

- 1) Should we discuss this committee?
- 2) Should we rule out an elected Senate?
- 3) Integrity
Practical
Bylist
- 4) Quaker Role - Federal level?

CONFIDENTIAL

July 13, 1980

Instance on behalf of 3 bodies

MEMORANDUM FOR THE PRIME MINISTER

Orwell Keber

Federal Position on Senate Reform

*Improve last question
proposed on the Senate
without being all we do in the
officers*

In his July 11, 1980 memorandum to you dealing with the first week of constitutional talks, Mr. Kirby indicated that a note on the Senate would be prepared for your consideration. This is the note, and it follows upon the July 8, 1980 note to Mr. Chrétien on the Senate, a copy of which you received earlier in the week.

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For reference purposes, we have attached a copy of the July 8th note together with a table which outlines the positions of the provinces on the Senate as indicated in their opening statements in Montreal.

As you know, Ministers in Montreal discussed the Senate (and related division of powers matters) at a private meeting last Thursday in Montreal, and arrived at the following points of consensus:

1. on the need for a new second chamber.
2. that the new second chamber not be an elected body.
3. that it be composed of provincial representatives.
4. that on representation:
 - a) a majority wanted equal representation on a province by province basis
 - b) some wanted a weighted representation based on an undetermined number per region, using four regions as a basis
 - c) two reserved their position.
5. that the new upper chamber could possibly, but not necessarily, be a substitute for some of the regular federal-provincial mechanisms.

6. that the new chamber have the power to ratify federal actions in such areas as:

a) declaratory power

b) federal spending power

and, that there was a willingness to discuss further the establishment of another category of suspensive powers.

This consensus is to be used as a basis for discussion, after governments have given it further consideration.

The purpose of this memorandum is to lay out several options for upper chamber reform and to raise a number of questions for your consideration so that Mr. Chrétien and the members of the federal delegation can receive your guidance before embarking on the second week of constitutional talks in Toronto.

Strategic Considerations

As you know, the federal government has not put forward specific proposals for Senate reform in the current round of negotiations. The first question that must be answered is whether the federal government is prepared to consider intensive discussion of the question of upper chamber reform, using the points of consensus as points of departure for negotiation. Thus, your reaction to the six points would be most helpful to us. As Mr. Kirby indicated to you in his July 11th note, it is our judgment that a federal willingness to pursue negotiations would facilitate the process of discussion as well as permit several of the other twelve items to be approached in a rather different fashion.

Thus, we would suggest that the Government of Canada prepare itself to participate actively in discussions of Senate reform in Toronto in the coming week and in Vancouver the following week. If this is the line that is taken, it will be important to knit the Government of Canada's concerns and positions on the division-of-powers items into the Senate negotiations. As Mr. Kirby said in his July 11th note to you, however, we do not believe that this should be taken to eliminate the need for the federal government to bargain seriously on economic powers items.

Mr. Kirby's note also pointed out the fact that the 'Points of Senate Consensus' document does not mention duality, although it is an issue that Quebec is pressing in discussions of Senate reform. This appears to be an area in which the Government of Canada could take a leadership role, consistent with its acceptance of the principle in its Bill C-60 Senate proposals. It would not only be better strategically to have both the federal government and Quebec advancing the principle, but it would mean also that the ultimate arrangement that was arrived at would be more likely to be acceptable both to Ottawa and to Quebec.

Should the Government of Canada embark on serious discussion of upper chamber reform, we would propose that it insist that negotiations begin with a careful consideration of a reformed Senate's role and, in the light of that reflection, turn to such other matters as its composition, basis of representation and powers. The options outlined below are developed in that perspective.

One final strategic matter. If we proceed with serious Senate discussion, it will be important to review the impact of that discussion on the Government of Canada's longer term plans and objectives. It will obviously not be possible to complete discussion of such a complex topic by September. That being so, the fact that it is a major item of substantial intergovernmental negotiation that remains outstanding in September may provide concrete testimony of the federal government's determination to proceed, even after the first wave of constitutional reform (primarily, the people's package) is completed.

On this point, we would suggest that the federal government say nothing in the coming weeks that would preclude the possibility of an elected Senate, even if that is not a factor in intergovernmental discussions, since - if it should ever be a matter of a direct appeal to the people - an elected Senate would be a vastly more popular proposal in the public mind than any other alternative.

The Broad Options

Without minimizing the importance of strategic considerations, the choice of a particular type of Senate has more to do with finding what is appropriate for Canada in the long run than with meeting potential interprovincial consensus. Looking at it from the broadest perspective, options for a second chamber could be divided into three basic models: the intergovernmental institution, the traditional second chamber and some possible "marriage" between the two.

i) The Intergovernmental Institution

The main role of this institution would be to develop concerted approaches in areas where powers are shared between both orders of government or where broad political consensus is required for the central government to act efficiently. The principle points of comparison would be the West German Bundesrat, the substantially modified version of it now proposed by B.C., and the Beige Paper proposal for a Federal Council.

It would be a forum comprised of delegates voting upon instructions from their respective governments. It could be a purely provincial body, or it could include a federal delegation whose powers could be deliberative or include voting, depending on the jurisdiction and functions of the institution. Provincial delegations would remain under full control of their respective governments, if not at all times, at least when critical issues were being discussed. It could either provide for equal provincial representation, with special voting rules favouring the larger provinces in special circumstances, where a greater weight for population is warranted, or, for population-weighted representation, again possibly with specific voting rules in circumstances where a greater weight for 'provincial equality' is warranted.

