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

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Résumé de l'article

Les renvois sont les arrêts les plus politiques qui soient, car ils impliquent presque toujours des questions d'ordre publique. Les questions dans ces renvois sont souvent posées afin d'obtenir des jugements sur la relation entre les gouvernements provinciaux et fédéral. Ces renvois impliquent aussi, mais moins fréquemment, des questions concernant la relation entre les branches du gouvernement, c'est à dire entre l'exécutif, le législatif et le judiciaire. Le *Renvoi relatif à la réforme du Sénat*, cependant, est l'une des rares affaires où figurait chacun de ces trois éléments. Cet article entreprend l'analyse du *Renvoi relatif à la réforme du Sénat* sur plusieurs niveaux politiques. D'abord, l'article met en contexte le renvoi en termes des mégapolitiques constitutionnelles, cette longue tradition canadienne qui tente de résoudre les problèmes constitutionnels à travers des négociations formelles et souvent très médiatisées entre les gouvernements provinciaux et fédéral. Le gouvernement Harper, cependant, a jeté l'anathème sur de telles interactions, préférant les actions politiques unilatérales aux accords politiques négociés. Cet article s'adresse ensuite aux relations entre le gouvernement Harper et les partis d'opposition durant la période de gouvernement minoritaire (2006 à 2011). C'est durant cette période qu'on aurait anticipé une demande de renvoi de la part du gouvernement, puisqu'il ne pouvait obtenir l'appui des autres partis dans la Chambre des communes et dans le Sénat pour son projet de loi sur le Sénat. Mais cela n'a pas été fait. Ceci mène donc à l'étude d'une troisième problématique: la politique interne du parti au pouvoir, en l'espèce le Parti conservateur du Canada. L'article fait enfin l'étude de la politique juridique et comment le gouvernement du Québec a forcé la main du gouvernement en demandant son propre renvoi de la Cour d'appel du Québec. Le cadre général de la politique résultant des relations entre les branches exécutif, législatif et judiciaire est abordé tout au long de l'article.

McGill Law Journal — Revue de droit de McGill

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 interparty 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 Québec essentially forced the federal government's hand by bringing its own reference to the Québec 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.

Les renvois sont les arrêts les plus politiques qui soient, car ils impliquent presque toujours des questions d'ordre publique. Les questions dans ces renvois sont souvent posées afin d'obtenir des jugements sur la relation entre les gouvernements provinciaux et fédéral. Ces renvois impliquent aussi, mais moins fréquemment, des questions concernant la relation entre les branches du gouvernement, c'est à dire entre l'exécutif, le législatif et le judiciaire. Le *Renvoi relatif à la réforme du Sénat*, cependant, est l'une des rares affaires où figurait chacun de ces trois éléments. Cet article entreprend l'analyse du *Renvoi relatif à la réforme du Sénat* sur plusieurs niveaux politiques. D'abord, l'article met en contexte le renvoi en termes des mégapolitiques constitutionnelles, cette longue tradition canadienne qui tente de résoudre les problèmes constitutionnels à travers des négociations formelles et souvent très médiatisées entre les gouvernements provinciaux et fédéral. Le gouvernement Harper, cependant, a jeté l'anathème sur de telles interactions, préférant les actions politiques unilatérales aux accords politiques négociés. Cet article s'adresse ensuite aux relations entre le gouvernement Harper et les partis d'opposition durant la période de gouvernement minoritaire (2006 à 2011). C'est durant cette période qu'on aurait anticipé une demande de renvoi de la part du gouvernement, puisqu'il ne pouvait obtenir l'appui des autres partis dans la Chambre des communes et dans le Sénat pour son projet de loi sur le Sénat. Mais cela n'a pas été fait. Ceci mène donc à l'étude d'une troisième problématique: la politique interne du parti au pouvoir, en l'espèce le Parti conservateur du Canada. L'article fait enfin l'étude de la politique juridique et comment le gouvernement du Québec a forcé la main du gouvernement en demandant son propre renvoi de la Cour d'appel du Québec. Le cadre général de la politique résultant des relations entre les branches exécutif, législatif et judiciaire est abordé tout au long de l'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*,[1] 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*;[2] 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-

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1 *Reference Re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reform Reference*].

2 See generally Adam Dodek, "Uncovering the Wall Surrounding the Castle of the Constitution: Judicial Interpretation of Part V of the *Constitution Act, 1982*" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada: The Law and Politics of Part V of the* Constitution Act, 1982 (Toronto: University of Toronto Press, forthcoming).

old Lasswell's famous definition of politics as "who gets what, when, and how",[3] 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.[4] On this basis, the Court has rightly attracted the attention and the analysis of many political scientists,[5] some legal scholars,[6] and has even

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3 See Harold D Lasswell, *Politics: Who Gets What, When, How* (New York: McGraw Hill Book Company, 1950).

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 ("[j]udges 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).

