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A Survey of the Role of Upper Houses in Six Select Westminster-Model Parliamentary Democracies

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A SURVEY OF THE ROLE OF UPPER HOUSES IN SIX SELECT
WESTMINSTER-MODEL PARLIAMENTARY DEMOCRACIES

A Thesis

Presented to

The Faculty of the Department of Government
The College of William and Mary in Virginia

In Partial Fulfillment
Of the Requirements for the Degree of
Master of Arts

by

Bruce Richard Eells

1976

APPROVAL SHEET

This thesis is submitted in partial fulfillment of
the requirements for the degree of

Master of Arts

A handwritten signature in cursive script, appearing to read "Bruce R. ...", written over a horizontal line. Below the line, the word "Author" is printed in a simple, sans-serif font.

Approved, July 1976

A handwritten signature in cursive script, appearing to read "Alan J. Ward", written over a horizontal line. Below the line, the text "Dr. Alan J. Ward, Chairman" is printed in a simple, sans-serif font.

A handwritten signature in cursive script, appearing to read "Margaret Hamilton", written over a horizontal line. Below the line, the text "Dr. Margaret Hamilton" is printed in a simple, sans-serif font.

A handwritten signature in cursive script, appearing to read "Donald Baxter", written over a horizontal line. Below the line, the text "Dr. Donald Baxter" is printed in a simple, sans-serif font.

DEDICATION

To my parents

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ABSTRACT

The purpose of this study is to compare the forms and functions of the upper houses of six, select Westminster-Model parliamentary democracies. By "Westminster-Model" is meant that form of parliamentary democracy developed in Great Britain where the government originates from the majority party of the lower house.

The six democracies to be studied are Canada, Australia, the Republic of Ireland, the Irish Free State, and New Zealand.

The hypothesis of this study is that upper houses in federal states will tend to have greater power than those of unitary states, as in the federal states the upper house is able to be used as an arena for spokesmen of the units of federation; in unitary states, the possibility of this sort of usage is diminished, and any attempt at establishing popular representation in the upper house is likely to be redundant of the lower house, while any method other than popular representation will result in the upper house receiving a low measure of public esteem, often being accused of mischievousness or hostility to the lower house and the government.

The sort of roles to be examined will be the representative role, i.e., what sort of constituency, if any, does the upper house represent, and by what means (popular election or otherwise) is it able to represent its constituency; the legislative role of initiating, revising, and vetoing legislation; the origination of ministers from the upper house; and, where necessary, the reasons for the abolition of an upper house.

The results suggest that it is not federalism per se which is the determining factor in upper house strength, but rather the development of a situation where organized political parties are unable to gain a certain majority in the upper house.

A SURVEY OF THE ROLE OF UPPER HOUSES IN SIX SELECT
WESTMINSTER-MODEL PARLIAMENTARY DEMOCRACIES

INTRODUCTION

According to Muir it is considered a truism among writers of political textbooks, for instance, Walter Bagehot, that the so-called "Western democratic" forms of government should be possessed of the doctrine of the separation of powers, that is, each of the three branches of government, the executive, legislative, and judicial, should be independent of one another. In the United States, recognition of this doctrine has led to its codification under the first three Articles of the Constitution. As is often the case, theory and practice do not always coincide; the President is often allowed a freer rein with his powers than, for instance, the Congress (witness the use of Executive agreements, which do not require Senate approval, as opposed to treaties, which do), yet Congress is still able to act independently of the President when the need is felt:

Richard Nixon resigned his office only when it became evident to him that impeachment was an imminent possibility. So in the case of a presidential system of government such as that in the United States, it can be said that the doctrine of separation of powers is indeed a reality.

But, this doctrine had its roots in eighteenth-century England, and it is here that theory and practice widely diverge. It was provided in the Act of Settlement (1701) that Judges, once appointed, should be irremovable except on an address from both Houses of Parliament, and that, after the death of Queen Anne, no person who held an office of profit under the Crown i.e., minister should be permitted to sit in the House of Commons.¹ These provisions were intended to keep the Judges and Parl-

liament from falling under the control of the Crown or "Government." The latter provision was repealed in 1707, before it became operative. If it had come into force, all Ministers would have been excluded from Parliament (as they are in the United States) and the system of responsible cabinet government might never have developed. But in fact, holders of "offices of profit under the Crown" sat in Parliament throughout the eighteenth century; indeed, until 1783 they formed roughly one-quarter of the total membership of the Commons, and it was largely through them that the Whigs, and later George III, were able to secure their power. So, in reality, the Executive and the Legislature in Britain are very much interdependent. While in theory Parliament controls the Government by voting on motions of confidence, in practice, it is the Government which controls the Parliament, particularly with the rise in the past century of organized political parties.

Richard Rose believes that the domination of the executive over the legislature in Britain is a consequence of party discipline in the House of Commons. MPs of the majority party support cabinet motions in order to maintain their party in its control of the executive. Those members of Parliament with ministerial ambitions are rarely given posts if they frequently vote against those who control the party line and independents are rarely elected to the House of Commons. The strength of party discipline in the Commons is such that from October, 1964 to March, 1966, the Labour Government held office even though it had only 317 of 630 seats in the Commons.² It can be discerned, then, that the rise of the Cabinet system of responsible government, along with the development of a disciplined party system, has contributed to what Muir terms a "Concentration of Responsibility"³ in British politics as opposed to the classic separation of powers.

The role of the House of Lords in this system of government has become an increasingly anomalous one as the cabinet grew to control the House of Commons. Originally instituted as a co-equal branch of Parliament along with the Commons, it has, over the years, become (often against its will) a revising chamber, whose suggestions may be, and often are, rejected by the Executive. Even so, it contains within its ranks such former Ministers, members of the business community, the intelligentsia and persons of distinction that its criticisms and recommendations are often listened to, if not always followed.

But what of those nations which have consciously adopted the British Westminster model of responsible government and applied it to their own situations? What would be the position of an upper house in a democratic nation based on a pre-democratic model without the tradition and prestige of the House of Lords? If it is to be elected, it will run the risk of being considered a competitor of the lower house for the attention of the Government without representing a constituency significantly different from a lower house, based on direct popular election. If its membership is chosen by some other method, by either appointment or indirect election, it raises the specter of a non-democratic house vying for power with a democratic one, but without possessing the history and tradition that have given the Lords its prestige.

It is the purpose of this thesis to consider the role of six Second Chambers in five Westminster-model parliamentary democracies. The existing second chambers to be examined will be those in Britain, Canada, Australia, and the Republic of Ireland. In addition, two chambers will be included which were abolished, the New Zealand Legislative Council (1854-1951), and the first Senate of the Irish Free State (1922-1936).

