutional Odys-

61 Section 37 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, provided that a constitutional conference would take place within one year of its coming into force (i.e. within a year of April 17, 1982). Section 37.1 provided that at least two additional constitutional conferences would be convened, the first within three years and the second within five years of April 1982.
62 See e.g. Canada, Report of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform (Ottawa: Queen's Printer, January 1984) (Joint Chairmen Honourable Gildas Molgat, Senator & Honourable Paul Cosgrove, MP); Royal Commissi-

on on the Economic Union and Development Prospects for Canada, Report, vol 3, Cat-

talogue No Z1-1983/1-3E (Ottawa: Minister of Supply and Services Canada, 1985); Can-

ada, Special Joint Committee of the Senate and the House of Commons, The 1987 Con-

stitutional Accord (Ottawa: Queen's Printer, 1987) (Joint Chairmen Hon Arthur Trem-

blay, Senator & Chris Speyer, MP).
63 Alberta, Legislative Assembly, Alberta Special Select Committee on Upper House Re-

form, Strengthening Canada: Reform of Canada’s Senate (March 1985).
idea had previously been fleshed out in a 1981 proposal by the Canada West Foundation.64

Senate reform was one of the five components of the Meech Lake Accord agreed to in 1987. Under the terms of the Accord, the federal government and the provinces agreed to amend section 25 of the Constitution Act, 1867 to provide that the Prime Minister would select Senators from a list of persons submitted from the relevant province. The Accord also provided that until the proposed amendment came into force, the Prime Minister would follow its requirements, i.e., only select Senators from amongst those proposed by the relevant province. Finally, the Accord provided that there would be annual federal-provincial conferences and that the first item on the agenda would be more substantive Senate reform.65 However, the failure to include Senate reform in the Accord was one of several factors that contributed to the Accord’s ultimate failure. Even a last-ditch attempt to save the Accord through a “companion resolution” committing to Senate reform could not save the accord which collapsed in dramatic fashion in June 1990.66

Senate reform would not be excluded from the next round of megaconstitutional politics. The Charlottetown Accord (1992) contained comprehensive reforms to the division of powers, the Supreme Court of Canada appointment process, altered seat distribution in the House of Commons, added a Social Charter, entrenched federal-provincial and aboriginal consultation, included a “Canada clause” in the preamble, and, of course, would have reformed the Senate. Under the Charlottetown Accord, senators would have become elected—either in a general election or by provincial legislatures; every province would have had equal representation (territories and Aboriginal peoples would also have been guaranteed representation). The Senate’s powers would have been curtailed, and a double majority would have been required to pass a bill on matters relating to French language and culture.67


66 See generally Russell, Constitutional Odyssey, supra note 42 at 150–53; Milne, supra note 65 at 248–56.

67 See Consensus Report on the Constitution: Charlottetown, August 28, 1992 (Ottawa: Canada, 1992) [Charlottetown Accord], reproduced in Russell, Constitutional Odyssey,
The Charlottetown Accord was put to a national referendum in October 1992 and was defeated. The era of megaconstitutional politics in Canada thus ended on October 26, 1992 and with it the best chance for comprehensive Senate reform in Canada's history.


The Reform Party deserves credit for putting Senate reform on the national political agenda and for sustaining its place there when it easily could have fallen off the political radar. The Reform Party was founded in 1987 out of strong feelings of western exclusion or alienation from politics in Ottawa. These sentiments ultimately coalesced into a political movement that was channeled into the Reform Party, later into the Canadian Alliance and ultimately into the Conservative Party of Canada.

Senate reform was a primary driver in the founding of the Reform Party. Throughout the history of the Reform Party and its successors, the commitment to a Triple E Senate never strayed far from the top of its priorities. The Reform Party's first Bluebook highlighted Triple E Senate as its first principle of constitutional reform and it maintained pride of place in every subsequent Bluebook. This commitment continued with the creation of the Canadian Alliance in 2000.
The approach to Senate reform changed with the merger of the Reform/Canadian Alliance and the Conservative Party in 2003. The Constitution was no longer viewed as a vehicle through which Senate reform would be accomplished but as an obstacle to it which needed to be bypassed. While Senate reform was not mentioned in the Agreement in Principle between Stephen Harper’s Canadian Alliance and Peter MacKay’s Progressive Conservative Party, which together formed the Conservative Party of Canada in 2003, it returned to pride of place in the new Conservative Party of Canada’s 2004 election platform. Here, the basic shape of what would become the Harper Government’s Senate reform proposals was outlined. The focus was on creating an elected Senate that would be independent of the Prime Minister. Notably, the Conservative Party asserted that creating an elected Senate “could be done without any constitutional amendments,” indicating the continued aversion toward or fatigue regarding megaconstitutional politics. The promise of an elected, equal, effective, and independent Senate was continued in the

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73 See Canadian Alliance, A Time for Change: An Agenda of Respect for All Canadians (2000) at 20, online: <www.poltext.org/sites/poltext.org/files/plateformes/can2000all_plt_en_14112008_173717.pdf>. This campaign platform gave pride of place to the issues of the day, i.e. the deficit, the economy and health care. However, the inclusion of Senate reform in the Canadian Alliance’s platform demonstrates that the Reform Party/Canadian Alliance was not prepared to let the issue completely fall off the political agenda.


76 Ibid at 13.
Conservative Party’s platform for the 2006 election which brought Stephen Harper and the Conservative Party to power with a minority government.


From the moment it took office in February 2006, the Harper Government indicated its intention to act on its promise of Senate reform. This distinguished Senate reform from a host of Conservative Party election promises that were dispensed with or ignored once the Conservative Party won power, including enshrining property rights in the Constitution, strengthening access to information legislation, giving MPs a free vote on the definition of marriage, ensuring that all Officers of Parliament are appointed through consultation with all parties in the House of Commons and confirmed through a secret ballot of all Members of Parliament, not just named by the Prime Minister. Other promises were dispensed with once they ran into opposition, such as the commitment to “[e]stablish a Public Appointments Commission to set merit-based requirements for appointments to government boards, commissions, and agencies, to ensure that competitions for posts are widely publicized and fairly conducted.” To be clear, the actions of the Conservative Party in jettisoning election promises once they won power were not in any way unusual; such behaviour has become a familiar motif in Canadian politics, especially in the difficult context of a minority government. If anything, the Conservative Party is generally credited for its success in fulfilling its campaign commitments.

To the Harper Government, Senate reform was thus not simply a campaign commitment; it was a core political priority, at least until the Supreme Court’s decision in the Senate Reform Reference. In its first Speech from the Throne, the Harper Government identified Senate reform as a priority in the context of democratic reform. It stated:

[T]his Government will seek to involve parliamentarians and citizens in examining the challenges facing Canada’s electoral system and democratic institutions. At the same time, it will explore means

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78 See ibid at 4–5.

79 Ibid at 9.
to ensure that the Senate better reflects both the democratic values of Canadians and the needs of Canada’s regions.80

Each of the seven subsequent Speeches from the Throne mentioned Senate reform, with the exception of the abbreviated Speech from the Throne in January 2009 following the prorogation crisis.81

In May 2006, the Harper Government introduced Bill S-4, An Act to Amend the Constitution Act, 1867 (Senate tenure),82 as one of the first pieces of legislation initiated from the Senate. Bill S-4 would have amended section 29 of the Constitution Act, 1867 to impose an eight year term limit for senators. At the time, the Liberals held a majority in the Senate and the bill stalled. It was referred to a Special Senate Committee on Senate Reform. It was noteworthy that the Prime Minister personally ap-

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81 Speech from the Throne To Open the Second Session Thirty-Ninth Parliament of Canada, 39th Parl, 2nd Sess, (16 October 2007), online: <www.parl.gc.ca/parlinfo/Documents/ThroneSpeech/39-2-e.html> (“Canadians understand that the federation is only as strong as the democratic institutions that underpin it. Our Government believes that Canada is not well served by the Senate in its current form. To ensure that our institutions reflect our shared commitment to democracy, our Government will continue its agenda of democratic reform by re-introducing important pieces of legislation from the last session, including direct consultations with voters on the selection of Senators and limitations on their tenure”); Speech from the Throne To Open the First Session Forty First Parliament of Canada, 40th Parl, 1st Sess, (18 November 2008), online: <www.parl.gc.ca/parlinfo/Documents/ThroneSpeech/40-1-e.html> (“[l]egislation will also be introduced to allow for nominees to the Senate to be selected by voters, to serve fixed terms of not longer than eight years, and for the Senate to be covered by the same ethics regime as the House of Commons”); Speech from the Throne to Open the Third Session, Forty First Parliament of Canada, 40th Parl, 3rd Sess, (3 March 2010), online: <www.parl.gc.ca/parlinfo/Documents/ThroneSpeech/40-3-e.html> (“[o]ur Government also remains committed to Senate reform and will continue to pursue measures to make the upper chamber more democratic, effective and accountable”); Speech from the Throne to Open the First Session Forty First Parliament of Canada, 40th Parl, 1st Sess, (3 June 2011), online: <www.parl.gc.ca/parlinfo/Documents/ThroneSpeech/41-1-e.html> (“[r]eform of the Senate remains a priority for our Government. Our Government will re-introduce legislation to limit term lengths and to encourage provinces and territories to hold elections for Senate nominees”); Speech from the Throne to Open the Second Session Forty First Parliament of Canada, 40th Parl, 2nd Sess, (16 October 2013), online: <www.parl.gc.ca/parlinfo/Documents/ThroneSpeech/41-2-e.html> (“[t]he Government continues to believe the status quo in the Senate of Canada is unacceptable. The Senate must be reformed or, as with its provincial counterparts, vanish. The Government will proceed upon receiving the advice of the Supreme Court”).

peared to testify before this committee, thus demonstrating the political priority that he gave to this issue. He was the first sitting Prime Minister to testify before a Senate committee and this was the only time that Mr. Harper did so. The Committee’s report was tabled in October 2006 and the bill continued to be debated in 2006 and 2007. In 2007, it was referred to the Standing Senate Committee on Legal and Constitutional Affairs, which recommended that the bill not proceed to third reading until the Supreme Court had ruled on its constitutionality. The Senate adopted the committee’s report and the bill was dropped from the order paper.