5 See Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) [Russell, *Judiciary in Canada*]; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism,* 2nd ed (New York: Oxford University Press, 2001); Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2012); FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont: Broadview Press, 2000) [Morton & Knopff, *Charter Revolution*]; Rainer Knopff & FL Morton, *Charter Politics* (Toronto: Nelson Canada, 1992); James B Kelly & Christopher Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009); Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montréal: McGill-Queen's University Press, 2001); James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005); Ian Greene, *The Courts* (Vancouver: UBC Press, 2006); Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company, 2000); Donald R Songer, Susan W Johnson, CL Ostberg & Matthew E Wetstein, *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (Montréal: McGill-Queen's University Press, 2012); Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montréal: McGill-Queen's University Press, 2010); Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montréal: McGill-Queen's University Press, 2013); Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008); Lori Hausegger, Matthew Hennigar & Troy Riddell, *Canadian Courts: Law, Politics, and Process,* 2nd ed (Toronto: Oxford University Press, 2015).

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

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

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6 See Allan C Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, revised ed (Toronto: Thompson Educational Publishing, 1994); Andrew Petter, *The Politics of the* Charter*: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010); Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (Montréal: McGill-Queen's University Press, 2005) [Martin, *Dangerous Branch*]; Grant Huscroft, "Rationalizing Judicial Power: The Mischief of Dialogue Theory" in James B Kelly & Christopher Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 50; Benjamin Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (2009) 47:1 Osgoode Hall LJ 1.

7 See Philip Slayton, *Mighty Judgment: How the Supreme Court of Canada Runs Your Life* (Toronto: Allen Lane, 2011).

8 See *Supreme Court Act*, RSC 1985, c S-26, s 53.

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"].

10 Only governments have the power to initiate a reference: the Governor-in-Council at the federal level (see *Supreme Court Act*, *supra* note 8, s 53) and the Lieutenant-Governor-in-Council at the provincial level (see *Constitutional Question Act*, RSBC 1996, c 68, s 1; *Constitutional Questions Act*, RSNS 1989, c 89, s 3; *Court of Appeal Reference Act*, RSQ 1977, c R-23, s 1; *Courts of Justice Act*, RSO 1990, c C-43, s 8(1); *Judicature Act*, RSA 2000, c J-2, s 26(1); *Judicature Act*, RSNB 1973, c J-2, s 23(1); *Judicature Act*, RSNL 1990, c J-4, s 13; *Judicature Act*, RSPEI 1988, c J-2.1, s 7(1); *The Constitutional Questions Act*, CCSM 2002, c C180, s 1; *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 *Supreme Court Act*, *supra* note 8, s 54.

11 *Edwards v Canada (Attorney General),* [1930] AC 124, 1929 UKPC 86 [*The Persons Case*].

12 See *Reference Re Resolution to Amend the Constitution,* [1981] 1 SCR 753, 125 DLR (3d) 1 [*Patriation Reference*]. See also *Reference Re Objection to a Resolution to Amend the Constitution,* [1982] 2 SCR 793, 150 DLR (3d) 385 [*Quebec Veto Reference*].

13 See *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Quebec Secession Reference*].

14 See *Reference Re Same-Sex Marriage,* 2004 SCC 79, [2004] 3 SCR 698 [*Same-Sex Marriage Reference*].

bility of an impugned Supreme Court appointment.[15] 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."[16] However, jurisprudential and political analyses of references remain underdeveloped in Canada.[17] 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."[18]

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 *Patriation Reference* as Constitutional Method" (2011) 54 SCLR (2d) 143 at 144 [Mathen, "The Question"].

17 Cf Carissima Mathen, "Mutability and Method in the Marriage Reference" (2005) 54 UNBLJ 43 at 57 (calling for the need to reconcile references' technical non-binding status with their actual result of having the force of law) [Mathen, "Mutability"]. Exceptions include François Chevrette & Grégoire Charles N Webber, "L'utilisation de la Procédure de l'Avis Consultatif devant la Cour Suprême du Canada : Essai de Typologie" (2003) 82:3 Can Bar Rev 757; JF Davison, "The Constitutionality and Utility of Advisory Opinions" (1937) 2:2 University of Toronto Law Journal 254; Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can Bar Rev 67; James L Huffman & MardiLyn Saathoff, "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction" (1990) 74:6 Minn Law Rev 1251; Grant Huscroft, "Constitutionalism from the Top Down" (2007) 45:1 Osgoode Hall LJ 91; Huscroft, "Politics and the Reference Power", *supra* note 9; Mathen, "The Question", *supra* note 16.

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."[19] 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,[20] as was the case in the *Patriation Reference*,[21] the *Quebec Secession Reference*,[22] and the *Securities Reference*.[23] 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*,[24] the *Provincial Judges Reference*,[25] and the *Supreme Court Act Reference*[26] are examples. References may also involve proposals for institutional reform (e.g. *Reference Re Representation in the House of*

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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.

23 See *Reference Re Securities Act,* 2011 SCC 66, [2011] 3 SCR 837 [*Securities Act Reference*].

24 *Reference Re Meaning of the Word "Persons" in s 24 of British North America Act*, [1928] SCR 276, [1928] 4 DLR 98 [*The Persons Case Supreme Court of Canada*] rev'd by *The Persons* Case *supra* note 11.

25 *Reference Re Provincial Court Judges*, [1997] 3 SCR 3, 150 DLR (4th) 577.