They will be examined in order to determine what lessons may be applied to second chambers in general. The House of Lords will be used as a model to determine how effectively each second chamber uses its legislative powers in the initiation and amendment of public and private bills. The origin of ministers in the lower or upper houses will also be considered. Furthermore, in the federations under study, (Canada and Australia) the question of whether the federal nature of the Parliamentary system works to increase the powers of the second chamber as a house of review will be examined. The hypothesis under consideration is this: If second chambers are instituted in parliamentary democracies, their powers as reviewing chambers will tend to be greater in federal nations than in unitary ones, as the upper houses in the former will tend to become representative of the units of federation and as such will become guarantors of autonomy within the federal system; in unitary states, a democratically elected upper house becomes redundant because the electorate of both houses is identical. Thus, it can always be claimed that the second chamber is superfluous. Any method of representation other than democratic will nearly always assure lower house predominance, since it is unlikely that a Government will pay greater heed to a non-democratic house than the democratically elected one from which it was drawn. In undertaking this study, it is hoped that a more thorough understanding of second chambers, an area often neglected in the examination of parliamentary government, and of the parliamentary system in general, may be gained.

NOTES

1. Muir, Ramsay, How Britain is Governed (New York: Ray Long and Richard Smith, 1934). p. 18.
2. Rose, Richard, Politics in England (Boston: Little, Brown and Company, 1974) pp. 83-84.
3. Muir, Ramsay, How Britain is Governed, p. 21

CHAPTER I

THE HOUSE OF LORDS

"Curiously enough, more thought has been devoted to explaining why everybody else differs from the British than vice-versa." Norton E. Long¹

Ideally, it would seem to be most desirable for nations to develop their own institutions of government derived from their own theories, traditions and history, rather than to copy those institutions which appear to be most attractive or successful elsewhere. But such has been the influence of the so-called "Westminster" model of parliamentary government, caused in no small way by the past role of Britain in world affairs, that at one time or another a goodly proportion of the world has consciously adopted its forms, if not its practices. Even today, such disparate nations as Canada, India, and Japan use systems of government copied after the British model, particularly in regard to bicameralism.

A fundamental problem arises, however, when nations try to take a form of government which has evolved over the years, literally by trial and error, and transplant it nearly wholesale on a political culture of comparatively recent development. How can a nation such as Canada, for instance with a relatively recent history of independence and an extremely heterogenous population (based on the large numbers of British and French settlers) hope to successfully emulate the practices of the much older and more homogenous culture of Great Britain? Adaptations must be made

and many of them are necessarily substantial ones.

This becomes even more evident when we speak of the form and substance of second chambers. In Britain the rule of the Monarch was never entirely absolute; he had not only to obey feudal law but was bound by that law to consult his "great men" whenever he wanted to make war or raise special subsidies. As Section 12 of the "Magna Carta" states, "No scutage or aid shall be imposed...except by common counsel of our kingdom."² In order to obtain that counsel he had to summon archbishops, abbots, earls and greater men (i.e., barons) singly, and the rest of the King's tenants by writs addressed to the sheriff's.³ This granted the King a wide discretion in the choosing of Parliament. On important occasions it might be necessary to summon all of the great men for discussion, but on minor occasions the King, although he had to summon a Parliament, might summon whomever he wanted. As early as 1213, King John summoned four knights from each county "to discuss the affairs of the kingdom." In 1265, Simon de Montfort summoned in the King's name not only two knights from each county, but also four to six burgesses from certain towns.⁴

Originally the commoners, or Commons, sat in their own chamber for social rather than political reasons, yet the principal of a bicameral parliament was established.⁵ Muir argues that the Lords were never very active in affairs. They were content to allow the day-to-day work of legislation, particularly financial legislation, to be handled by the Commons while most of the highest offices were filled by peers. Moreover, usually about one third of the members of the House of Commons were personal proteges of the Lords, and nearly the whole membership of the Commons consisted of the younger sons or connections of the peers, or were drawn from the same class as the peers.⁶ By 1832 a "new, powerful and energetic class,

whose strength was derived from the wealth created by industry and commerce" began to compete for political power with the aristocracy, and made the House of Commons its instrument. Friction between the two Houses became more frequent, and the House of Lords had to learn from the Duke of Wellington that it must not resist when the "will of the people" was manifest, but must confine itself to amending or delaying objectionable projects of change, rejecting only those measures in which no great interest was taken by the electorate, such as bills for the redress of Irish grievances. The House of Lords then, became basically a delaying body, a Second Chamber.⁷

Towards the end of the 19th century, another stage in the development of the House of Lords began. It had two causes: first, the dominating issue in British politics came to be a demand for widespread social changes, a protest against the unjust distribution of wealth, and a growing anger against the juxtaposition of poverty with idle luxury. In 1884 there was a brief campaign to "end or mend" the House of Lords, and, although it died, it was a sign of the need for some sort of change. On the other hand, the very wealthy, feeling themselves threatened, began to close ranks, regardless of whether their wealth came from land or trade. Moreover, the wealth that came from trade had come to seem more respectable. In the last twenty years of the 19th century, the number of people whose wealth derived from trade increased rapidly, due largely to the expansion of the British Empire. They had directorates to offer, which the leaders of the landholding houses did not despise, particularly as agriculture was doing badly. The two great forms of wealth ceased to be sharply distinguished, and found a common center (and fortress) in the House of Lords, particularly after the Home Rule split of 1886, which drove into the Conservative Party most of the magnates who had remained Liberal.

Throughout the 19th century, as the population became larger and better educated, and as the industrial revolution gave greater power to those not of noble birth, the House of Commons became the ascendant branch of Parliament as reflected in the Reform Acts of 1832, 1867, and 1884, which significantly reduced the property qualifications needed to vote in Commons elections. The Representation of the People Acts of 1918 and 1928 finally abolished the property qualification altogether, awarded women over thirty the franchise, and ultimately allowed women an equal franchise with men.⁹

As the momentum toward popular government increased, it was inevitable that the House of Lords would undergo a devaluation of its powers and prerogatives. Before the Reform Act of 1832, notes Bagehot, the Lords resembled:

" . . . if not a directing Chamber, at least a Chamber of Directors. The leading nobles, who had most influence in the Commons, sat there. Aristocratic influence was so powerful in the House of Commons, that there was never any serious breach of unity."

The reason for this, he suggests, is that Britain at that time "had not two houses of distinct origin, it had two Houses of common origin . . ." ¹⁰ The "latent unity" which had proven a bond for so long was abolished due to the pressures alluded to earlier, with the establishment of what was to become representative government. Prior to 1832, the origins of the two Houses may have been common; after the Reform Act their origins became definitely, and often antagonistically, different. The House of Lords now came to represent a pre-democratic element in a nation which was becoming increasingly democratic.

With the combination of the two main sources of wealth, trade and land, and the consolidation of political power into the hands of the Conservative Party after 1886, the House of Lords attempted to stem the

rising democratic tide by rejecting several Bills of the Liberal Government of 1906 in spite of the enormous majority by which that Government was supported. In 1909, the Lords ventured to attack the supremacy of the House of Commons over finance. It rejected the budget, and by so doing assumed the power -- which it had never previously claimed-- of dismissing the Ministry.¹¹ After two elections had been fought in 1910, the Parliament Act was passed the following year. The Act limited Lord's opposition to a money bill to one month, after which the bill was deemed as passed. Non-money bills might also be passed without Lords' consent, provided that they had passed in three successive sessions in the House of Commons. The Parliament Act of 1949 further reduced the Lords' power of rejection from three sessions to two.¹²

With the Lords thus "bitted and bridled" as Muir describes it,¹³ it is not unreasonable to ask whether the House continues to exist for reasons other than sheer inertia. The answer to this question appears to lie primarily in three functions: the dignified function, the legislative function (particularly with regard to revision), and to a somewhat lesser degree, the representative function.