Such an upper house could have considerable powers on a small number of very sensitive matters, and more modest tools of intervention in areas where concerns of the provinces should be taken into account, but where the views of Parliament should ultimately prevail. It would not get involved, ideally, in areas where the provinces have no

significant interest or concern. Hence the necessity of structuring the agenda of this type of Senate into items where full veto power would apply (e.g. the essence of the declaratory or spending power) and items where a suspensive veto and/or advance consultation would apply. Dualistic features like the ones of the Bill C-60 Senate proposal could be fitted into this type of Senate via special deliberation and vote procedures for the relevant items of legislation.

ii) The Traditional Upper House

The traditional role of a second chamber involves reviewing, improving and amending lower house legislation - and perhaps blocking some of it as well. Its role is to give a "sober second thought" to House of Commons legislation, to conduct longer term study, analysis and investigation of complex issues, and to provide some correction for unsatisfactory representation of minority or regional interests that might characterize the lower house under certain circumstances.

A traditional Senate of that kind can be partly or entirely nominated, like the current Senate; it could be indirectly elected, as in the Bill C-60 proposal, or directly elected, as in the case of Australia and the U.S. The main characteristic differentiating this type of Senate from the first one involves "who controls it" constitutionally. The intergovernmental body is controlled by delegating governments, while the traditional Senate does not in principle come within the direct control of any body outside of it. The various election and/or nomination procedures have to do with how much political autonomy the Senate should be allowed to achieve. As a consequence, it could easily be organized as an institution reflecting regional interests at large, and not the views of executives at either level of government.

The powers of traditional Senates are generally similar to the ones of the lower house, with limits or exceptions regarding the right to initiate appropriation bills. There are also provisions, usually, to ensure that in case of conflict, the views of the lower house prevail. Dualistic features could be fitted into this type of Senate as well.

iii) The Hybrid Senate

An upper chamber might be designed to perform the main roles of an intergovernmental institution and the traditional upper house.

If all members of such a Senate are nominated instead of elected, the provincial representatives among them would vote upon instruction on Category "A" matters of special importance to the provinces (e.g. the declaratory power). The remaining matters subject to Senate scrutiny would come under a "free" vote (Category B). Not all matters need be subject to scrutiny (e.g. appropriations). Some matters could be subject to a very short delay; on others, perhaps the right to tender advice after second reading in the Commons might be sufficient. It is a bit more complicated to conceive of an elected Senate working in that fashion (because it would be awkward to address provincial voting instruction to directly elected members) but perhaps the provincial representation should be structured to include at least one provincial Minister acting as a delegate. In any event, the case for a Senate split in half between federal and provincial representatives is much stronger here than with the intergovernmental upper house. Perhaps the main difficulty with this model is its inherent complexity. Categories A and B would be complicated further if issues dealing with language were to be treated differently as well.

One way to obviate the problem would be to work at improving the current Senate along the lines of a traditional second chamber, while considering the possibility of creating a "sui generis" intergovernmental institution at the same time. This intergovernmental institution might conceivably take the form of an institutionalized First Ministers' Conference. In this case, reform would have to deal with two institutions instead of one.

iv) Summary of Options

I An Intergovernmental Institution

(Government representatives to develop broad political consensus in areas of shared power.)

A. Purely provincial (Bundesrat)

B. Mix of provincial and federal

- proportion to be determined
- federal powers in this institution restricted to deliberation or to include also the power to vote

II The Traditional Upper House

(Sober second thought, long term studies, counter-balance to representation by population in lower house and not constitutionally tied to voting on instruction.)

A. Current Senate (nominated)

- purely federal
- federal and provincial
- purely provincial

B. Directly Elected Senate

- on the occasion of provincial elections
- on the occasion of federal and provincial elections
- elected independently for fixed periods

C. Indirectly Elected Senate (Bill C-60)

- purely provincial
- federal and provincial

III The Hybrid Senate

(Acting on governmental instruction for certain matters such as the declaratory power /Category A matters/ and acting independently on other matters that are to come under scrutiny by the Senate.)

A. Nominated Senators

- voting on instruction on Category A matters
- free vote on other matters coming under Senate scrutiny

B. Elected Senators + One Minister at Least per Government

- Minister casts block vote on Category A matters
- free vote on other matters coming under Senate scrutiny

The provincial consensus on the Senate, outlined at the beginning of this note does not spell out in detail a specific upper chamber model, since it is simply intended to record the stage reached in provincial and preliminary discussions. However, it is fairly clear that the various possible models implied in that document would be closer to option one or three than to option two.

Issues for Consideration

We would like to raise the following issues for your consideration. In some cases, these issues have been noted in earlier memoranda.

1. Priority in constitutional talks. Is the federal government prepared to give Senate reform high priority in the current round of constitutional talks?
2. Duality. Would the federal government be prepared to take the initiative in pressing for the clear reflection of duality in any reformed upper chamber? How might that chamber's role in French-English relations be structured, and would it be possible to extend its role beyond specifically linguistic matters to include certain specified cultural matters?
3. Further negotiations. More generally, do you agree that we should continue to negotiate within the framework of the three options set out above, and have you any guidance to offer us as to the direction in which we should attempt to move the discussions in Toronto this week?

David Cameron

David R. Cameron

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