26 See *Supreme Court Act Reference*, *supra* note 15.

Commons,[27] *Saskatchewan Boundary Reference*,[28] and the *Upper House Reference*[29]) or constitutional reform (e.g. *Upper House Reference*,[30] *Patriation Reference*,[31] the *Quebec Secession Reference*[32]). The *Senate Reform Reference*[33] was one of the rare cases that featured each of these elements.[34]

The *Senate Reform Reference* was only the second reference initiated by the Harper Government since it was sworn into office in 2006.[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.[36] Conversely, if the Harper Government was not concerned about

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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).

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

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

30 *Ibid*.

31 *Supra* note 12.

32 *Supra* note 13.

33 See *Senate Reform Reference*, *supra* note 1.

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).

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).

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 *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. 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

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Hogg, Patrick Monahan, Stephen Scott**,** Gérald Tremblay, and Richard Simeon). Subsequently, a significant body of literature was published expressing doubt about the constitutional validity of the Harper Government's Senate reform proposals. See generally Ronald L Watts, "Bill C-20 Faulty Procedure and Inadequate Solution (Testimony Before the Legislative Committee on Bill C-20, House of Commons, 7 May 2008)" in Jennifer Smith, ed, *The Democratic Dilemma: Reforming the Canadian Senate* (Montréal: McGill-Queen's University Press, 2009) 59; Don Desserud, "Whither 91.1? The Constitutionality of Bill C-19: An Act to Limit Senate Tenure" in Jennifer Smith, ed, *The Democratic Dilemma: Reforming the Canadian Senate* (Montréal: McGill-Queen's University Press, 2009) 63; Andrew Heard, "Constitutional Doubts about Bill C-20 and Senatorial Elections" in Jennifer Smith, ed, *The Democratic Dilemma: Reforming the Canadian Senate* (Montréal: McGill-Queen's University Press, 2009) 81; John D Whyte, "Senate Reform: What Does the Constitution Say?" in Jennifer Smith, ed, *The Democratic Dilemma: Reforming the Canadian Senate* (Montréal: McGill-Queen's University Press, 2009) 97.

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*

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[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[39] which was reissued (with minimal updates) in 1963 as part of the Carleton Library Series.[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[41] until they became part of the larger constitutional proposals during the era of what has become known as *megaconstitutional politics* in Canada.

Professor Peter Russell coined the term megaconstitutional politics to distinguish this phenomenon from "ordinary" constitutional politics which involves "piecemeal, small-scale efforts to reform" aspects of a country's constitution.[42] Conversely, 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."[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."[44] According to Russell, Canada's first round of megaconstitutional politics began when Pierre Trudeau emerged on the political scene as Prime Minister in 1968.[45]

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39 Robert A MacKay, *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).

40 Robert A MacKay, *The Unreformed Senate of Canada*, revised ed (Toronto: McClelland and Stewart, 1963).

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 *Constitution Act, 1915* (*British North America Act, 1915* (UK), 5-6 Geo V, c 45). See also *Newfoundland Act* (*British North America Act, 1949* (UK), 12-13 Geo VI, c 22) (adding Senate seats for Newfoundland); *Constitution Act (No 2), 1975*, SC 1974-75-76, c 53, s 1 (adding seats for the Yukon and Northwest Territories); and *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 *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.

42 Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004) at 75 [Russell, *Constitutional Odyssey*].

43 *Ibid*.

44 *Ibid*.

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 *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 radical[49] proposal was contained in the federal government's 1978 white paper on the Constitution entitled *A Time for Action*[50] 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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Charter of Human Rights (Ottawa: Minister of Justice, 1968)**.** See Anne F Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) vol 1, ch 9 at 51–74.

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.

47 See e.g. Prime Minister Pierre Elliott Trudeau, *A Time for Action: Toward the Renewal of the Canadian Federation* (Ottawa: Minister of Supply and Services Canada, 1978) [*A Time for Action*]; Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services, 1979); Committee on the Constitution, Canadian Bar Association, *Towards a New Canada* (Montréal: Canadian Bar Foundation, 1978) 37–46.

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.[52] 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.[53]

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."[54] 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.[55] 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.[56]

The *Upper House Reference*[57]—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."[58] 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.

56 PC 1978-3581 (November 23, 1978).

57 *Supra* note 29.

58 *Ibid* at 78.

acter cannot be altered by unilateral action by the Parliament of Canada."[59] These aspects of the *Upper House Reference* would become important 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 Reference* 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 constitutional 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 enacted 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 Constitution.[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 produced a report which was the first to officially endorse the idea of a "Triple E Senate": a Senate that would be "elected, equal, and effective".[63] The

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59 *Ibid.*

60 See generally Romanow, Whyte & Leeson, *supra* note 48; Russell, *Constitutional Odyssey*, *supra* note 42, at 107–26; David Milne, *The New Canadian Constitution* (Toronto: James Lorimer & Company, 1982).

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 Commission on the Economic Union and Development Prospects for Canada, *Report*, vol 3, Catalogue No Z1-1983/1-3E (Ottawa: Minister of Supply and Services Canada, 1985); Canada, Special Joint Committee of the Senate and the House of Commons, *The 1987 Constitutional Accord* (Ottawa: Queen's Printer, 1987) (Joint Chairmen Hon Arthur Tremblay, Senator & Chris Speyer, MP).