The Dignified Function

Bagehot describes the "dignified function" of government as that function which attracts and holds the imagination of the citizenry through its symbolism of the nation.

"A common clever man who goes into a place will get no reverence; but the 'old squire' will get reverence. Even after he is insolvent, when everyone knows that his ruin is but a question of time, he will get five times as much respect from the common peasantry as the newymade rich man who sits beside him . . . An old Lord will get infinite respect. His very existence is so far useful that it awakens the coarse, dull, contracted multitude, who could neither appreciate nor perceive any other."

Besides this positive role of its dignified function, there is also a negative role:

"It prevents the use of wealth - the religion of gold. This is the obvious and natural idol of the Anglo-Saxon.... He has a natural instinct of wealth for its own sake. And within good limits this feeling is quite right.... But the admiration of wealth in many countries goes far beyond this; it ceases to regard in any degree the skill of acquisition; it respects wealth in the hands of the inheritor just as much as in the hands of the maker; it is a simple envy and love of a heap of gold as a heap of gold. From this our aristocracy preserves us. There is no country where a 'poor devil of a millionaire is so ill off as in England.' The experiment is tried every day, and every day it is proved that money alone - money pur et simple - will not buy 'London Society.' Money is kept down, so to say, cowed by the predominant authority of a different power."¹⁴

But besides this "dignified function," if we may borrow Bagehot's terminology, there remains enough of an "efficient function" to justify the Lord's existence. To begin with, the House of Lords performs the unique legal function of acting as the final Court of Appeal. In 1873 a motion was made to abolish this jurisdiction, but as a result of a change of Government the legislation for abolition was repealed. Instead, authority was given for the appointment of paid "Lords of Appeal in Ordinary" who hold life peerages and sit in the House of Lords as ordinary members. Thus it can be said that the House of Lords, for judicial business, is, in reality, a different body than the House of Lords for legislative business.¹⁵

Legislative Functions

Crick considers that the "true function of the House of Lords is to save time for the Commons" and to debate not so much the great issues of public policy but rather matters of administration and of the working of social policies for which the Commons has little time.¹⁶ The House is indeed a legislative chamber. The Bryce Committee stated in 1918 that bills of a largely or partially non-controversial character may have an easier passage

through Commons if they have been fully discussed and put into a well-considered shape by the Lords before being submitted to the lower chamber.¹⁷ Additionally, the Lords have an equal right to initiate bills as does the Commons, but Jennings notes that unless such bills are either entirely non-controversial or are supported by the Government, they are unlikely to pass in Commons.¹⁸ It would appear that the real function of the Lords as a Second Chamber, then, is as a house of review. Bagehot considered an Act of Parliament to be "at least as complex as a marriage settlement; and it is made much as a settlement would be if it were left to the vote and settled by the major part of persons concerned, including the unborn children...." But the Lords "have no constituency to fear or wheedle; they have the best means of forming a disinterested and cool judgment of any class in the country. They have, too, the leisure to form it."¹⁹ Jennings considers the debates on bills sent up from Commons, as well as debates on general policy, as often being of high quality. The reasons he cites are three: first, debates are short and few peers take part; second, those who do take part are generally peers who have experience as ministers, ambassadors, Governors-General, etc.;²⁰ third, there is no need to make debating points.²¹ The Lords do not serve active constituencies and there is no personal advantage for them in publicity. As their office is either appointive or hereditary, they need not fear the consequences of an election. Moreover, when the Lords take a division, it has little meaning. At present, a Government that faces defeat in Lords need not even go through the formality of a vote of confidence in the Commons.²² The debates, then, are useful if not strictly essential; however, such speeches do have influence both within and without the Government. Bromhead and Shell's 1967 study on the Lords shows that 56% of the Lords who responded to the survey felt that civil servants paid

attention to their debates, while 44% felt that the Government regularly paid attention to debates in the upper chamber. Bromhead and Shell note that the high figure for civil servants is no doubt largely due to the fact that somewhere in the civil service officials must note every debate and supply ministers with material to answer points raised. Similarly, the peers on the Government front bench always include an appropriate departmental spokesman, though he may be on the fringe of the Government. There appear to be two reasons why peers believe in the influence they exercise. First, there were many examples given of bills amended during their passage through the Lords, such as the Companies Bill, the Misrepresentation Bill, and the Hire Purchase Bill of 1964, among others. In addition, there is a feeling among peers that their general debates on motions for papers, or unstarred questions, or, for that matter, second reading debates, influence opinion both in the Government and the civil service. As one peer noted: "Civil servants get ideas from speeches made here."²³

But it is the power of amendment which is perhaps the most important of all. Unfortunately, when Bagehot praised the "cool judgement" of the Lords, he was speaking of the period just prior to the rise of organized party politics in Britain. Bagehot spoke of a conservative revising chamber, rather than the Conservative-dominated house that the Lords has become. Jennings suggests that the so-called "Conservatisation" of the House is one means of illustrating that party division in modern Britain is in large measure, economic division.²⁴ When the Conservative majority sits in the House of Commons, amendments to bills are proposed by the Government, and the Lords merely ratifies them. But when Labour is in power, the result is to increase the time occupied in legislation in the

House of Commons, in order to insure that bills reaching the Lords are in their best considered "shape." Yet Vincent notes that in the period 1964-65, after the Labour party had come to power, the total number of amendments to bills from both Houses numbered 214, a rather small figure, yet not in itself so destructive to the Lords' claim as a revising chamber as the character of the amendments themselves. Of the 214 amendments, eighty-three came from non-Labour peers. Only five of the non-Government amendments were carried in a division, the remainder being accepted by the Government spokesmen because of their generally purely formal or drafting character. The overwhelming majority of Opposition amendments of a "constructive" or substantive character were refused and withdrawn without being put to a division. The majority of Opposition amendments passed, then, must be considered as Government amendments expressing the considered wish of minister and officials. Lord Egremont's amendments to his Salmon Bill were, in his own words, "framed with the help of Government draftsmen and the Ministry of Agriculture."²⁵