Meanwhile, in December 2006, the Government introduced Bill C-43, An Act to Provide for Consultations with Electors on their Preference for Appointments to the Senate, in the House of Commons; the first of its bills on “consultative elections” for the Senate. The idea of “consultative elections” is that voters elect Senate “nominees” whose names are then submitted to the Prime Minister for consideration when filling vacant Senate seats. However, the Prime Minister made clear that he would treat the results of those elections as more than mere “recommendations”. He committed to appointing Senators who had been “elected” through such “consultative elections”.

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83 See Special Senate Committee on Senate Reform, Report on the subject-matter of Bill S-4, An Act to Amend the Constitution Act, 1867 (Senate tenure) (October 2006), at 1 and Appendix A.
86 Senate, Journals of the Senate, 39th Parl, 1st Sess, No 106 (19 June 2007) at 1654.
87 Bill C-43, An Act to Provide Consultations with Electors on their Preference for Appointments to the Senate, 1st Sess, 39th Parl, 2006 [Bill C-43].
88 See ibid. See also the explanation in Senate Reform Reference, supra note 1 at paras 8–9. Constitutionally, the Governor General summons persons for appointment to the Senate. Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II No 5 at, s 24. However, as the Supreme Court recognized in the Senate Reform Reference, supra note 32 at para 50: “In practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada when filling Senate vacancies.” There is thus a critical difference between consultative elections “recommending” nominees to the Prime Minister for consideration and the Prime Minister “recommending” nominees to the Governor General for appointment to the Senate. In the first case, the “recommendation” has no legal or conventional binding force while in the second case the recommendation is binding as a matter of constitutional convention.
The Harper Government persisted in the face of continued opposition. After Parliament was prorogued in September 2007, the Government reintroduced both bills in the House of Commons in November 2007. These bills stalled and died on the Order Paper when the thirty-ninth Parliament was dissolved in September 2008. After the October 2008 election, the minority Harper Government still faced a Liberal majority in the Senate. As it promised in its election platform and in the 2008 Throne Speech, the Harper Government re-introduced both pieces of Senate reform legislation. However, it did not do so immediately. As is well known, the first session of the fortieth Parliament lasted only several weeks because of the prorogation crisis of November 2008 to January 2009. Few pieces of legislation were introduced in the House of Commons and in the Senate during these three weeks; the Government’s Senate reform legislation was not amongst them. However, in the second session of the fortieth Parliament, the Government re-introduced its Senate term limit legislation in the Senate which then died on the order paper with prorogation in December 2009. In the third session of the fortieth Parliament, the Government switched horses, re-introduced its consultative elections bill in the Senate and its term limit legislation in the House. Both bills died on the Order Paper when Parliament was dissolved in March 2011. After the May 2011 election returned a Conservative majority, the Harper Government bundled both components of its Senate reform—term limits and consultative elections—into a single Bill C-7 which was introduced in the House in June 2011. That bill never progressed past first reading, despite the Conservative majority. Thus, from the time it first formed the government in February 2006 until the time it referred the matter to the Supreme Court almost exactly seven years later, the Government had introduced three bills in the Senate and five bills in the House of Commons.

An important turning point in the narrative occurred in December 2008. In the two years and ten months since Stephen Harper became Prime Minister in February 2006, he had only made two Senate appoint-

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93 See Bill C-7, An Act Respecting the Selection of Senators and Amending the Constitution Act, 1867 in Respect of Senate Term Limits, 1st Sess, 41st Parl, 2011 (first reading 21 June 2011).
ments; each was an exceptional case. First, on February 27, 2006, the Prime Minister appointed Michael Fortier of Montréal to the Senate in conjunction with naming him a member of his cabinet as Minister of Public Works. The appointment was ostensibly made in order to give Montréal representation in the Harper cabinet because Canada’s second-largest city had not elected a Conservative Member of Parliament. Upon appointment to the Senate, Fortier promised to step down from the upper chamber and run for a seat in the House of Commons in the next election. He kept his promise and resigned from the Senate to run unsuccessfully in the 2008 election. Second, in July 2007, the Prime Minister appointed Bert Brown to the Senate; Brown had attracted national attention in the early 1980s by plowing “Triple E Senate or Else” into his neighbour’s field. Brown was also the only person to run in each of Alberta’s three Senate nominees’ elections in 1989, 1998 and 2004, winning a spot as a “Senator-in-waiting” in both 1998 and 2004.

Apart from these two exceptional appointments, the Prime Minister did not make a single appointment to the Senate in close to three years. This was both an extraordinary expression of principled commitment to Senate reform and a tremendous act of political self-restraint for the leader of a party, part of which had never been in power before (Reform/Canadian Alliance) and another part of which had not been in power for over a decade (Progressive Conservative). There can be no doubt that in addition to the handful of elected Senate “nominees” in waiting, there were scores of self-identified potential Senators-in-waiting eager to be rewarded for their loyal service to the Reform/Conservative Party.

However, the Prime Minister’s self-discipline and principled commitment to Senate reform wilted in December 2008 when he appointed eighteen new Senators including the ill-fated trio of Mike Duffy, Pamela Wallin

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96 Ibid.


99 Ibid.
and Patrick Brazeau. At this time the Harper Government’s commitment to maintaining and exercising power trumped its commitment to Senate reform: Power had triumphed over principle. The Senate was still to be reformed, but it was also a tool to be utilized to achieve the Harper Government’s agenda, which included reforming that very body. Thus, the Press Release accompanying the announcement of the eighteen new Senators in December 2008 asserted that “[e]ach new Senator pledges to support Canada’s elected government, promote Canadian unity and advance Senate reform” and that “[t]he incoming Senators have all pledged to support eight-year term limits and other Senate reform legislation.” These claims were repeated in subsequent Senate appointments in August 2009 and January 2010, by which time the Prime Minister had effective control over the upper house. He continued to make appointments to the Senate though, making five more in 2010, three in 2011—just after winning a majority government in the election—twelve in 2012, and five in January 2013, just before referring the reference to the Supreme Court. By the time the reference was heard in November 2013, Prime Minister Harper had made fifty-nine appointments to the Senate. Every one of them took their seat in the Senate as a member of his Conservative Party of Canada. Prime Minister Harper had not succeeded in reforming the Senate, but he had transformed it from a Liberal Senate to a Conservative Senate. Yet, his reforms remained frustrated.

One theme that emerges from the above chronology is dogged persistence in the face of opposition. Opposition from whom? Between 2006 and 2011, the Conservatives had a minority in the House of Commons and faced opposition from the other political parties. The Liberals controlled the Senate until January 2010 and also opposed the Conservatives’ Senate reform bills. From January 2010 onward, the Conservatives enjoyed a majority in the upper house. In their 2011 election platform, the Con-

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101 See ibid.


103 See ParlInfo, “Senators: Appointment by Prime Minister Stephen Harper”, online: Parliament of Canada <www.parl.gc.ca/parlinfo/Lists/senators.aspx?Parliament=00000000-0000-0000-0000-000000000000&Party=0c0ef0db-d14a-4438-8818-784c924f06ae&PrimeMinister=0218bf67-e53a-4a8d-8ab4-0229e4fca5a4&Language=E&SortColumn=StartDate&SortDirection=ASC>.
servatives claimed to have been working tirelessly on Senate reform, only to be blocked by the Liberals and the NDP. The Conservatives reiterated their promise to re-introduce their Senate reform legislation and to only appoint elected Senate nominees from provinces that have Senate nominee elections.\textsuperscript{104}

However, after the Conservatives’ 2011 election win, they controlled a majority in the House of Commons and proceeded to use that majority to fast track legislation or steamroll the opposition, depending on one’s perspective. Yet despite that majority and despite enjoying a clear majority in the Senate at the time Bill C-7 was introduced, the Government did not push Bill C-7 beyond first reading. As the Prime Minister’s former Chief of Staff noted, the Prime Minister never called Bill C-7—or its predecessor legislation—for a vote.\textsuperscript{105} Bill C-7 stalled for almost two years before the Prime Minister decided to refer the Bill to the Supreme Court for its advisory opinion.