63 Alberta, Legislative Assembly, Alberta Special Select Committee on Upper House Reform, *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]

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64 See generally Peter McCormick, Ernest C Manning & Gordon Gibson, *Regional Representation: The Canadian Partnership* (Calgary: Canada West Foundation, 1981) at 94–138.).

65 See text of the accord and analysis in Peter W Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988) ch 5 at 17–20, appendix IV 68–84. See also David Milne, *The Canadian Constitution: The Players and the Issues in the Process That Has Led from Patriation to Meech Lake to an Uncertain Future*, revised ed (Toronto: James Lorimer & Company, 1991) at 342.

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[68] and with it the best chance for comprehensive Senate reform in Canada's history.

B. "The West Wants In!" Senate Reform (Party) (1987–2005)

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[69] 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.[70] The Reform Party's first Bluebook[71] highlighted Triple E Senate as its first principle of constitutional reform and it maintained pride of place in every subsequent Bluebook.[72] This commitment continued with the creation of the Canadian Alliance in 2000.[73]

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supra note 42 appendix at 275–301. On the *Charlottetown Accord* see generally Kenneth McRoberts & Patrick J Monahan, eds, *The Charlottetown Accord, The Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993); Russell, *Constitutional Odyssey*, *supra* note 42 at 190–227.

68 See Peter H Russell, "The End of Mega Constitutional Politics in Canada?" (1993) 26:1 Political Science & Politics 33.

69 *Constitution of the Reform Party of Canada* (30 October 1987), online: University of Calgary <contentdm.ucalgary.ca/cdm/compoundobject/collection/reform/id/237>.

70 See generally Preston Manning, *The New Canada* (Toronto: Macmillan Canada, 1992) at 196–214; Preston Manning, *Think Big: Adventures in Life and Democracy* (Toronto: McClelland & Stewart, 2002) at 208–11; Tom Flanagan, *Waiting for the Wave: The Reform Party and the Conservative Movement*, 2nd ed (Montréal: McGill-Queen's University Press, 2009); David Laycock, *The New Right and Democracy in Canada: Understanding Reform and the Canadian Alliance* (New York: Oxford University Press, 2002); Trevor Harrison, *Of Passionate Intensity: Right-Wing Populism and the Reform Party of Canada* (Toronto: University of Toronto Press, 1995); Murray Dobbin, *Preston Manning and the Reform Party* (Toronto: James Lorimer & Company, 1991).

71 Reform Party of Canada, *Blue Book: Platform & Statement of Principles of the Reform Party of Canada* (Calgary: Reform Party, 1988), online: University of Calgary University Archives, Political Papers <contentdm.ucalgary.ca/cdm/compoundobject/collection/reform/id/197>.

72 See *ibid* at 6; Reform Party of Canada, *Blue Book: Principles and Policies* (Calgary: Reform Party, 1990) at 6, online: University of Calgary University Archives, Political Papers <contentdm.ucalgary.ca/cdm/compoundobject/collection/reform/id/2230>; Reform

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,[74] it returned to pride of place in the new Conservative Party of Canada's 2004 election platform.[75] 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,"[76] 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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Party of Canada, *Blue Book: Building New Canada, Principles and Policies* (Calgary: Reform Party, 1991) at 1, 5, online: University of Calgary University Archives, Political Papers <digitalcollections.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2212&REC=3>; Reform Party of Canada, *The Blue Book: Building a New Canada, Principles & Policies* (Calgary: Reform Party, 1995) at 6, 36–37, online: University of Calgary University Archives, Political Papers <contentdm.ucalgary.ca/cdm/compoundobject/collection/reform/id/2156>; Reform Party of Canada, *Blue Book: A Fresh Start for Canadians: 1996–1997 Principles & Policies of the Reform Party of Canada* (Calgary: Reform Party, 1996–1997) at 6, 22, online: University of Calgary University Archives, Political Papers <digitalcollections.ucalgary.ca/cdm4/document.php?CISOROOT=/reform&CISOPTR=2128&REC=7>; Reform Party of Canada, *The Blue Book: Principles & Policies of the Reform Party of Canada* (Calgary: Reform Party, 1999) at 13, online: University of Calgary University Archives, Political Papers <contentdm.ucalgary.ca/cdm/compoundobject/collection/reform/id/2258>.

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.

74 *Agreement-in-Principle on the establishment of the Conservative Party of Canada* between Stephen Harper and Peter MacKay (15 October 2003) Ottawa, online: <www.davidorchard.com/online/PDF_files/agreement.pdf>.

75 See Conservative Party of Canada, *Demanding Better: Conservative Party of Canada, Platform 2004,* at 13, online: <www.cbc.ca/canadavotes2004/pdfplatforms/platform_e.pdf>.

76 *Ibid* at 13.

Conservative Party's platform for the 2006 election[77] which brought Stephen Harper and the Conservative Party to power with a minority government.