Before 1911, the only remedy to non-Conservative Government had available in order to enforce passage of what it considered important legislature was to threaten to have enough peers created to give the Government a majority. This threat was used three times: in 1712 in order to pass the Treaty of Utrecht (although at this time, party politics were not the issue); in 1832 in order to pass the Reform Bill; and in 1911 to pass the Parliament Bill.²⁶ However, as a remedy it is so extreme that it could be used only when the Monarch could be definitely assured that the measure had popular support. And if the Government's bluff were called by the Lords, the effect would be to destroy the upper chamber. But the Parliament Act of 1911 provided a remedy to the dilemma. The crisis which ultimately produced the Act was the

rejection of the Lords of the Finance Bill of 1909 which gave effect to Mr. Lloyd George's so-called "confiscatory" land-tax budget. The House had never before refused to pass a Finance Bill, and it was alleged that to do so was to infringe on the historical privilege of the House of Commons as the sole judge of financial measures.²⁷ As mentioned previously, the Parliament Act now enables a Money Bill to be presented for the royal assent and become law if it is not passed by the House of Lords within one month of its receipt. With regard to all other public Bills, the Lords could interpose a delay of two years, and the bill would become law if it simply passed through the House of Commons in three successive sessions. Although this diminished the power of the Lords considerably, it did not necessarily destroy it. A delay of this sort was able to make the efforts of a Labour Government demonstrably more difficult. As Jennings points out, two years is nearly half the life of a normal Parliament. Furthermore, the Opposition would certainly continue to obstruct the measure in Commons. However, this power has been used only twice, in 1912 and 1914, and neither of the two Acts took effect as originally proposed.²⁸

Although perhaps not strictly a legislative function, it is necessary to note the important role that the Lords play as a seat for some Government Minister, and Punnet notes that in every Government there are a number of posts filled by Peers. There are a number of practical advantages to having Peers serve as Ministers. A Peer has no constituency duties and his attendance at debates and votes is not essential, so that he has more time to devote to Ministerial duties than does a member of Commons. This is probably most important for a Government that has only a small majority in the Commons. The Lords is also a useful seat for Ministers, in that any figure who is called upon to serve in the Government, but who does not wish

to enter the party political fray of the House of Commons, can be raised to a Peerage and thereby be made eligible for Ministerial office. Sir Percy Mills was given a Peerage in 1957 to enable him to take up the post of Minister of Power in MacMillan's Government, while Lords Bowden, Cadogan, Chalfont, and Gardiner were given Life Peerages in 1963 and 1964 and were thereby made eligible for Ministerial Office in the Wilson Government. Yet, despite the fact that the Life Peerages were introduced in 1958 as a means of recruiting non-party men into the Government, they have not been used a great deal. Furthermore, the disclaiming of titles allowed under the 1963 Life Peerages Act, which was to have made elevation to the Lords more acceptable to those who might otherwise be unwilling to inflict an hereditary title on their heirs, has not reversed this trend.

It can be seen, then, that the legislative role of the House of Lords in Britain has been a rather spotty one. Initiation of bills other than Government (i.e., Conservative) Bills has been rare. Its greatest value lies as a chamber of revision; however, Vincent notes, revision in recent years, even with a non-Conservative Government in power, has been generally of a more technical than substantive nature, although technical revision is perhaps as worthy a task as any, provided that it is done sufficiently to suit the needs of the particular legislation. As a source of Ministers, the House of Lords is of considerable value as a means of using available talent without placing an inordinate amount of stress on members of the Commons, and to a lesser extent, of attracting "non-political" persons (or rather, persons who would not bother to campaign for office) who might have the talent and desire for a Ministry position.

The existence of the House of Lords is as much a matter of historical trial-and-error as it is of crisis-and-resolution. As a pre-democratic

element in a democratic society, the role of the Lords is becoming increasingly anomalous. Much of this has to do with the composition of the Lords, that is, their social and political origin and the rather unique composition of the House. These are factors which will be examined in the next section on representation and composition.

Representative Role

At the close of his chapter on the Lords, Bagehot bemoaned the fact that there were no life peers in that House. He argued that such positions:

" . . . would give us a larger command of able leisure, it would improve the Lords as a political pulpit, for it would enlarge the list of its select preachers."

He warns:

" . . . if all (Lords) members continue to be of one class, and that not quite the best; if its doors are shut against genius that cannot found a family, and ability which has not £5,000 a year, its power will be less year by year, and at last be gone . . ." ³⁰

However, the Life Peerages Acts of 1959 and 1963 have to a large degree solved this problem. ³¹ The 1959 Act allowed the Monarch to confer on any person a peerage for life, so that those politically talented individuals who once lacked the family or money to acquire a title may now sit as Lords. Such a peerage is not hereditary; Jennings notes that it is generally the first-generation peers who are most active politically. Peers of subsequent generations frequently become "backwoodsmen," never to be seen or heard unless some proposal of great political importance is under debate. ³² Furthermore, "backwoodsmen" tend to be of a Conservative stripe. Lord Ogmore notes that of the 1,062 members of the Lords who take party whips, Conservatives outnumber non-Conservatives by almost three-to-one; ³³

clearly, should the need arise, the Conservative party could summon up enough Lords to slow passage of Labour Government bills should the Opposition consider it necessary. Life peerages could conceivably allow a Labour Government to appoint members to the House of Lords without saddling subsequent generations with a "backwoodsmen" label, and thus help to even the party balance.

The Act of 1963 had its roots in the Wedgwood Benn Affair. Crick recalls that the First Viscount Stansgate was created under unusual circumstances, during World War II as a means of strengthening the Labour Party in the Upper House ". . . at a time when a coalition Government of three parties is charged with the direction of affairs."³⁴ In 1950, his son, Anthony Wedgwood Benn had been elected as a Member for southeast Bristol. In 1955, he introduced a Bill to enable him to renounce his right to a peerage, without affecting the right of his children to succeed on his death. The Bill was rejected by the Lords on second reading and got no further. When Viscount Stansgate died in 1960, Mr. Wedgwood Benn executed an instrument of renunciation of the viscounty, and a petition to the Commons was presented by a fellow M.P. on his behalf pointing out that it has never been laid down by Act of Parliament or decided by the courts that a peer by inheritance, even if he has not received a writ of summons to the Lords (which Mr. Wedgwood Benn had not, by not taking the necessary steps to receive one) is disqualified from sitting in the Commons.³⁵ The House of Commons referred to the Committee of Privileges Anthony Wedgwood Benn's claim, and the Committee reported against him. When the Report came before the Commons, the House, at that time controlled by the Conservative Party, refused permission for Benn to address them from the bar of the House on

his own behalf. At length a new Writ was issued for a by-election, and Benn determined to stand. On May 4, 1961, Bristol returned Benn over his opponent by a two-to-one majority, despite much publicity that his election would be invalid. When Benn's opponent, Malcom St. Clair, petitioned it, the Election Court found in his favor; and on May 8, the House again refused admission to Benn, despite the fact that it was clearly challenging the rights of the constituency.