Prime Minister Harper’s fidelity to Senate reform drove him to persevere in the face of continued frustration of his legislative efforts. However, his fidelity to federal unilateralism would not allow him to pursue any other avenue to reform the Senate.

\section*{D. The Harper Government’s Politics of Open Federalism}

One of the reasons that the Harper Government was faced with a political decision over whether or not to initiate a reference to the Supreme Court on Senate reform in 2013 was because of its rejection of its own policy of open federalism.

As a matter of policy, Senate reform should have gone hand in hand with another long-time core Reform/Conservative commitment: open federalism. Nadia Verrelli describes open federalism as “the idea that the federal government should strive for open negotiations and equal relations with the provinces on key intergovernmental issues.”\textsuperscript{106} Open federalism “is about collaboration – with every level of government – and being clear about who does what and who is accountable for it.”\textsuperscript{107} The commit-

\begin{footnotesize}
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\item See Brodie, \textit{supra} note 84.
\item Stephen Harper, Speech, “Prime Minister Harper Outlines His Government’s Priorities and Open Federalism Approach”, (20 April 2006), online: Prime Minister of Canada <www.pm.gc.ca/eng/news/2006/04/20/prime-minister-harper-outlines-his-governments-
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ment to open federalism was expressed in Conservative Party election platforms, throne speeches and other pronouncements. For example, the Conservative Party’s 2006 election platform promised to “[s]upport the creation of practical intergovernmental mechanisms to facilitate provincial involvement in areas of federal jurisdiction where provincial jurisdiction is affected, and enshrine these practices in a Charter of Open Federalism.”

The Conservative Party contrasted its commitment to open federalism with the centralist philosophy of its Liberal predecessors. However, in practice, the Harper Government did not embrace open federalism. To the contrary, Prime Minister Harper has generally eschewed any collaboration or negotiation with provincial premiers.

Most of the provinces opposed the Harper Government’s attempt to reform the Senate unilaterally. It is certainly not surprising that the provinces, having forced Senate reform onto the federal-provincial negotiation agenda as part of the megaconstitutional politics of the 1970s–1990s, would assert a continued desire to be part of any plans to reform that institution. However, the Prime Minister refused to sit down with provincial premiers to discuss Senate reform or virtually any other subject. The Prime Minister has displayed a strong aversion bordering on disdain for traditional First Ministers Meetings (FMMs). Only one FMM has occurred during his tenure in office: in January 2009 during the parliamentary crisis relating solely to the development of the stimulus budget in the face of a global economic crisis. Thus, the refusal to meet with the premiers became a core policy of the Harper Government which was only dispensed with when the government’s very survival was at stake. It generally trumped other policy goals such as Senate reform.

Verrelli is strongly critical of the process through which the Harper Government attempted to enact Senate reform. She asserts: “[t]hough Prime Minister Harper speaks of practising open and transparent federal governance – thereby attempting to distinguish himself from his predecessors, most notably Jean Chrétien and Pierre Trudeau – his govern-

108 Stand up for Canada, supra note 77 at 42.


ment’s proposed amendments to the Canadian Senate are arguably indicative of a more ‘closed’ view of federal relations in that the provinces are being actively shut out of the process of institutional reform.” Writing before the Supreme Court’s decision in the Senate Reform Reference, Verrelli asserted that Prime Minister Harper’s “preferred method of pursuing reform is symptomatic of an arrogant, if not rogue, government that believes it can circumvent and disregard its constitutional obligations in order to realize its desired agenda.” Verrelli’s assertion of the Harper Government’s constitutional obligations was on this view vindicated by the Senate Reform Reference.

The Harper Government’s shunning of the provinces is therefore arguably inconsistent with its own declared policy of open federalism and with Canadian political history and political culture. The issue in the Senate Reform Reference was whether this was inconsistent with constitutional law. Ultimately, the Supreme Court determined that it was.

E. Senate Reform from the Top Down

The Senate Reform Reference was necessitated because of the Harper Government’s political preference for external top-down Senate reform rather than bottom-up reforms. Such a preference was understandable when the Liberals ruled the Senate, but once the Conservatives took control of the Senate, the failure to pursue internal reforms and continue to pursue only legislative changes reflected a distinct policy choice. Conservative Party policy remained to remake the Senate rather than improve it through the Prime Minister’s Office (PMO) and from within the Senate itself.

Thus, the government could have embarked on various reforms—including improving appointments and limiting the terms of Senators—without the need for legislative or constitutional change. On term limits, Prime Minister Harper could have appointed people in their 60s who would have to retire in ten to fifteen years when they reached the mandatory retirement age of seventy-five. As a matter of practice, Prime Minister Jean Chrétien often embraced such short-term appointments.113

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112 Ibid at 50.

113 See Andrew Heard, “Assessing Senate Reform Through Bill C-19: The Effects of Limited Terms for Senators” in Jennifer Smith, ed, The Democratic Dilemma: Reforming the Canadian Senate (Montréal: McGill-Queen’s University Press, 2009) 117 at 120 (Table 1) (revealing that Prime Minister Chrétien gave 37.5 per cent of his appointments to people who had less than eight years to serve, by far the highest rate of any Prime Minister in the last 30 years).
On appointments, if the goal was to decrease patronage and partisanship, the Prime Minister could have done this without legislation or without a constitutional amendment. The Prime Minister simply needed to follow his own model in creating a non-partisan non-binding advisory committee for vice-regal appointments. In fact, Prime Ministerial leadership and commitment can be a strong guarantee of non-partisanship, as the example of past Supreme Court appointments demonstrates. There was a time when partisan appointments to the Supreme Court were made. Prime Minister Wilfrid Laurier appointed his Minister of Justice and Attorney General Sir Charles Fitzpatrick as Chief Justice in 1906. And as late as 1954, Prime Minister Louis St. Laurent appointed his Minister of Finance Douglas Abbott to the high court. Since then, overtly partisan appointments have been avoided. Over time, a convention developed against the Prime Minister making partisan appointments to the Court.

The Harper Government also chose not to pursue internal reforms within the Senate to strengthen that body. For example, the Senate could have embarked on any of the following: (1) defining and enforcing the residency requirements for qualification for appointment established in section 23 of the Constitution Act, 1867; (2) restricting outside activities, that is, remunerated work, for Senators; and (3) reducing partisanship by requiring all Senators to sever all ties with political parties or prohibiting

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115 See Bob Rae, “Supreme Court Handed Harper a Constitutional Lesson, Not a Loss” (28 April 2014) Globe and Mail, online: <www.theglobeandmail.com/globe-debate/supreme-court-handed-harper-a-constitutional-lesson-not-a-loss/article18297978/> (arguing that Prime Minister Harper simply could have made better appointments to the Senate instead of trying to change the appointments process); Andrew Coyne, “We Can't Realistically Reform or Abolish the Senate, But We Can Defang It” National Post (18 July 2014), online: <news.nationalpost.com/full-comment/andrew-coyne-we-cant-realistically-reform-or-abolish-the-senate-but-we-can-defang-it> (arguing that the government should enact legislation to restrict the powers of the Senate).

116 See Russell, Judiciary in Canada, supra note 5 at 138–39 (showing political or public experience of justices). Note that Justice Julien Chouinard, appointed by Progressive Conservative Prime Minister Joe Clark, had been a Progressive Conservative party candidate.


118 Constitution Act, 1867, s 23. This provision requires that senators be resident in the province for which they are appointed. Section 33 empowersthe Senate to determine all issues of qualification, including residency. The Senate has never done so because it always operated as gentleman’s club, taking members at their word.
them from holding any official position with a political party, or related entity, such as its fundraising arm, participating in an electoral campaign, or engaging in any fundraising activity on behalf of a political party.\footnote{119}

The government’s failure to embark on such internal and micro-reforms may be explained by a number of possible reasons. As a matter of principle, it may be that the Harper Government feels that the current Senate is simply illegitimate and cannot be reformed except through complete overhaul. This is the direction that its political statements have taken from time to time since 2008. The Conservative Party’s election platform that year included a heading declaring the party’s plan for “Reforming or Abolishing the Senate.”\footnote{120} There was no mention of abolition in the 2011 election platform, but public references to abolition by the Prime Minister certainly increased since he included a question about it in the reference to the Supreme Court. Thus, it may be that attempting to strengthen an institution that is widely considered illegitimate would simply be a waste of time.

A better explanation is that the Harper Government wants to fundamentally alter the Canadian political landscape and make changes that are difficult to undo. It is weary of full-scale megaconstitutional change but wants to entrench Senate reform on its own terms. According to this explanation, the Harper Government wants to fundamentally overhaul the Senate and not “tinker” with it through informal practices that could be easily dispensed with by a subsequent Government. Different practices of the Harper Government suggest both support for and opposition to this notion. The Harper Government’s own dealings with reforms to the Supreme Court of Canada appointment process support this argument. The Government has proclaimed commitment to reform but easily dispensed with its own process twice\footnote{121} and at the time of the writing of this article, the future of the entire reformed process remained uncertain. Conversely, the Harper Government’s reformed appointment process for vice-regal nominations has been widely lauded and has vastly improved the legitimacy of that procedure. It would be difficult politically for a subsequent prime minister to dispense with this process.