C. The West Is *In: The Harper Government (2006–2013)*

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.[78] 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."[79] 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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77 Conservative Party of Canada, *Stand up for Canada: Conservative Party of Canada Federal Election Platform 2006*, at 44, online: <www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf> [*Stand Up for Canada*].

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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[80] *Speech from the Throne To Open the First Session, Thirty-Ninth Parliament of Canada*, 39th Parl, 1st Sess, (4 April 2006), online: <www.parl.gc.ca/parlinfo/Documents/ThroneSpeech/39-1-e.html>.

[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 Fortieth 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, Fortieth 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").

[82] Bill S-4, *An Act to Amend the Constitution Act 1867 (Senate tenure)*, 1st Sess, 39th Parl, 2006.

peared to testify before this committee,[83] 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.[84] 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.[85] The Senate adopted the committee's report and the bill was dropped from the order paper.[86]

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;[87] 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.[88] 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".[89]

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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.

84 See Ian Brodie, "Harper's Gitmo: The Sisyphean Task of Senate Reform", online: (2014) 8:2 C2C Journal 5.

85 Senate Constitutional and Legal Affairs Committee, *Thirteenth Report* (June 2007), online: <www.parl.gc.ca/Content/SEN/Committee/391/lega/rep/rep13jun07-e.htm>.

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.

89 *Ibid* at 62–63. See also Conservative Party of Canada, *Policy Declaration* (Ottawa: Conservative Party of Canada, 2005) at 5, online: <www.cbc.ca/bc/news/060119_CPM.pdf> [*Policy Declaration*].

The Harper Government persisted in the face of continued opposition. After Parliament was prorogued in September 2007, the Government re-introduced both bills in the House of Commons in November 2007.[90] 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[91] 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.[92] 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.[93] 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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90 See See Bill C-19, *An Act to Amend the Constitution Act, 1867 (Senate tenure*), 2nd Sess, 39th Parl, 2007 (first reading 13 November 2007). See also Bill C-20, *An Act to Provide for Consultations with Electors on their Preferences for Appointments to the Senate*, 1st Sess, 39th Parl, 2007 (first reading 13 November 2007).

91 See Bill S-7, *An Act to Amend the Constitution Act, 1867 (Senate term limits)*, 2nd Sess, 40th Parl, 2009 (first reading 28 May 2009).

92 See Bill S-8, *An Act Respecting the Selection of Senators*, 3rd Sess, 40th Parl, 2010 (first reading 27 April 2010). See also Bill C-10, *An Act to Amend the Constitution Act, 1867 (Senate term limits)*, 3rd Sess, 40th Parl, 2010 (first reading 29 March 2010).

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[94] in conjunction with naming him a member of his cabinet as Minister of Public Works.[95] 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.[96] 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;[97] Brown had attracted national attention in the early 1980s by plowing "Triple E Senate or Else" into his neighbour's field.[98] 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.[99]

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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94 See Office of the Prime Minister, News Release, "Prime Minister Announces Appointment to the Senate" (27 February 2006), online: Prime Minister of Canada News Releases <www.pm.gc.ca/eng/news/2006/02/27/prime-minister-announces-appointment-senate>.

95 See Clifford Krauss, "Awkward Start for Canada's New Leader" *New York Times* (11 February 2006), online: <www.nytimes.com/2006/02/11/international/americas/11canada.html>.

96 *Ibid.*

97 See Office of the Prime Minister, News Release, "Prime Minister Stephen Harper Confirms Albertans' Choice for Senate: Bert Brown Joins the Upper Chamber" (10 July 2007), online: Prime Minister of Canada <www.pm.gc.ca/eng/news/2007/07/10/prime-minister-stephen-harper-confirms-albertans-choice-senate-bert-brown-joins>.

98 Brian Laghi, "Albertan to Be Appointed As 'Elected' Senator", *Globe and Mail* (19 April 2007), online: <www.theglobeandmail.com/news/national/albertan-to-be-appointed-as-elected-senator/article683715/>.

99 *Ibid.*

and Patrick Brazeau.[100] 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."[101] These claims were repeated in subsequent Senate appointments in August 2009 and January 2010,[102] 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.[103] 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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100 See Office of the Prime Minister, News Release, "Prime Minister Harper Acts to Fill Senate Vacancies", (22 December 2008) online: Prime Minister of Canada News Releases <www.news.gc.ca/web/article-en.do?m=/index&nid=428769>.

101 See *ibid.*

102 See Office of the Prime Minister, News Release, "PM Names Five Outstanding Canadians to Senate" (29 January 2010) online: Prime Minister of Canada News Releases <www.pm.gc.ca/eng/news/2010/01/29/pm-names-five-outstanding-canadians-senate>. See also Office of the Prime Minister, News Release, "PM Acts to Fill Senate Vacancies" (27 August 2009) online: Prime Minister of Canada News Releases <www.pm.gc.ca/eng/news/2009/08/27/pm-acts-fill-senate-vacancies>.

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-ef3a-4a8d-8ab4-0229e4fcaa54&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.[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.[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.

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."[106] Open federalism "is about collaboration – with every level of government – and being clear about who does what and who is accountable for it."[107] The commit-

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[104] See Conservative Party of Canada, *Here for Canada: Stephen Harper's Low-Tax Plan for Jobs and Economic Growth* (Ottawa: Conservative Party of Canada, 2011) at 62.