Two days after Wedgwood Benn (now Viscount Stansgate) had been nominated for the British by-election, it was announced in the House of Commons that the Government intended to set up a Joint Select Committee to consider among other things, whether Peers should have the right to sit in either house, to vote at elections or to surrender their peerages. The final Committee Report recommended, and the 1963 Act provided, that:

1. Peerages may be surrendered. Existing Peers will be given six months to make up their minds from the date when the new law comes into effect; newly succeeding Peers one year, except if they are already in the Commons, then one month. Resignation would be for life, but the title and all privileges will be resumed by the heir on the death of the "holder" of the dormant title.
2. The Peerage of Scotland (those created before the Act of Union 1706) should all be admitted to the House of Lords. Previously, sixteen Representative Peers were elected from their number.
3. The Peerage of Ireland (those created before the Act of Union 1800) have had no Representative Peers since 1919; so they should now be allowed to stand for any constituency in the United Kingdom and to vote (they had previously been excluded from election in Northern Ireland).
4. Peeresses in their own right of England, the United Kingdom and of

Scotland should be allowed to sit in the Lords, or to surrender their titles on the same terms as all other Peers.³⁶

Vincent contends that the present character of the House of Lords is essentially a creation of the MacMillan era, and that its character is one of liberalism. He notes that the practical effect of life peerages so far has been to enhance the administrative and party usefulness of the House to the Labour Party. As evidence of the liberalism of the Life Peers, he notes that in divisions on four major bills in the House of Lords, notably the Sexual Offences Bill, the Death Penalties Bill, the Rhodesia Oil Sanctions, and the Defense Estimates, the votes of "progressives" have far outnumbered those of the so-called "reactionaries," although Vincent failed to define his terms with any accuracy. He notes that given Mr. Wilson recommended the creation of as many as fifty-eight peerages between October 1964 and April 1966, it is clear again that new creations could within a few years make any Conservative advantages in effective voting powers on even straight party issues (assuming, of course, the absence of backwoodsmen) a very marginal matter, and he goes on to state that by the 1964-65 session, the life peerages had made the House a predominantly non-hereditary chamber as far as its business was concerned.³⁷

Vincent notes that in the nineteenth century there was one relatively highly integrated elite: the landowning class. The modern position, however, is quite different. The people who run those activities which can influence general national policy form from four to six different elites living widely separate lives. In these terms, argues Vincent, the House of Commons now represents only one of these elites, the political profession. Currently, there is no one in the House who can speak for such business as the Bank of England, nor are there representatives of the unions such as members from T. U. C. The House of Commons, then, has become a means for communication

and competition within the political profession, but not for communication and competition between the elites who really run the country. Vincent believes that the pluralism of elites in the upper house consists less of massive representation of any directive group, than in the absence of the omission or predominance of any of those walks of life which do in general direct things. "If the great are still few on the ground in the House of Lords, the friends of the great and the semi-professional advocates of the great are less few." The contacts that matter between civil servants, business and union and military leaders, the intelligentsia, etc., must remain those taking place in submerged intercourse behind the scenes, so far as primary government is concerned; but there is a secondary kind of power, the power to diffuse influence exercised by those who run things over those other activities they do not actually run. This, then, would appear to be the true value of the present House of Lords: that in a very real way it more closely mirrors the realities of the current structure of politics, and at one remove and in a minor key reflects the present essence of the movement of history, by allowing for the convergence of concurrent moderate liberal majorities in all major elites.³⁸

If it is true that the Life Peerages Acts have allowed the House of Lords to de facto become a less hereditary and far less Conservative (although not necessarily conservative) House than it is generally portrayed, it is not unreasonable to ask why the form of an hereditary chamber must be retained at all. If the Life Peers and first generation Peers do most of the important work in the House, then perhaps it is time to do away with practice of allowing hereditary "backwoodsmen" even the possibility of sitting and voting in the House of Lords.

Reform of the Lords

Proposals for reform or abolition of the House of Lords in the twentieth century date back to the Act of 1911 whose preamble recommended the reconstitution of the Lords on an elected basis.³⁹ However, such a notion was never seriously considered. The Bryce Commission of 1918 recommended that three-quarters of the members of the Lords be elected indirectly by the Commons on a regional basis, with the remainder elected by a Joint Standing Committee of both Houses. However, Lord Shepherd notes that the Commission's recommendations foundered through the disputes of the time.⁴⁰ Most recently, reform has centered in the payment of an attendance allowance (raised to $4\frac{1}{2}$ guineas in 1964), the granting of leaves of absence (1958), and the Life Peerage Acts of 1958 and 1963 which allowed for women peers, life peers and the renunciation of a Peerage for life, respectively.

Surely, such changes as these constitute a "tinkering" with the existing machinery of government rather than a general overhaul, which is what many politicians (particularly in the Labour Party) and political scholars have been recommending. Crick, for example, remarks that the mountain of British government labored in 1958 to bring about the "mouse" of reform in the form of the Peerage Act.⁴¹ Bromhead and Shell argue that whatever changes the Lords have undergone in order to improve its role in the British government, two factors still remain, the hereditary right to a seat in the Upper House, and the power of the Lords to delay the passage of legislation by a year, both factors which cannot help but effect inter-parliamentary and executive-parliamentary relationships.⁴² Burrows contends that while the House of Lords may be of use to a Conservative Government, it is of little or no use to Labour unless it can attain a voting control of that chamber. If we assume, as does Burrows, that a second chamber is of use in the machinery of

government, that any reconstituted second chamber should be based on the existing House of Lords in order to preserve its tradition, and that ultimate authority should rest in the House of Commons as representative of the popular will,⁴³ then it would be worthwhile to examine his scheme of reform in the context of a Labour Government elected with a small majority in the Commons, as Labour on occasion has had problems regarding its relations with the Lords.

Of course, a Labour Government elected with a small majority would have to act with caution, as the Government could claim only a limited mandate to govern, and the possibility of Conservative Peers joining with the Conservative opposition in the Commons to make things difficult is a very real one. Burrows suggests what he calls a "Two-Writ Scheme," which in effect would establish two classes of Peers: Life, or created hereditary Peers of first creation who would have the right to sit and vote on matters of Government policy; and those hereditary peers of subsequent generations who would be allowed only to exercise their traditional right as a Counsellor of the Crown, to wit, to give counsel but not to vote unless specifically given that authority by the Government of the day.

Burrows contends that such a scheme would serve to eliminate control over legislation which accrues by right of birth to the successor of a peerage. However, it preserves the independent advice tendered by an educated section of the community which is not necessarily influenced by political allegiance. As far as party strength is concerned, Burrows writes that as of 1964, among 251 Life Peers, roughly 96 would refer to themselves as Conservatives, 53 Labour, 5 Liberal, and 97 would not consider themselves bound to any party; however, party composition in the Lords is subject to creation and death. If necessary, a Government could issue voting writs to certain hereditary peers (by creating for them new peerages) in order to attain a

sufficient number of supporters to obtain a working majority.⁴⁴

Should Labour attain a large majority in the Commons, it might have fewer inhibitions about dealing with the Lords. Burrows suggests that the Parliament Acts of 1911 and 1949 might be amended to provide that any bill presented to the Commons by a Minister of the Crown must be passed by the Lords, either without amendment or with such amendments as might be agreed to by the Minister, within one month after it had been sent up to that House. In the case of a Government Bill originating in the House of Lords, the Bill must be passed by that House within two months of its presentation by the Minister, and any amendments made to the bill during its passage in the Commons need not be agreed to by the Lords. The effect of the amending Bill would be to place all Government Bills introduced in the Commons in the same positions as Bills certified by the Speaker of the House of Commons as Money Bills. For Bills originating in the Lords, the revising functions of the Upper Chamber would be retained, but such revisions would be those accepted by, rather than imposed upon, the government of the day.⁴⁵