\footnote{121} With the appointment of Justice Thomas Cromwell in 2008 and with the appointment of Justice Clément Gascon in June 2014.
The Harper Government thus preferred substantial reform to the Senate entrenched through legislation rather than internal and informal micro-reforms. Fidelity to this vision of reform in the face of opposition helps explain why Senate reform remained on the political agenda in 2012 and into 2013 when the Harper Government decided to refer the issue to the Supreme Court.

The constitutionality of the Harper Government’s Senate reform proposals had been called into question since at least 2006 and continued to hover over the Harper Government into 2013, providing two questions for analysis: why did the Harper Government direct a reference to the Supreme Court on Senate reform and why in February 2013, as opposed to anytime in the prior seven years? These two questions are intertwined and are addressed together in the following section.

**F. Why Did the Harper Government Bring the Reference?**

There are several possible explanations for why the Harper Government directed the reference to the Supreme Court. Huscroft argues that there are different reasons why a government decides to direct a reference. He explains that

> [i]t is possible that a government genuinely wants the Court’s advice on an important matter. It may doubt the constitutionality of its position and think it unwise to act without the Court’s approval. Or it may simply seek to have its views affirmed prior to acting ... But it would be naïve to assume that governments act out of such pure motivations. Political interests are likely to be important, if not predominant considerations in any government’s decision to invoke the reference procedure.122

Based on the above, other sources and the experience of the Senate Reform Reference, we can consider the following classifications: (1) the pure-heart motivation; (2) the prudential motivation; (3) the diffusion of political responsibility motivation; and (4) the proactive strike motivation.123

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The Senate Reform Reference has elements of (3) and (4), but not (1) and (2). It is certainly not an example of (1) the pure heart motivation where “a government genuinely wants the Court’s advice on an important matter, ... doubt[ing] the constitutionality of its position and think[ing] it unwise to act without the Court’s approval.”\textsuperscript{124} The Harper Government never expressed any doubt about the constitutionality of its legislative proposals and steadfastly refused for seven years to refer them to the Supreme Court for a ruling on their constitutionality. The Senate Reform Reference is also not an example of (2) the prudential motivation. In such cases, the government may bring a reference in order to get a quick resolution of an important legal question as in the Supreme Court Act Reference.\textsuperscript{125} Other practical concerns may make a reference attractive for the government to seize the initiative on an issue, as was the case in the Securities Act Reference.\textsuperscript{126}

The Senate Reform Reference is, however, an example of (3) the diffusion of political responsibility motivation. References may be brought in order for the government to attempt to diffuse political or moral responsibility for an issue. Under this category, governments may ask questions to which they know the answers but to which they want the courts to pronounce the answers.\textsuperscript{127} The government may do so in order to diffuse political opposition to a proposed course of action, as was most certainly the case in the Same-Sex Marriage Reference.\textsuperscript{128} The government may use the reference function simply to refuse to take a political position on the issue, as in the Person’s Case.\textsuperscript{129}

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\textsuperscript{124} Huscroft, “Politics and the Reference Power”, supra note 9 at 11.

\textsuperscript{125} See supra note 13. As this reference demonstrated, sometimes the answer sought is not what was expected.

\textsuperscript{126} Supra note 22. See Huscroft, “Politics and the Reference Power”, supra note 9 at 12.

\textsuperscript{127} See Huscroft, “Politics and the Reference Power”, supra note 9 at 8 (citing the Quebec Secession Reference, supra note 13 and the Same-Sex Marriage Reference, supra note 14 as examples).

\textsuperscript{128} See Huscroft, “Politics and the Reference Power”, supra note 9 at 9 (discussing the Same-Sex Marriage Reference, supra note 14).

\textsuperscript{129} See The Person’s Case, supra note 11 (reversing The Persons Case Supreme Court of Canada, supra note 24). See generally Robert J Sharpe & Patricia I McMahon, The Per-
The Senate Reform Reference displays elements of this category because the Harper Government had effectively refused to move forward on its Senate reform legislation due to internal opposition. For over a year and a half Bill C-7 was stalled in the House of Commons, reportedly due to internal opposition within the Conservative caucus. And this came after Senate reform legislation was shifted from the Senate to the House due to opposition within the Conservative Senatorial ranks. However, the Harper Government could not simply abandon its commitment to Senate reform without significant political cost, as the Prime Minister had personally invested much political capital in the issue. Abandoning Senate reform would have injured Mr. Harper as a leader and would have hurt the image of Conservative Party with its followers who actively, and often fervently, supported Senate reform. With a majority in both the House of Commons and the Senate and with the Senate expense scandals involving Senators that Mr. Harper himself had appointed—Senators Duffy, Wallin, and Brazeau—Mr. Harper could no longer simply blame the opposition for dragging its feet on Senate reform. It was simply not credible. Mr. Harper was forced to demonstrate some action, and referring his legislation to the Supreme Court for a ruling both demonstrated action and bought him some time while the matter was under consideration by the Supreme Court.

The decision to initiate the reference supports alternative political hypotheses. Some have suggested that the reference was “tactical” in the sense of a calculated move to seek greater power than the Prime Minister expected the Supreme Court to sanction or even that he referred the reference to the Court with the full expectation that the Court would re-

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ject his Senate reform proposals. Others have submitted that it is part of a larger strategy of shifting the blame for the government’s inability to fulfill political commitments onto other actors—in this case onto the Supreme Court and the Premiers. The Prime Minister’s previous pronouncements support this theory.

In November 2013, Prime Minister Harper gave a speech to Conservative Party members in which he blamed “the courts” for standing in the way of Senate reform, presumably referring to the ruling of the Québec Court of Appeal against the government’s unilateral Senate reform proposals, but also presaging the Supreme Court of Canada’s hearing of the Senate Reform Reference later that same month. Similarly, the Prime Minister’s response in the immediate aftermath of the Supreme Court’s decision on the Senate Reference also supports this theory. On the day that the Supreme Court issued its “advisory opinion”, the Prime Minister “shut the door” on his “career pledge to reform the Senate” and blamed the Supreme Court for stranding Canadians with a scandal-plagued Senate. I will return to this theme in Part IV.


134 See Clark, supra note 131.

135 Canadian Press, “Harper Goes on Offensive amid Damaging Senate Expense Scandal”, Maclean’s (1 November 2013), online: <www.macleans.ca/news/canada/harper-goes-on-offensive-amid-damaging-senate-expense-scandal/> (“[t]he party leader blamed the ‘courts’ for standing in the way of Senate reform. He appeared to be referring to a recent Québec appeal court ruling—the Supreme Court of Canada has yet to give its opinion on how to achieve change in the upper chamber”).

136 See e.g. Tonda MacCharles, “Supreme Court Rejects Harper Government Proposals for Senate Reform”, The Star (25 April 2014), online: <www.thestar.com/news/canada/2014/04/25/supreme_court_rejects_harper_government_proposals_for_easy_senate_reform.html> (“Prime Minister Stephen Harper shut the door Friday on a career pledge to reform the Senate after the Supreme Court of Canada ruled he needs substantial provincial consent to introduce elections or term limits to the upper chamber and unanimous consent to do away with it altogether. In response, the Conservative government said it is dropping Senate reform and ruled out a referendum to build public support to bring reluctant premiers onside as one of its own cabinet ministers, Maxime Bernier, and NDP Leader Tom Mulcair—who both advocate abolition—publicly urged Friday. The prime minister said he was ‘personally disappointed’ in a ruling he says left the country ‘essentially stuck’ with an [sic] scandal-plagued unelected Senate supported by ‘virtually no Canadian.’ The prime minister said no change will come to the 147-year-old Senate anytime soon because the court declared, according to Harper, ‘these are only decisions the provinces can take.’ We know that there is no consensus among the provinces on reform, no consensus on abolition, and no desire of anyone to reopen the Constitution and have a bunch of constitutional negotiations,’ Harper said. He said the court had effec-
Whether the Prime Minister expected to “lose” the reference or not, the case was a political win-win for the Harper Government. If the Supreme Court ruled in his favour, the Prime Minister could proceed unilaterally with enacting Bill C-7. In the face of a green light from Supreme Court and pressure from the Senate scandal, it is hard to imagine that internal caucus opposition would have been sufficient to overcome the Prime Minister’s will to implement his reforms to the Senate. If the Supreme Court ruled against him, as it did, then the Prime Minister would be able to claim—as he did—that he had tried but that the Supreme Court had thwarted his attempts at Senate reform.\textsuperscript{137} The Senate Reform Reference thus presented an opportunity for the Harper Government to both obtain political sanction and deflect political blame for desired policy choices.

A critical factor in explaining the timing of the Harper Government’s decision to bring the reference is category (4) the proactive strike. The Senate scandal did not start really heating up until revelations regarding Nigel Wright’s payment of $90,000 to Senator Mike Duffy which occurred in May 2013, after the reference was directed to the Supreme Court. Thus, the developing Senate scandal was unlikely to have been a significant factor in the decision to initiate the reference. Rather, another reference likely strongly impacted the Prime Minister’s decision making.