[105] See Brodie, *supra* note 84.

[106] Nadia Verrelli, "Harper's Senate Reform: An Example of Open Federalism?" in Jennifer Smith, ed, *The Democratic Dilemma: Reforming the Canadian Senate* (Montréal: McGill-Queen's University Press, 2009) 49 at 49 [Verrelli, "Harper's Senate Reform"].

[107] 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-

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."[108] The Conservative Party contrasted its commitment to open federalism with the centralist philosophy of its Liberal predecessors.[109] 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.[110] 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-

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priorities-and-open-federalism-0>, cited in Verrelli, "Harper's Senate Reform", *supra* note 106 at 52.

108 *Stand up for Canada*, *supra* note 77 at 42 ·

109 See Office of the Prime Minister, "PM Outlines Vision Based on Real Results for a Strong Quebec within a United Canada" (7 December 2007), online: Prime Minister of Canada Video Remarks <www.pm.gc.ca/eng/video/pm-outlines-vision-based-real-results-strong-quebec-within-united-canada>, cited in Verrelli, "Harper's Senate Reform", *supra* note 106 at 52–53.

110 Bruce Carson, *14 Days: Making the Conservative Movement in Canada* (Montréal: McGill-Queen's University Press, 2014) at 201–202; Paul Wells, *The Longer I'm Prime Minister: Stephen Harper and Canada, 2006–* (Toronto: Random House Canada, 2013) at 82–84.

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."[111] 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."[112] 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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[111] Verrelli, "Harper's Senate Reform", *supra* note 106 at 49–50.

[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.[114] In fact, Prime Ministerial leadership and commitment can be a strong guarantee of non-partisanship,[115] 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.[116] Over time, a convention developed against the Prime Minister making partisan appointments to the Court.[117]

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*;[118] (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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[114] See Office of the Prime Minister, News Release, "New Advisory Committee on Vice-Regal Appointments" (4 November 2012), online: Prime Minister of Canada News Releases <www.pm.gc.ca/eng/news/2012/11/04/new-advisory-committee-vice-regal-appointments>.

[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.

[117] See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, 2nd ed (Toronto: Oxford University Press, 2014).

[118] *Constitution Act, 1867*, s 23. This provision requires that senators be resident in the province for which they are appointed. Section 33 empowers the 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.[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."[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[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.

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[119] See e.g. Adam Dodek, "Senate, Heal Thyself" *Globe and Mail* (12 November 2013), online: <www.theglobeandmail.com/globe-debate/senate-heal-thyself/article15379279/>.

[120] Conservative Party of Canada, *The True North Strong and Free: Stephen Harper's Plan for Canadians* (Ottawa: Conservative Party of Canada, 2008) at 24.

[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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[122] Huscroft, "Politics and the Reference Power", *supra* note 9 at 11.

[123] The sample size for references brought by the federal government is small. Since 1968 when Pierre Trudeau became Prime Minister, the federal government has only initiated twelve references to the Supreme Court of Canada: *Reference Re Criminal Law Amendment Act*, [1970] SCR 777, 10 DLR (3d) 699; *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452; *Upper House Reference*, *supra* note 29; *Reference Re Newfoundland Continental Shelf*, [1984] 1 SCR 86, 5 DLR (4th) 385; *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1 [*MB Language Rights Reference, 1985*]; *Reference Re Ng Extradition*, [1991] 2 SCR 858, 195 DLR (4th) 1; *Reference re Milgaard*, [1992] 1 SCR 866, 90 DLR (4th) 1; *Reference Re Quebec Sales Tax*, [1994] 2 SCR 715, 115 DLR (4th) 449; *Quebec Secession Reference*, *supra* note 13; *Reference Re Same-Sex Marriage*, *supra* note 14; *Securities Act Reference*, *supra* note 23; *Senate Re-*

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."[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*.[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*.[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.[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*.[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*.[129]

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form Reference, *supra* note 1. They have participated in other references, but those were appeals to the Supreme Court of Canada from the provincial courts of appeal initiated by the Lieutenant Governors-in-Council. See e.g. *Reference Re Firearms Act*, 2000 SCC 31, [2000] 1 SCR 783; *Reference Re Employment Insurance Act, ss 22 and 23*, 2005 SCC 56, [2005] 2 SCR 669, *Reference Re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457; *Electoral Boundaries Reference*, *supra* note 28; *Reference Re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 56 CCC (3d) 65.

124 Huscroft, "Politics and the Reference Power", *supra* note 9 at 11.

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

126 *Supra* note 22. See Huscroft, "Politics and the Reference Power", *supra* note 9 at 12.

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).

128 See Huscroft, "Politics and the Reference Power", *supra* note 9 at 9 (discussing the *Same-Sex Marriage Reference*, *supra* note 14).

129 See *The Persons 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.[130] And this came after Senate reform legislation was shifted from the Senate to the House due to opposition within the Conservative Senatorial ranks.[131] 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[132] or even that he referred the reference to the Court with the full expectation that the Court would re-

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sons Case: The Origins and Legacy of the Fight for Legal Personhood (Toronto: University of Toronto Press, 2007).