Burrows concludes his article by reviewing the changes made in the composition of the Lords under Conservative rule in the 50's and 60's. In particular, he concentrates on the Peerage Act of 1963, the gravest defect of which is that by renunciation of a peerage for life, a Lord deprives the House of his services. Further, by providing for those who wished to disclaim their peerages but had already taken their seats in the Lords, the Act weakened the standing of the upper house by demonstrating that service in the Commons was, if not more desirable, at least of greater value. Burrows considers that if present trends continue, the House of Lords will either continue to behave under Conservative rule as a minor government department, or, under Labour rule, will be ultimately deprived of any influence in

in Britain.⁴⁶

Bromhead and Shell's survey on the Lords and their House gave four choices as to the future composition of the upper chambers: 1) remove the hereditary peers altogether; 2) introduce the two-writ system; 3) allow the existing peers to elect some of their membership to the House; 4) maintain the present position. There was no consensus regarding any particular change, and only the most modest proposal (election by hereditary peers) drew any substantial support (31% of all Peers). Those who preferred no change (49%) did so on the ground that the House worked fairly well as is, there was no real reason to make any radical changes. Labour peers, on the other hand, considered it important to avoid strengthening the upper house and welcomed hereditary peers, as they helped to keep the prestige of the House low. Among Conservative peers, it was felt that the hereditary system helped to keep young men in the House, and allowed for more independence among hereditary peers (although there is little evidence to support this). There was also a rather firmly held belief that the hereditary peers are a "good microcosm of the nation."⁴⁷

Outright removal of peers by succession received the approval of only 3% of the respondents as a first preference. However, a gradual removal, by excluding those who in the future would succeed to titles without taking away any of the rights of the present holders, a move which would ultimately achieve the same end, won the support of 10% of all peers, 23% of the life peers, and 31% of all Labour peers.⁴⁸

The peers who were interviewed were asked to give a straight "yes" or "no" vote as to their attitude towards the two-writ proposal. Sixteen per cent replied "yes" and 77% replied "no". The major reason for this reaction appeared to be that most peers dislike the idea of having first and second

class members sitting and working together.⁴⁹

As to proposals to add members to the House by means of new criteria, four possibilities were put to the peers: 1) office holders of some important bodies during their term of office; 2) some persons elected by local authorities; 3) a popularly elected element; and 4) a limited number of persons appointed by the Government for a fixed, non-renewable term. In general, none of the four proposals attracted any substantial amount of support. Apparently, most peers are not interested in proposals for increasing the number of ways by which a person may enter the House of Lords.⁵⁰

Bromhead and Shell's conclusion from their study is that there appears to be little enthusiasm among the active peers (those who attended over half the sittings of the Lords during the period of the survey) for any major change in the composition or procedures of the House of Lords. However, Bromhead and Shell note that retrospective approval has been given by the Peers to the "relatively drastic" changes brought about by the 1958 Life Peerages Act and the 1963 Peerage Act, so that there is reason to believe that further reforms might, initially, be met with similar suspicion, but could gradually earn genuine approval. In other words, it is probable that when faced with an alternative on a questionnaire, the peers may decide that the safest route is in the maintenance of the status quo, but when a specific proposal is worked out and presented with the backing and responsibility of the Government, such a proposal may be viewed in a different light.⁵¹

Perhaps the most radical proposal for change was one put forward in 1969 by Lord Ogmores, President of the Welsh Liberal Party. Lord Ogmores notes an opinion poll taken in September 1968, in which 59% of those questioned supported a Welsh parliament for dealing with Welsh affairs; the figure rose to 61% among the 21-34 age group. What Lord Ogmores has in mind is the setting

up of a federal system in the United Kingdom, with a system of domestic Parliaments for England, Scotland, Wales and Northern Ireland, with a federal Government and Parliament for matters of common concern, and with regional assemblies for England subordinate to the English Parliament. What Lord Ogmore suggests is that such "domestic" Parliaments and their Governments could seek to use the House of Lords as a federal House by controlling future appointments. He seems to feel that without these and other changes in the Lords, namely the necessity of paying more satisfactory salaries as well as selecting members on a more "imaginative" basis, reform of the House of Lords will become "Much Ado About Nothing."⁵²

As recently as 1968-69 the Labour Government was prepared to consider substantial reforms in the composition and powers of the House of Lords. In the Queen's Speech at the opening of Parliament, October 30, 1968, it was announced that legislation would be introduced regarding Lords' reform. A year earlier, the Labour government had proposed that the powers of the Lords be reduced and its hereditary basis eliminated, so that it might develop within the framework of a modern parliamentary system. A conference of the representatives of the three main parties was convened by the government in the hope that an all-party consensus could be reached about the role, powers, and composition of the second chamber in the present day. The conference first met in November 1967 and continued its discussions until June 1968.

By that time the conference had reached agreement on the main outlines of a comprehensive scheme of reform covering both powers and composition. The Government continued and completed the work from the point at which the talks came to an end, and proposed to introduce the required legislation. The view of the conference had been that reform of the Lords should be based on the following propositions: a) that in the framework of a modern

parliamentary system, the second Chamber had an essential role to play, complementary to but not rivalling that of the Commons, if for no other reason than for the volume of legislative work with which Parliament must deal; b) that the present composition and powers of the Lords has prevented it from functioning as effectively as it should; c) that reform should be directed toward promoting the more efficient working of Parliament as a whole; and d) that once reform had been completed, the work of the two Houses should become more closely co-ordinated and integrated, and that the functions of the House of Lords should be reviewed.⁵³

It was the position of the Labour Government that any reform should achieve the following objectives:

1. The hereditary basis of membership should be eliminated.
2. No one party should possess a permanent majority.
3. In normal circumstances, the Government of the day should be able to secure a reasonable working majority, although how this would be achieved was not suggested.

A White Paper outlining the Labour Government's proposals was approved by an overwhelming majority in the House of Lords, and a Bill incorporating its provisions was introduced into the Commons in 1969. The Parliament (No. 2) Bill obtained a second reading, but, since it was a major constitutional Bill, it was considered right and proper for the committee stage to be taken on the floor of the House.

The Bill received a lukewarm reception from the Conservative Opposition. It caused a sharp and bitter reaction from the left-wing of the Labour Party and the right-wing of the Conservative Party. A brilliant and destructive campaign was fought by Mr. Enoch Powell and Mr. Michael Foot, and after several days of intense debate showing little progress, the Labour Govern-

ment withdrew the Bill in order that other important legislation could be passed.⁵⁴

Lord Shepherd considers that Mr. Foot saw in the Bill a danger to the Commons, in that a reformed House of Lords would have an enhanced position in relation to the lower House, and as such the Bill went against his view that the Lords should be abolished. Mr. Powell saw in the Bill a real danger of increased patronage for the Prime Minister, as Peers would continue to be created on the advice of the Government of the day.⁵⁵

The problem with regard to reform of the Lords, then, appears to be that the House as it now stands is of value to a Conservative Government, as it will tend to approve government programmes while suggesting only minimal or technical revisions to bills. Labour, on the other hand, tends to view the Upper House as an institution basically antagonistic to Labour's interests. When speaking of reform, a Labour government would be more likely to have in mind the reduction of powers of the present House rather than to bother itself with problems of composition which might enhance the role and status of the chamber.