On May 2, 2012, the Québec government initiated a reference of its own to its Court of Appeal seeking that court’s opinion on the constitutionality of Bill C-7, imposing nine-year term limits for Senators and creating “consultative elections” for senators in provinces that opted for them.\textsuperscript{138} Since that date, a ruling on the constitutionality of Bill C-7 by the Supreme Court became inevitable because there is an automatic right of appeal from a provincial court of appeal reference to the Supreme Court of Canada.\textsuperscript{139} The Harper Government could no longer escape a court ruling

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\item \textsuperscript{137} In this context, adding the question about Senate abolition, which was not before the Québec Court of Appeal, involved some political risk. If the Supreme Court had accepted the Harper Government’s argument that only the general amending formula applied to abolish the Senate, this would have provided political support to those who were calling for a national referendum on Senate abolition. However, by finding that unanimity was required, the Supreme Court did the Harper Government a favour, effectively taking abolition off the political agenda for the foreseeable future.
\item \textsuperscript{138} Décret 346-2012 (2012) GOQ II, 2277.
\item \textsuperscript{139} See Supreme Court Act, supra note 8, s 36.
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on the constitutionality of the their Senate reform proposals: They would get one from the Québec Court of Appeal in 2013 and in all likelihood they would have gotten one from the Supreme Court of Canada in 2014 whether they had acted or not. The decision of the Québec government forced the Harper Government’s hand; it had to act. By initiating a reference to the Supreme Court of Canada, the Harper Government could frame the questions and have some control over the timing and the process. Thus, the decision to bring the reference can be seen as both a reaction to the Government of Québec and as a proactive strike to get ahead of the Québec Court of Appeal decision and attempt to best defend the Harper Government’s strategy of federal unilateralism.

II. Political Issues Arising from the Senate Reference

In analyzing the politics of the reference itself, we can identify two classes of issues: those that relate to the issues and the parties before the Supreme Court that are particular to the Senate Reform Reference, and those that raise political issues about the nature of references more generally.

A. Political Issues about the Senate Reform Reference Specifically

1. For the Harper Government

As discussed below, the Supreme Court gave high priority to the Senate Reform Reference. In contrast, it has been suggested that the Prime Minister tried to distance himself from the case. In a September 2014 article, the Prime Minister’s former Chief of Staff, Ian Brodie, claimed that Mr. Harper “did little to draw attention to the reference”. Mr. Brodie makes a strong case that this is so but he over-reaches by trying to buttress his argument with the assertion that the Prime Minister “did not even send his Attorney General to argue the case.”

The suggestion that the Prime Minister neglected to direct his Attorney General to personally argue the reference somehow reflects on the lack of political priority given to the case is wholly without merit. Attorneys General do not personally represent the government in court. Attorney General Peter MacKay’s predecessors as Attorney General in the Harper Government never personally appeared before the Supreme Court or before any other court. No federal Attorney General in modern histo-

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140 Brodie, supra note 84.

141 Ibid.
ry—at least the last thirty years—has appeared personally before the Supreme Court of Canada to argue a case and it is misleading and mischievous to suggest that Attorney General MacKay should have done so.  

The Senate Reform Reference forced the Harper Government to attempt a difficult balancing act on the issue of “consultative elections”. Politically, the Harper Government needed to tell its supporters and the Canadian public that it was initiating reforms that would enable Senators to be elected as this is what Senate reform had always meant to their supporters. The Harper Government made very clear that the Prime Minister would respect the wishes of the electorate of any province that instituted consultative elections.

However, legally, Government lawyers were forced to argue that the “consultative elections” did not in fact elect Senators because that would clearly change “the method of selecting Senators” and bring the legislation squarely within section 42(1) of Part V of the Constitution Act, 1982, triggering the general amendment formula requiring the approval of Parliament plus at least seven provincial legislatures with at least fifty per cent of the Canadian population. Thus, government lawyers argued that the consultative elections did not change “the method of selection of Senators.”

Moreover, MacKay would not have had sufficient time to prepare to argue the case. MacKay had held the justice portfolio for four months when the Senate Reform Reference was argued in November 2013. Counsel had been working on the case since it was filed February 1, 2013—six months before MacKay was appointed Attorney General. Additionally, the Attorney General (or more likely the Deputy Attorney General) selected top senior justice counsel for the case who frequently appear before the Supreme Court. Counsel for the Attorney General of Canada were Robert J. Frater, Christopher M. Rupar and Warren J. Newman. See Senate Reform Reference, supra note 1. A search of the Supreme Court decisions database or LexisNexis will reveal the Supreme Court cases in which each were counsel. For example, Robert Frater has been counsel for the Attorney General of Canada in some of the biggest cases of the last few years including Canada (Citizenship and Immigration) v Harkat, 2014 SCC 37, [2014] 2 SCR 33; Securities Act Reference, supra note 23; Canada (AG) v PHS Community Services Society, 2011 SCC 44, 3 SCR 134 [Insite]; R v National Post, 2010 SCC 16, 1 SCR 477; Canada (Prime Minister) v Khadr, 2010 SCC 3, 1 SCR 44. Similarly, Warren Newman is one of the most senior, prolific and respected lawyers at the Department of Justice. His counsel work at the Supreme Court is only the tip of the iceberg of the advice that he provides. He is considered one of the leading constitutional lawyers and experts in Canada. He was counsel in the Quebec Secession Reference, supra note 13; Reference Re Manitoba Language Rights, [1992] 1 SCR 212, 88 DLR (4th) 385; MB Language Rights Reference, 1985, supra note 123.

In their 2011 platform, the Conservative Party of Canada said that in provinces that have democratic processes for selecting Senate nominees, appointees would come from among those chosen by the electorate; in provinces that do not hold democratic consultative processes, appointees would be people who support the Senate reform agenda (Conservative Party of Canada, Here for Canada, supra note 103 at 62–63). See also Policy Declaration, supra note 89 at 5.
because they merely constituted an “information-gathering process”. The National Post, long a supporter of Senate reform, editorialized that the Harper Government’s arguments that consultative elections would not alter the nature of the Senate were “disingenuous”.

The Court did not accept the Harper Government’s argument, reasoning that “[t]he proposed consultative elections would produce lists of candidates, from which prime ministers would be expected to choose when making appointments to the Senate.” The Court concluded that the compilation of such lists through elections “and the Prime Minister’s consideration of them prior to making recommendations to the Governor General would form part of the ‘method of selecting Senators’ which would trigger the application of the general amending procedure under section 42(1)(b) of the Constitution Act, 1982.

Moreover, in pressing their argument for the necessity of “consultative elections”, lawyers for the Government emphasized the partisan nature of Senate appointments since its creation in 1867. The federal government frequently repeated the fact that ninety-five per cent of all Senators appointed to the Senate since Confederation have been partisan appointments, in the sense of appointments by a Prime Minister of members of his own party. This argument sought to have the Supreme Court rescue the government from itself, since it surely did not take any legislation, let alone a constitutional amendment, to change the partisan nature of appointments to the Senate. All that is required is a Prime Minister willing to do this himself, since it is the Prime Minister who has sole discretion over Senatorial appointments. The injection of an element of political necessity to the argument was a rare and feeble attempt to exert political pressure on the Court.

2. For the Supreme Court

The Senate Reform Reference placed the Supreme Court in the political spotlight and the Court succeeded in deftly handling the reference without becoming unduly politicized. The Supreme Court prioritized the
reference, knowing its importance to the government, the Senate, the provinces, and Canadians. In so doing, it certainly allowed political considerations to influence its decisions about procedure. This was instigated, however, at the request of the Attorney General of Canada who brought a motion to set deadlines “to ensure an expeditious hearing” within one week of filing the reference.\textsuperscript{150} The suggestion—made by Ian Brodie—that the Supreme Court failed to give priority to the reference is wholly misplaced. Mr. Brodie claims that the Supreme Court “put the case on a slow path, and did not come to a decision until April, 2014.”\textsuperscript{151}

Mr. Brodie is correct in suggesting that the reference was certainly one that could have been expected to take a “slow path”. It was complicated in many respects. Legally, it provided the first opportunity for the Supreme Court to address the amendment formula contained in Part V of the \textit{Constitution Act, 1982}.\textsuperscript{152} It was of obvious constitutional and political significance as well. Whereas most Supreme Court cases have only two parties, and some have several interveners in addition, the Senate Reference had eighteen parties and interveners before it. However, Mr. Brodie is completely incorrect in asserting that the Supreme Court did in fact take a “slow path” with the reference.