130 See John Ibbitson, "Why is Senate Reform Stalled? Ask the PM", *Globe and Mail* (11 August 2012), online: <www.theglobeandmail.com/globe-debate/columnists/why-is-senate-reform-stalled-ask-the-pm/article4476208/>.

131 See CTV Online, "Senate Reform Ruffles Some Conservative Feathers", *CTV News* (15 June 2011), online: <www.ctvnews.ca/senate-reform-ruffles-some-conservative-feathers-1.657707>; Susan Lunn, "Senate Dissent Shifts Reform Bill to House", *CBC News* (15 June 2011), online: <www.cbc.ca/news/politics/senate-dissent-shifts-reform-bill-to-house-1.978090>; Janyce McGregor, "All Conservative Senators Support Reform: Segal", *CBC News* (25 June 2011), online: <www.cbc.ca/news/politics/all-conservative-senators-support-reform-segal-1.1101632>; Althia Raj, "Not All Tory Senators Back Senate Reform Agenda: Sources", *National Post* (1 June 2011), online: <news.nationalpost.com/2011/06/01/not-all-tory-senators-back-senate-reform-agenda-sources>; Kris Sims, "No Rift within Tory Caucus in Senate: Senators", *London Free Press* (16 June 2011), online: <www.lfpress.com/news/canada/2011/06/16/18294046-qmi.html>.

132 See Campbell Clark, "Harper's Tactic: Ask for More Than He Expects to Get", *Globe and Mail* (26 April 2014).

ject his Senate reform proposals.[133] 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.[134] 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,[135] 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.[136] I will return to this theme in Part IV.

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133 Terry Pedwell, Canadian Press, "Senate Reform Legally Akin to Same-Sex Marriage Debate: Harper Government", *Maclean's* (31 July 2013) A3, online: <www.macleans.ca/general/senate-reform-legally-akin-to-same-sex-marriage-debate-harper-government/> (quoting Professor Errol Mendes of the University of Ottawa who speculated the move could galvanize the Conservative voter base).

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.[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.[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.[139] The Harper Government could no longer escape a court ruling

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tively determined 'that significant reform and abolition are off the table.' 'I think it's a decision that the vast majority of Canadians will be very disappointed with, but obviously we will respect that decision.' His democratic reform minister Pierre Poilievre said the government will now focus on cutting costs and 'maximizing accountability' at the Senate").

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.

138 Décret 346-2012 (2012) GOQ II, 2277.

139 See *Supreme Court Act*, *supra* note 8, s 36.

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 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".[140] 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."[141]

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.[142]

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.[143]

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"

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[142] 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.

[143] 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".[144] 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".[145]

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."[146] 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*.[147]

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.[148] 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.[149] 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

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144 *Senate Reform Reference*, *supra* note 1 (Reply Factum of the Attorney General of Canada at para 22).

145 "Don't Give Up on Senate Reform", Editorial, *National Post* (26 April 2014), online: <news.nationalpost.com/full-comment/national-post-editorial-board-real-senate-reform-now>.

146 *Senate Reform Reference*, *supra* note 1 at para 65.

147 *Ibid* at para 66.

148 FOAG, *supra* note 36 at para 102.

149 See e.g. Rae, *supra* note 115.

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.[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."[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 *Constitution Act, 1982*.[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",[153] the Court issued an order establishing abbreviated timelines for actions in the case.[154] These timelines were much shorter than those that normally apply for references or for ordinary cases at the Supreme Court.[155] On any normal timetable, the reference would not have

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150 See *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.

151 Brodie, *supra* note 84.

152 The *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.

153 *Senate Reform Reference*, *supra* note 1 (Order PC 2013-70 dated 1 February 2013).

154 *Ibid*.

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) (*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

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,[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."[157]

Moreover, the assertion that the Supreme Court somehow tarried in rendering its decision ("did not come to a decision until April, 2014"[158]) shows a similar lack of familiarity with Supreme Court decision making. The Supreme Court rendered its decision in the *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.[159] However, the *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 *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 *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.

Court for consideration (r 51(1)). The interveners would not have had to file their factum until eight weeks after the order granting them the right to intervene, making it impossible for the case to be ready to be heard in November 2013.

156 Supreme Court of Canada, *Statistics 2004 to 2014*, at 4, online: <www.scc-csc.gc.ca/case-dossier/stat/pdf/doc-eng.pdf> [SCC Statistics].

157 Brodie, *supra* note 84.

158 *Ibid*.

159 SCC Statistics, *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

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[160] See *Quebec Secession* Reference, *supra* note 13.

[161] See *Securities Act Reference*, *supra* note 23.

[162] *Senate Reform Reference*, *supra* note 1 at para 20.

[163] *Ibid* at para 4.

some unexpected conservative sources.[164] 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.[165] 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.[166] 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").[167] 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.[168]

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.

[167] Adam Dodek, "Two Chambers, Both Red" *National Post* (19 November 2013), online: <news.nationalpost.com/full-comment/adam-dodek-two-chambers-both-red>.