Conclusion

Lord Ogmore notes that it is generally agreed that the House of Lords as a second chamber is useful in that it provides a useful function as a forum for full and free debate, in the revision of public Bills brought up from the Commons, in the initiation of less controversial public legislation and in the consideration of subordinate legislation and of private legislation, as well as in the scrutiny of the activities of the executive. It also enables a Government to utilize the services of a distinguished person as a Minister who may not be a member of the House of Commons. As a result of this view, then, reform rather than outright abolition has become the

official objective of the Labour, Conservative, and Liberal Parties, although there are many radical Liberal and Labour Party members and M. P.,s who would wish otherwise.⁵⁶ It is not unreasonable, then, to conceive of the Lords as a second chamber standing for some time to come; the question is one of what changes, if any, will be made in its powers and composition.

As mentioned earlier in this chapter, the evolution of the British system of government has been basically a matter of trial-and-error.

Goerner asserts that:

"A people of some antiquity has had a constitutional structure long before any of it is written down. There is no need to place in writing the fundamental customs that govern a people until some crisis calls them into question. If the crisis is settled, the settlement may then be solemnly set down through the ritual of writing and signature."⁵⁷

In Britain, King John's levying of taxes without Parliamentary support led to the Magna Carta: the Lords' refusal to pass the Finance Bill of 1299 resulted in the Parliament Act of 1911. If the government of Britain is thus truly organic, the same may equally be said of its second chamber. It is not unlikely then, that further reforms will be of an ad hoc nature.

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CHAPTER II

THE CANADIAN SENATE

Introduction and History

"The Senate's weakness, to some extent, lies in its legal strength." Robert MacKay

Considering Canada's political heritage, it is not at all surprising that the Canadian Parliamentary system should be modeled after the British. What is surprising, however, is the "superficial" resemblance of the Canadian and American legislatures, and of the two upper houses in particular, especially in regard to the number of senators (102 in Canada vs. 100 in the United States), and the manner in which they are selected (two from each state in the United States; 24 from each of the four Canadian "sections," plus six from the province of Newfoundland). Clokie comments that this appears to be an example of the combination of American expedience and British principles which sprung from the introduction in Canada of federalism. But the resemblance should not obscure the fact that the Canadian Parliament follows the British example so far as the status and influence of the upper house are concerned.⁵⁸

Although the Canadian Senate differs from the House of Lords by virtue of its lack of a landed aristocracy as a base of power, it should be noted that, by the eighteenth century, in Canada, as well as in Britain and the United States, a second chamber was appreciated as much for its ability to restrain an impetuous, popularly elected lower house as for its representative abilities.⁵⁹ Mackay notes that whatever the founding fathers' ambivalence regarding the Senate, it was meant to play a meaningful role as a legislative body. In general, it was to act as a conservative check on

legislation and, as a "sober second thought...a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation." In addition, its membership was to be representative for the provinces against the majority in the House of Commons.⁶⁰ However, although the fathers of Confederation spent six of their fourteen days in Quebec City discussing the upper house, it is difficult to determine precisely what they intended for the Senate to be a second chamber. In view of what Robert Mackay terms "the fears of the smaller provinces," and for that matter the French minority, the founding fathers were concerned with the idea of incorporating into the federal union at least "the appearance of a mechanism that would provide strong safeguards for both provincial and sectional interests."⁶¹ Put differently, the deciding factor which favored the installation of a second chamber in Canada was that it offered a compromise solution to one of the most difficult problems of representation where a federation of colonies of unequal size is involved. To quote John MacDonalld:

"In order to protect local interest, and to prevent sectional jealousies, it was found that the great divisions into which British North America is separated should be represented in the Upper House on the principle of equality"⁶²

If the lower house was to be representative of population, then the upper house would represent not the provinces, but the three major territorial "divisions" into which the races and economic interests of the provinces fell. Originally, 72 senators were allotted equally to "French" Quebec (Lower Canada), "English" Ontario (Upper Canada) and the Maritime Provinces (twelve each to Nova Scotia and New Brunswick). The number of senators was subsequently increased to 102 when the Western Provinces were admitted as a section, and Newfoundland was allotted six senators. Instead of being founded upon grounds of either provincial or racial

equality, then, the Senate gave "some recognition to the individuality of the federating units, some concession to racial claims, and some acknowledgment to the divergent social and economic interests of the separate portions of the new country."⁶³ However, while discussions regarding the confederation and particularly the nature of the upper house were still going on, at least one of the participants suggested of the Senate that:

"...it must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may come from that body, but it will never see itself in opposition against the deliberate and understood wishes of a people." (emphasis added)⁶⁴

This statement represents the curious dilemma of the Canadian Senate: that it should be an independent part of the legislature, yet that it should never allow itself to block the will of the people as expressed in the popularly-elected lower house.

In examining the role of the Canadian second chamber as a part of Parliament we shall examine first the federal nature of the Senate as a factor in its existence, i.e., does the Senate adequately represent the units of federation in the national government? Next, the legislative functions undertaken by the Senate shall be examined. In particular, we shall be concerned with the extent to which the Senate is able to revise legislation sent up to it by the Commons, and the extent to which the Senate is able to initiate legislation independently of that House.

If we accept that in a body of 102 legislators a committee system would be necessitated in order to allow for a specialization of knowledge which would contribute to the effective functioning of the Senate, then it becomes necessary to examine the committees of the Canadian Senate in order to see if they have fulfilled that function. Also, the possibility of ministers originating in the

Senate shall be examined, although as we shall see, Senate-based ministries have been extremely rare. In the concluding section we shall "step back," so to speak, in order to perceive an overview of the Senate, and to suggest some reforms which might allow it to gain a greater amount of political power, as well as a greater degree of public esteem. This is the format which will be used in the subsequent chapters dealing with the second chambers of Australia, the Irish Republic, and the failed chambers of the Irish Free State and New Zealand.

Federal Functions

In this section we shall ask if federalism helps to assure the Senate's existence as a viable institution in the Canadian government. Under a federal system of government, the units of federation (states, provinces) unite to form a central government. Since Canadian senators are chosen on a sectional-provincial basis, it will be of interest to note the extent to which the upper house is representative of the federated units of the nation in the federal government. We shall also examine its degree of representativeness, that is, the extent to which the senators are responsible to their constituencies.