The Court fast tracked the reference soon after it was filed. In response to the Government’s motion for directions “to ensure an expeditious hearing”,\textsuperscript{153} the Court issued an order establishing abbreviated timelines for actions in the case.\textsuperscript{154} These timelines were much shorter than those that normally apply for references or for ordinary cases at the Supreme Court.\textsuperscript{155} On any normal timetable, the reference would not have

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\item \textsuperscript{150} See \textit{Senate Reform Reference, supra} note 1 (Motion for directions (book form) regarding setting deadlines for filing materials to ensure expeditious hearing, CD received 7 February 2013). The Notice of Reference was filed with the Court on 1 February 2013.
\item \textsuperscript{151} Brodie, \textit{supra} note 84.
\item \textsuperscript{152} The \textit{Quebec Secession Reference, supra} note 13 provided an opportunity for the Court to consider Part V, but the Court chose not to address the amendment procedures. Thank you to the anonymous reviewer who pointed out this out.
\item \textsuperscript{153} \textit{Senate Reform Reference, supra} note 1 (Order PC 2013-70 dated 1 February 2013).
\item \textsuperscript{154} \textit{Ibid.}
\item \textsuperscript{155} For example, the Court provided only two weeks for any person wishing to intervene in the reference to serve and file a motion for leave to intervene. Under the Supreme Court Rules, a person usually has a much longer time to file a motion for leave to intervene: four weeks after the Government files its factum (which is usually 12 weeks after it files the notice of reference) (\textit{Rules of the Supreme Court of Canada, SOR/2002-156, r 46(7), (101)}). If this had been the case, motions for leave to intervene would not have been due until the end of August 2013. Other parties would have had 10 days to respond to the motion (r 49(1)) and the proposed interveners would have had the right to reply within a further five days (r 50(1)) after which the motions would have been submitted to the
\end{itemize}
been heard until 2014. Instead, the case was heard within ten months of the filing of the Notice of Reference, less than two months longer than the average time for cases to be heard at the Supreme Court,\textsuperscript{156} despite the case being anything but average. There is thus no validity to the claim that the Supreme Court put the case “put the case on a slow path.”\textsuperscript{157}

Moreover, the assertion that the Supreme Court somehow tarried in rendering its decision (“did not come to a decision until April, 2014”\textsuperscript{158}) shows a similar lack of familiarity with Supreme Court decision making. The Supreme Court rendered its decision in the \textit{Senate Reform Reference} within five months of the hearing. Between 2011 and 2013, the average Supreme Court case took six months from hearing to judgment.\textsuperscript{159} However, the \textit{Senate Reform Reference} was far from an average case. The reference was scheduled for two and half days of oral argument November 12–14, 2014. By contrast, most Supreme Court cases take two hours or half a day. Complicated ones with multiple parties may take a full day. There were eighteen parties before the Court in the \textit{Senate Reform Reference}; the transcript of the hearing filled 471 pages.

In the midst of preparing for the reference, the Supreme Court found itself shorthanded due to the challenge to the appointment of Justice Nadon. Justice Nadon recused himself from all matters before the Court. Given the importance of the \textit{Senate Reform Reference}, it would have been entirely appropriate for the Chief Justice to have postponed the hearing until such time as the Court had a full complement, especially since the missing judge held one of the three Québec seats and the reference involved important questions of federalism of particular importance to Québec, to wit, the Senate and constitutional amendment. She chose not to do so. This was a risky decision for the Chief Justice, because had the Court been divided in its decision, it would have come under serious criticism for deciding a case of such importance without one of the three Québec justices. However, had the Chief Justice elected to defer the hearing, it is very possible that the Supreme Court would have been criticized, and possibly even attacked in some quarters, for continuing to stall the cause of Senate reform. In the end, the Chief Justice’s decision to proceed with the reference as scheduled proved to be politically astute.


\textsuperscript{157} Brodie, \textit{supra} note 84.

\textsuperscript{158} \textit{Ibid}.

\textsuperscript{159} SCC Statistics, \textit{supra} note 156.
The Court issued its decision relatively quickly: on April 24, 2014, within less than five months of the hearing. In Supreme Court terms, this is a quick decision. It would not have been surprising had the decision taken upward of a year to be released. For comparative purposes, the Quebec Secession Reference took just over six months to decide,160 and the Securities Act Reference took eight months in 2011.161 In no terms, can it be suggested that the Supreme Court tarried in any way in deciding the Senate Reform Reference. On the contrary, rather than dragging its feet, the Supreme Court fast tracked the Senate Reform Reference.

The Supreme Court succeeded in limiting its political intervention in the case. Faced with one of the most political cases—one which involved a clash between the federal government and the provinces, the past and the future of one chamber of Parliament, a core political priority for the government, all set against the background of scandal—the Court did its best to deftly stickhandle through the tricky political terrain. It attempted to distance itself from the substantive issue of Senate reform: “The question before us now is not whether the Senate should be reformed or what reforms would be preferable, but rather how the specific changes set out in the Reference can be accomplished under the Constitution.”162 This articulation of the Supreme Court’s role is remarkably similar to how the Attorney General of Canada articulated the scope of the reference in Canada’s factum: “The reference is not about whether Senators can, or should be, elected. Nor is it about whether the Senate ought to be abolished. It is simply about which procedures in Part V of the Constitution Act, 1982 apply to proposed changes.” Thus, on paper at least, the Harper Government and the Supreme Court appeared to be ad item on the scope of the reference and the role of the Supreme Court.

The Supreme Court emphasized its narrow role in the continuing Senate reform drama: “Our role is not to speculate on the full range of possible changes to the Senate. Rather, the proper role of this Court in the ongoing debate regarding the future of the Senate is to determine the legal framework for implementing the specific changes contemplated in the questions put to us. The desirability of these changes is not a question for the Court; it is an issue for Canadians and their legislatures.”163 Much of the media reaction accepted the Supreme Court’s account, including from

160 See Quebec Secession Reference, supra note 13.
162 Senate Reform Reference, supra note 1 at para 20.
163 Ibid at para 4.
some unexpected conservative sources. The Harper Government, as might be expected, did not. Its response is analyzed in Part IV below.

The unanimous decision likely helped to avoid dragging the Court into a political quagmire. Because of their political nature, references can be tricky political terrain for the Supreme Court to traverse. If the Court is divided, its decision is more likely to become politicized, with different judges’ arguments being used to support different political positions. This was the case in the Supreme Court Act Reference regarding the eligibility of Justice Nadon. It was avoided in the Senate Reform Reference.

3. Relationship between the Supreme Court and the Senate

In the Senate Reform Reference, the Supreme Court demonstrated extreme deference and respect for the Senate as an institution. As I argued at the time of the hearing, there were actually two Senates “on trial”, so to speak, before the Court: first, the Senate that the Fathers of Confederation intended to create in 1867 (“the intended Senate”) and, second, the actual Senate that has emerged since then ("the actual Senate"). Surprisingly, over the course of three days of oral argument there was virtually no mention of the recent “troubles” in the Red Chamber that had been so much in the news over the preceding months. This “absence of (Senatorial) malice” was reiterated in the Court’s decision, which includes no reference to recent scandals that have captured media and public attention.

None of the parties placed the broader political context of Senate scandal and controversy before the Supreme Court. The closest was counsel for the Attorney General of Canada who pressed the point of the parti-

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164 See e.g. Conrad Black, “Why Are We Afraid of Constitutional Reform?”, National Post (3 May 2014), online: <news.nationalpost.com/full-comment/conrad-black-why-are-we-afraid-of-constitutional-reform> ("[i]nconceivably, Mr. Harper and his so-called Democratic Reform minister, Pierre Poilievre, seem to have imagined that the power to alter or abolish the Senate resided in the federal government alone. A first-year law-school student could have told them this wasn’t true after an hour’s research") [Black, “Why Are We Afraid?”].

165 See Supreme Court Act Reference, supra note 15.

166 As one anonymous reviewer pointed out, there may have been self-interested reasons for the Court to do so, since it shares an appointment process not dissimilar from the Senate’s.


168 See e.g. J Patrick Boyer, Our Scandalous Senate (Toronto: Dundurn, 2014); Claire Hoy, Nice Work: The Continuing Scandal of Canada’s Senate (Toronto: McClelland & Stewart, 1999).
san nature of Senate appointments going back to Confederation. Of course, the judges could not have been ignorant of events occurring within a one kilometre radius of their offices. However, there seemed to be an unspoken agreement among all the parties not to refer to, let alone, engage in such “political” considerations. As a result, the hearing and the decision had a bit of fairy tale character to them. The Senate Reform Reference had been strongly influenced by political considerations, but the hearing and the decision was divorced from them.

In both the hearing and in the decision, the judges of the Supreme Court demonstrated remarkable respect for the Senate. They treated it more like an “idealized Senate” than the intended Senate or the actual Senate that we have. The Court’s judgment revealed this penchant for an idealized Senate. The Court emphasized the critical constitutional role that the Senate plays under our Constitution in our system of government. For example, the decision mentions the phrase “sober second thought” no less than thirteen times. In idealizing the Senate in this fashion, the Court demonstrated respect for the separation of powers and also demonstrated respect for the Senate as an institution; arguably the Supreme Court showed more respect for the Senate than many of its own members show for their own institution.

In refusing to take into account the broader political circumstances, the Supreme Court may be accused of being tone deaf to political realities. However, had the Court considered such political factors—without invitation from any of the parties—it surely would have been accused of being guilty of the sort of results-oriented reasoning that critics of judicial activism abhor.