[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.[169] 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.[170] 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.[171] 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.[172]

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[169] See Adrian Humphreys, "Senate Reform Hopes Live: Supreme Court Delivers Blueprint for Ideal Version of the Red Chamber", *National Post* (25 April 2014), online: <news.nationalpost.com/2014/04/25/senate-reform-hopes-live-supreme-court-delivers-blueprint-for-ideal-version-of-the-red-chamber/>; John Geddes, "In Defence of a Senate That Does Not Exist", *Maclean's* (25 April 2014), online: <www.macleans.ca/politics/ottawa/the-courts-senate-conclusions-and-the-senate-we-really-have/>; and Black, "Why Are We Afraid?", *supra* note 164.

[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.[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.[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.[175] In references, the Supreme Court has refused to answer particular questions on various limited grounds.[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

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[173] *In re References by the Governor-General in Council* (1910), 43 SCR 536, 1910 CanLII 29.

[174] Mathen, "The Question", *supra* note 16 at 144.

[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).

[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

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[177] Huscroft, "Politics and the Reference Power", *supra* note 9 at 2.

[178] *Ibid*; Mathen, "The Question", *supra* note 16; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2014, release 1) at 8.20.

[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.[183]

III. Political Aftermath of the Reference

A. Political Response

The Prime Minister's response to the *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.[184] Instead, the Prime Minister stated that the Supreme Court had effectively determined that significant reform and abolition are off the table.[185] 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 *Senate Reform Reference* contrasts starkly with his reaction to the Supreme Court's decision several weeks earlier in the *Supreme Court Reference*

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183 See e.g. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 14.05 (applications).

184 See *Senate Reform Reference*, *supra* note 1 at paras 4, 20.

185 See Leslie MacKinnon, "Stephen Harper Says Senate Reform Is off the Table", *CBC News* (25 April 2014), online: <www.cbc.ca/news/politics/stephen-harper-says-senate-reform-is-off-the-table-1.2622053>.

which invalidated the appointment of Justice Marc Nadon.[186] On that occasion, the Prime Minister both appeared to be and expressed that he was "genuinely surprised"[187] 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 *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[188] for Senators which the Supreme Court clearly said Parliament could do unilaterally. Similarly, it has taken no action to remove the real property requirement[189] which it can do unilaterally for every province except Québec which requires the consent of that province's National Assembly.[190] It has taken no public steps to engage the government of Québec on this issue.

In many ways except an all important one, the *Senate Reform Reference* looks very similar to the *Patriation Reference*.[191] 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."[192] 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 *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 *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.

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186 See *Supreme Court Act Reference*, *supra* note 15.

187 See e.g. Jordan Press, "Harper Government 'Genuinely Surprised' by Supreme Court's Decision To Reject Marc Nadon", *National Post* (21 March 2014), online: <news.nationalpost.com/2014/03/21/marc-nadon-not-allowed-to-sit-on-supreme-court-of-canada-top-court-rules/>.

188 See *Constitution Act*, 1867, s 23(4).

189 See *Constitution Act, 1867*, s 23(3).

190 See *Senate Reform Reference*, *supra* note 1 at paras 84–88.

191 *Supra* note 12.

192 Verrelli, "Harper's Senate Reform", *supra* note 106 at 55.

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

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[193] Canada, News Release, "Harper Government Addresses Supreme Court Ruling on Senate Reference" (25 April 2014), online: Democratic Reform <www.democraticreform.gc.ca/eng/content/harper-government-addresses-supreme-court-ruling-senate-reference>.

[194] Mark Kennedy, "Harper Refused 'Inappropriate' Call from Chief Justice of Supreme Court on Nadon Appointment, PMO Says", *National Post* (1 May 2014), online: <news.nationalpost.com/2014/05/01/harper-refused-inappropriate-call-from-chief-justice-of-supreme-court-on-nadon-appointment-pmo-says/>.

the accusations that the Chief Justice had acted "inappropriately".[195] As the media noted, calling the behaviour of the Chief Justice of Canada "inappropriate" was "nothing short of shocking".[196] 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.[197]

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. [198]

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[195] Jeff Lacroix-Wilson, "Harper Accused of Trying to Intimidate Supreme Court Justices", *Ottawa Citizen* (5 May 2014), online: <o.canada.com/news/harper-accused-of-trying-to-intimidate-supreme-court-justices >.

[196] John Geddes, "Disorder in the Court", *Maclean's* (8 May 2014), online: <www.macleans.ca/politics/ottawa/the-growing-spat-between-stephen-harper-and-the-supreme-court/> [Geddes, "Disorder"].

[197] See Colin Perkel, "International Legal Group Slams Harper over Supreme Court Feud", *Canadian Press* (26 July 2014), online: <www.citynews.ca/2014/07/26/international-legal-group-slams-harper-over-supreme-court-feud/>.

[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/article18823392/?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 (z), (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.[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 the appointment of previous "elected senators".[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.

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[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 been 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 megaconstitutional politics, this reference simply closed a short chapter of

federal unilateralism that some described as a "fantasy".[201] It is not clear what will emerge instead.

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[201] "Don't Give Up on Senate Reform", *supra* note 145.