170 See Senate Reform Reference, supra note 1 at paras 15, 17, 52, 54, 56, 60, 63, 70, 79 (twice), 81, 82, 88.

171 This was certainly the immediate response of the Prime Minister to the Supreme Court’s decision (see MacCharles, supra note 136).

172 See Rory Leishman, Against Judicial Activism: The Decline of Freedom and Democracy in Canada (Montréal: McGill-Queen’s University Press, 2006); Martin, Dangerous Branch, supra note 6; Morton & Knopff, Charter Revolution, supra note 5.
B. The Politics of the Relationship between the Supreme Court and the Executive Generally

1. The Senate Reform Reference and the Nature of Advisory Opinions

The Senate Reform Reference reveals larger aspects of the relationship between the Executive and the Supreme Court and the nature of references. In exercising its reference function, the Supreme Court has been described as an adviser to the Crown.\textsuperscript{173} The Supreme Court is depicted as acting as a legal adviser to the government, performing an executive function which is said to infringe on the separation of powers between the judiciary and the executive.\textsuperscript{174} Such a description mischaracterizes the nature of the Supreme Court’s role, the relationship between the adviser (the Court) and the advisee (the Executive) and the character of references.

To the extent that the Supreme Court provides “advice” to the executive, it is very different from the “advice” that the executive receives from its own lawyers. In the government context, advisers cannot simply refuse to answer questions posed to them.\textsuperscript{175} In references, the Supreme Court has refused to answer particular questions on various limited grounds.\textsuperscript{176} Legal advisers generally do not have the same luxury or discretion; they are called upon to provide “their best advice” with limited facts, context, specificity or vague or moot circumstances.

The character of the “advice” is markedly different in a reference from ordinary legal advice. Advice from executive legal advisers are predictions as to how the courts will rule on a particular issue. Advisory opinions from the Supreme Court should be considered authoritative as to how the high court would rule if the same matter was brought before it. Advice from executive legal advisers may be rejected. As Huscroft notes, “[i]f reference opinions were truly advisory in nature, they could be rejected by

\textsuperscript{173} In re References by the Governor-General in Council (1910), 43 SCR 536, 1910 CanLII 29.

\textsuperscript{174} Mathen, “The Question”, supra note 16 at 144.

\textsuperscript{175} This is true in the private context as well, absent a conflict of interest or lack of competence. See generally Federation of Law Societies of Canada, Model Code of Professional Conduct, ch 3.1 (Competence) and ch 3.2-2 (Candour and Honesty).

\textsuperscript{176} These include including mootness (Quebec Veto Reference, supra note 12), lack of specificity (Local Prohibition), lack of factual context (Upper House Reference, supra note 29) and the risk of creating legal uncertainty (Same-Sex Marriage Reference, supra note 14). This list does not appear to be exhaustive, indicating the discretion that the Supreme Court has to decide under what circumstances it will elect to answer a question.
the government that sought them.” 177 But they cannot. As has frequently been noted, advisory “opinions” acquire the force of law. 178

Moreover, references look very much like traditional appeals both in hearing and decision. 179 Courts make no distinction between references and ordinary cases in terms of their precedential force. 180 If anything, references tend to have stronger influence than ordinary judgments. The Senate Reform Reference will bear this out as it will have significant and enduring precedential value regarding the interpretation of Part V of the Constitutional Act, 1982 relating to constitutional amendment.

The term “advice” or “advisory opinion” is therefore misleading. A reference opinion is “advice” in the same way that the Prime Minister usually “advises” the Governor General on behalf of the Queen’s Privy Council for Canada or submits an instrument of advice to the Governor General. In ordinary cases, the Prime Minister’s advice is a command and is binding on the Governor General. 181 Similarly, unlike advice from executive legal advisers, advisory opinions from the Supreme Court are in practice binding on the executive. In short, the Court, as so-called “adviser to the Crown” does not act like such. And the government, as the “advisee” similarly does not act as it usually does when commissioning and obtaining advice.

The Senate Reform Reference thus provides a good case study for understanding the true nature of references in Canadian Constitutional Law and in Canadian constitutional politics. In practice, references are treated as binding by all actors in the Canadian legal and political systems. Arguably, references have more persuasive force both as a matter of law and of politics than ordinary decisions. The response to the Supreme Court’s “advisory opinion” in the Senate Reform Reference demonstrates the binding nature of references; all actors treated it as binding and authoritative. Thus, the Senate Reform Reference provides the opportunity to re-characterize references. 182 References should be considered rulings that

179 Huscroft, supra note 8 at 4.
180 See Ibid at 5; Hogg, supra note 178 at 8.20; Mathen, “The Question”, supra note 16.
181 I leave aside the exceptional cases of the exercise of the Governor General’s reserve powers.
182 See Mathen, “Mutability”, supra note 17 (“[e]ventually it may become necessary to reconcile references’ technical (non-binding) status with their (actual force of law) result” at 57). Deeper theoretical work remains to be done on this issue as suggested by Mathen. My point is only to stoke that fire; the Senate Reform Reference will support that work when it is undertaken.
have the same force as actual decisions. In actuality, references are simply a special power afforded to the Governor-in-Council (or to the Lieutenant-Governor in Council provincially) to seek a declaration, similar to the power that exists generally under provincial codes of civil procedure.\footnote{See e.g. \textit{Rules of Civil Procedure}, RRO 1990, Reg 194, r 14.05 (applications).}

\section*{III. Political Aftermath of the Reference}

\subsection*{A. Political Response}

The Prime Minister’s response to the \textit{Senate Reform Reference} had indicated that his fidelity to federal unilateralism trumps his fidelity to Senate reform. His response also clearly indicates his belief that the Supreme Court now joins the list of those that have frustrated his efforts at Senate reform. If the Supreme Court’s treatment of the Senate in the reference reflected an idealized Senate, the Prime Minister’s response returned matters to the actual Senate. The Prime Minister did not accept the Supreme Court’s assertion that it was simply setting the rules to be followed for political actors in pursuing reform.\footnote{See \textit{Senate Reform Reference}, supra note 1 at paras 4, 20.} Instead, the Prime Minister stated that the Supreme Court had effectively determined that significant reform and abolition are off the table.\footnote{See Leslie MacKinnon, “Stephen Harper Says Senate Reform Is off the Table”, \textit{CBC News} (25 April 2014), online: <www.cbc.ca/news/politics/stephen-harper-says-senate-reform-is-off-the-table-1.2622053>.} In focusing on the effects of the Supreme Court’s decision, the Prime Minister may very well prove to be correct. However, whereas the Supreme Court did not foreclose any policy options, the Prime Minister’s remarks indicate that he had, again indicating his penchant for unilateralism over the politics of consultation, negotiation and compromise or open federalism. The Supreme Court had effectively taken federal unilateralism “off the table”. By my count, the Supreme Court used the words “unilateral” or “unilaterally” no less than thirty-five times in its decision.

The Harper Government’s response reflected a clear political strategy of killing Senate reform and blaming the Supreme Court for its death. The Prime Minister’s remarks were very thorough, indicating that he had been well-briefed on the possibility of the Supreme Court’s deciding as it did. He had already decided on a course of action and announced it immediately, rather than taking the frequent tactic of stating that the Government would study the decision. The Prime Minister’s response to the \textit{Senate Reform Reference} contrasts starkly with his reaction to the Supreme Court’s decision several weeks earlier in the \textit{Supreme Court Reference}.
which invalidated the appointment of Justice Marc Nadon.\footnote{See \textit{Supreme Court Act Reference}, supra note 15.}\footnote{See \textit{Supreme Court Act Reference}, supra note 15.} On that occasion, the Prime Minister both appeared to be and expressed that he was “genuinely surprised”\footnote{See \textit{Supreme Court Act Reference}, supra note 15.} by the Supreme Court’s ruling. The government did not appear to be prepared for the Court’s ruling and announced no plan in response to it.

By contrast, the Harper Government’s response to the \textit{Senate Reform Reference} suggests a political strategy of letting the cause of Senate reform quietly die. It has taken no action to move forward on abolishing the $4,000 net worth requirement\footnote{See \textit{Constitution Act, 1867}, s 23(4).} for Senators which the Supreme Court clearly said Parliament could do unilaterally. Similarly, it has taken no action to remove the real property requirement\footnote{See \textit{Constitution Act, 1867}, s 23(3).} which it can do unilaterally for every province except Québec which requires the consent of that province’s National Assembly.\footnote{See \textit{Senate Reform Reference}, supra note 1 at paras 84–88.} It has taken no public steps to engage the government of Québec on this issue.

In many ways except an all important one, the \textit{Senate Reform Reference} looks very similar to the \textit{Patriation Reference}.\footnote{Supra note 12.} In both cases, the federal government desired to achieve what it had identified as a core political priority of national importance. In both instances, the federal government asserted the power to proceed with constitutional change unilaterally. This assertion was opposed by the provinces and ultimately challenged in the courts. As Verrelli has written, “[t]he ultimate effect of both Trudeau’s and Harper’s proposed actions are similar: push aside the provinces and ignore the vital position they hold within the federation.”\footnote{Verrelli, “Harper’s Senate Reform”, supra note 106 at 55.} In both cases, the Supreme Court ruled that substantial provincial consent was necessary for the federal government to proceed with its changes. Here the similarity between the two references ends. The Supreme Court’s decision in the \textit{Patriation Reference} forced the federal government back to the negotiating table with the provinces because the federal government was committed to achieving its political goal. In the \textit{Senate Reform Reference}, there is no table to return to because the federal government has refused to sit down with the provinces on this and most issues.
The Harper Government appears prepared to fall on the sword of Senate reform rather than forsake its fidelity to federal unilateralism.

To date, the Harper Government’s (non-)response to the Senate Reform Reference would seem to indicate that it is not prepared to jettison the politics of unilateralism for open federalism and that it is prepared to forsake its commitment to reforming the Senate as a result. As set out above, the Harper Government has eschewed internal reforms which could improve that body. However, on the day that the Senate Reform Reference was released, the Harper Government promised to minimize costs in the Senate and make it more transparent and accountable: “We remain committed to making the Senate a more accountable institution.”193 The details of this plan, beyond not filling vacant seats in the Senate, remain unclear. The political challenge for the Harper Government will be to distance itself from an institution that it now increasingly “owns” through Senators appointed by Prime Minister Harper. The Senate Reform Reference will live on in the political narrative as Canadians are reminded of the Government’s failure to reform the Senate at each successive Senate appointment and with continuing or new scandals in the Senate including the trial of Senator Mike Duffy. In such circumstances, the Harper Government is likely to continue blaming the Supreme Court for the Senate we have. It has clearly demonstrated that it has no aversion to treating the Supreme Court any differently from any other political adversary.

B. Interbranch Conflict between the Harper Government and the Supreme Court

The Senate Reform Reference likely triggered a serious interbranch conflict between the executive and the Supreme Court. A week after the Supreme Court delivered its decision in the Senate Reform Reference, the Prime Minister’s Office asserted that the Prime Minister had refused to take a call from Chief Justice McLachlin in the summer of 2013 when the Nadon appointment was under consideration because such a conversation would have been “inadvisable and inappropriate”.194 Prime Minister Harper and Minister of Justice and Attorney General Peter MacKay repeated


the accusations that the Chief Justice had acted “inappropriately”. As the media noted, calling the behaviour of the Chief Justice of Canada “inappropriate” was “nothing short of shocking”. The unprecedented attack on the integrity of the Chief Justice of Canada by the head of the executive branch and the country’s chief legal officer was met with a response from the Supreme Court of Canada, denouncements from the legal community, and international condemnation.

On its face, the accusations were not connected to the Senate Reform Reference. However, it is difficult to imagine that the PMO, the Prime Minister, and his Attorney General would have lashed out at the Supreme Court a week after the Senate Reform Reference if the Court had sanctioned their unilateral policy plans. While it remains speculation, I believe that the Senate Reform Reference likely sparked the PMO’s firestorm of criticism against the Chief Justice and the Court.

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198 Subsequent media revelations of the appointment process for Justice Nadon demonstrate that the Harper Government’s narrative about the Chief Justice’s actions was not what it appeared to be. According to media reports, which the government has not denied, there were four Federal Court judges on the list of six under consideration by the Supreme Court Selection Panel. See e.g. Sean Fine, “The Secret Short List That Provoked the Rift between Chief Justice and PMO”, Globe and Mail (23 May 2014), online: <www.theglobeandmail.com/news/politics/the-secret-short-list-that-caused-a-rift-between-chief-justice-and-pmo/article18823292/?page=all>. The revelation of the composition of the short list to the Chief Justice by the Supreme Court Selection Panel led her to contact the Minister of Justice’s office and ultimately request to speak with the Prime Minister, who by all accounts makes the actual decisions about Supreme Court appointments. Attorney General Peter MacKay publicly admitted in the reply to Order Paper, 41st Leg, 1st Sess, No Q-543 (3 June 2012) that the Chief Justice had done nothing wrong; See response House of Commons, “Inquiry of Ministry” by Peter MacKay in Sessional Papers, No 12-543 (2014) at paras (2), (aa) and (bb). In his biography of Stephen Harper, John Ibbitson states that the Supreme Court of Canada’s decision in the Nadon case (March 21, 2014) sparked the Prime Minister’s attack on the Chief Justice (May 1–2, 2014) (See John Ibbitson, Stephen Harper (Toronto: Signal, 2015) at 385). However, there is no explanation as to why the Prime Minister waited six weeks to lash out at the Chief Justice. The Supreme Court delivered its opinion in the Senate Reform Reference on April 24, 2014, one week before the Prime Minister’s outburst. The timing of the intervening Supreme Court decision supports my assertion that the Senate Reform Reference was the trigger for the Prime Minister’s attack on the Chief Justice.
The “strategy”—if it was one—of attacking the Chief Justice of Canada and the Supreme Court confounded many media and political observers precisely because Canadians demonstrate far greater trust in the Supreme Court as an institution than in the political branch of government. The strategy may reveal an attempt to politicize the Supreme Court of Canada for partisan political gain.\(^\text{199}\) The cost may be the deterioration in the relationship between the executive branch and the judicial branch.

C. Political Implications and Constitutional Amendment

The *Senate Reform Reference* is also likely to have medium and longer term political implications. In the medium term, it will be used as political weapon by opponents of various proposed reforms. For example, some have asserted that the Supreme Court’s decision calls into question the legality of previous “elected senators”.\(^\text{200}\) The legality of such an argument is rather dubious because there is a significant distinction between an ad hoc appointments process where the Prime Minister chooses to appoint to the Senate a nominee who had been popularly-elected and the legislative scheme in Bill C-7 that was before the Court which gave statutory and constitutional recognition to such a scheme and required the Prime Minister to consider the results of such elections. However, it shows that the *Senate Reform Reference* will be used for various political purposes: to question the legitimacy of the appointment of existing Senators, to undermine the viability of alternate appointment plans such as Justin Trudeau’s, and even to challenge existing and future reforms to the Supreme Court appointment process.

The *Senate Reform Reference* will also have a long term political impact on constitutional reform. It has now become the blueprint for constitutional amendment and the Supreme Court has clearly stated that it will not allow form to triumph over substance. It represented a significant political win for the provinces and setback for the federal government. The Supreme Court clearly indicated that the “General Formula” for constitutional amendment—agreement of the both Houses of Parliament and the Legislatures of seven of the ten provinces having more than fifty per cent of the population—is the default amending procedure. This will strongly restrict federal unilateralism, both for the Harper Government and for its successors.

\(^{199}\) See Geddes, “Disorder”, *supra* note 196.

\(^{200}\) Brodie, *supra* note 84.
Conclusion

I have argued that three themes of fidelity, frustration, and federal unilateralism emerge from an analysis of the politics of the Senate Reform Reference. These themes can be seen in considering three different political narratives inform the understanding of the place of the Senate Reform Reference in the continuing saga of the quest for Senate reform. The first narrative is straightforward. It involves a Prime Minister who has always been dedicated to the cause of reforming the upper house only to find that once he became Prime Minister his attempts at Senate reform were thwarted at every step of the way: first by the opposition and the Senate itself, next by some within his own caucus, by the provincial premiers, and finally by the courts, notably the Supreme Court of Canada. We can consider this the standard narrative, which emphasizes fidelity and frustration. We can also identify an alternative political narrative, which we might term the “defeatist political narrative”. According to this narrative, at some point a Prime Minister dedicated to Senate reform came to realize that he could not achieve his vision of Senate reform without the support of provincial premiers. Instead of ramming his package of Senate reforms down the throats of recalcitrant caucus members and take his chances in the courts—as he was willing to do with other legislation—the Prime Minister used the courts as a convenient tool to justify his inability to deliver Senate reform to those in his party that supported it. Under this narrative, frustration forced the Prime Minister to abandon fidelity to Senate reform.

A third political narrative combines elements of both. Under this narrative, Prime Minister Harper demonstrated a remarkable fidelity to the cause of Senate reform despite successful attempts to frustrate his legislative efforts. However, it is not Senate reform which was thwarted but Prime Minister Harper’s penchant for unilateralism. Prime Minister Harper was not interested in strengthening the Senate but in fundamentally altering it, irrespective of the consequences, either for the Upper Chamber or for parliamentary democracy in Canada. Whereas politics is said to be the art of the possible, Prime Minister Harper was unwilling to compromise. He was unwilling even to sit down with the premiers to discuss possibilities to achieve his desired reforms to the Senate. This narrative of fidelity, frustration and federal unilateralism is the one around which I have chosen to structure this paper, because I believe it provides the best account of the politics of the Senate Reform Reference.

To date, the Senate Reform Reference appears somewhat anomalous. While references are the most political of cases and often force political compromise or resolution of political issues, this has not been the case with the Senate Reform Reference. Instead of launching a new era of mega-constitutional politics, this reference simply closed a short chapter of
federal unilateralism that some described as a “fantasy”. It is not clear what will emerge instead.

201 “Don’t Give Up on Senate Reform”, supra note 145.