Mackay argues that the key to Canadian federation lay in securing adequate guarantees for the protection of provincial and sectional rights. It was generally understood that since the union must be ratified in an Act of the British Parliament, which would come to be considered as Canada's constitution, the Act would be subject to interpretation by the courts, as is the U.S. Constitution, and that through this the provinces would have judicial protection against the encroachments of the central government. Yet, giving reserved legislative powers to the central government while, at the same time, enumerating the powers of the provinces, as well as

empowering the central government to appoint all the justices of the higher courts, would have made judicial protection for the provinces appear insufficient. There appeared to be room for encroachment by the central government on the rights of the smaller provinces or of any one section, and consequently a need to secure to the provinces and sections the means of influencing the politics and legislation of the federal Parliament. The practical difficulty lay in deciding on a principle of representation, just as at Philadelphia. On the proportion of representation which any province or section could obtain in the federal Parliament might depend the influence that it could exert in federal politics. There was no arguing that representation in the lower house should not be on the basis of population, since on no other basis would Upper Canada, the most populous area, have entered into the federation. The question shifted, therefore, to the nature of an upper house. The importance of this question may be deduced from the fact that, as mentioned earlier, nearly all of six days out of a total of fourteen spent in discussing the details of the scheme of federation were given over to the problem of constituting a second chamber. On the fourth day of the conference, John A. MacDonald introduced the first resolution on the constitution of the upper house. It was that the Senate should represent equally the three divisions, Upper and Lower Canada and the Maritimes. This motion eventually crystallized into a further resolution that twenty-four members should be allotted to each section.⁶⁵ Currently, under Section 22 of the British North America Act of 1867, as amended, there are 102 members of the Canadian Senate; 24 senators were allotted to the Western Provinces and six to Newfoundland when they entered the federation in 1871 and 1949 respectively. A special provision allows this number to be increased to 106 or 110 (one or two extra senators for each of the divisions).⁶⁶

Yet representation of the various sections and provinces was to be more apparent than real. Popular election as a method of constituting the upper chamber would have been more effective from the standpoint of representation, but it was dropped at the Quebec Conference of 1964 with little opposition, except from Prince Edward Island. The chief objections to it were that it would tend to create two houses of exactly or nearly the same character, both of which would be likely to consider themselves as the "official" interpreters of the popular will. Such a condition would inevitably lead to conflicts between the two houses. In addition, it was considered "un-British." Neither appointment by the provincial governments, nor election by provincial legislatures, were seriously urged, except, again, by Prince Edward Island, although MacKay does not explain why. There was considerable difficulty about the first selection of members to the upper chamber, but there was little opposition to the system of appointment by the federal government. In the first instance, it was agreed that nominations were to be made by the provincial governments and that all parties should be represented in such nominations, but no restrictions were attached to any subsequent appointments by the federal government, except that appointees must be residents of, and property holders in, the provinces for which they were appointed and, in the case of Quebec, residents of, and property holders in, particular districts.⁶⁷

Senators may now belong to either sex, must be at least thirty years of age, must own real property within his or her province to a net value of at least \$4,000 over and above all debts and liabilities.⁶⁸ The reasoning behind these qualifications appears to be that the Canadian founding fathers desired to avoid the defects that they saw in the House of Lords. Senators would not consist of a hereditary class, with its all-too-large proportion of "backwoodsmen" who almost never bothered to perform their governmental duties.

The property qualifications would not be so high as to distinguish senators sharply from their fellow citizens. They were to hold property in their respective districts and live among their fellow-man.

Constitutionally, senators are appointed by the Governor-General as representative of the monarchy in Canada; in practice, however, appointments, which as of 1965 are to age 75, are determined by the Prime Minister, with party service being the most important qualification for a seat in most instances.⁶⁹ Campbell notes that "the Senate's independence from partisan forces has been undermined by the fact that its members are appointed by the Government of the day."⁷⁰ And, indeed, it would appear that party service is considered to be the most important qualification for most Senate seats. Liberal governments have almost invariably appointed Liberals, and Conservatives have appointed Conservatives. Since the First World War the Liberals have governed for far more years than the Conservatives and they have had, therefore, far more opportunities to fill Senate vacancies and to create in the post-World War II era a lopsided Senate Liberal majority.⁷¹

In theory, then, contemporary Conservative Governments are helpless before the Senate, because it "overflows with Liberals." But theory and practice have not always been the same. For one thing, Albinski contends,

"...the Senate, as a body, has for a considerable time been acutely conscious of its anomalous status in an otherwise popular representative and popular system. One constraint has been the practical view that stubborn and recurrent partisanship could hasten the Senate's abolition, or basic reconstruction."⁷²

In other words, the Senate is not at all eager to obstruct a Conservative Government, as it is aware that its existence in a democracy is anomalous in that it is an appointed house.

In 1970, Prime Minister Pierre Trudeau partially broke the tradition of "packing the house" with Liberals when, in addition to picking some party

loyalists for Senate posts, he nominated persons with careers in such areas as the trade-union movement and academia. He also selected a former Social Credit Premier of Alberta, and a Quebec Woman identified with the women's rights movement and the New Democratic Party. Even so, the Canadian Senate has retained its essential character. As of 1970, then, there was one Social Creditor and one NDP follower, but the Liberal contingent enjoyed a three-to-one majority in the chamber.⁷³ Generally, every party leader in Canada deploras the manner of appointment until the position of Prime Minister is attained. In the case of the Liberals, then, the attraction of a basically sympathetic Senate becomes manifest, while for the Conservatives the chance to redress old grievances makes the possibility of substantial alteration of this practice considerably more remote, although Conservative Governments in the post-war period have not been able to stay in power long enough to redress the party imbalance. However, whether the partisanship of the upper house is as great an issue as it appears to be is a question which will be examined further in the section on legislation.

Whether or not the Senate has performed its federal or representative functions particularly well is a matter of some disagreement among scholars. MacDonald argues that "...the main defense of these sectional interests has been not the Senate but the federal nature of the Cabiner, and behind that the federal nature of the great national parties."⁷⁴ Kunz, on the other hand, suggests that while the Senate may not be a primary safeguard of provincial rights, "it should not be taken to imply that it has no useful function to perform as a reinforcement of provincial or sectional interests."⁷⁵ But the examples he uses to make this point seem forced. One of these is a proposed 1936 amendment that included an extension on the power of levying indirect taxes to the provinces. The Senate rejected this legislation because, it was

believed, the bill would have curtailed the constitutional powers of the federal government. It is difficult to see how this case constituted an instance where the Senate had acted to protect the provinces or sections. Kunz cites other legislation, such as the 1925 Canteen Funds Distribution Bill, and the 1940 Northwest Territories Bill. A close look at these cases, however, does not reveal what could be called a "substantive role" in the overall protection of provincial and sectional interests. With respect to the 1925 Canteen Funds Distribution Bill, for example, the Senate inserted an amendment in a provision which called for \$2,300,000 to be given to returned World War I veterans. The amendment stipulated that the funds should be distributed by the existing machinery of the provinces. In the 1940 Northwest Territories Bill, the Senate stipulated that jurisdiction in civil matters over the Northwest Territories would be divided among courts of eight provinces rather than given to the Ontario superior courts.⁷⁶

As MacKay points out, it is necessary to distinguish between sectional and provincial rights. On the one hand, the provinces are component parts of federation; on the other hand, the four sections or divisions, two of which are the provinces of Ontario and Quebec, are recognized in the British North America Act only for purposes of equal representation in the Senate. In other words, the four divisions have no additional rights under the constitution. However, it is possible to say that the Maritime and the Western Divisions do have certain sectional interests common to their respective provinces. This has been recognized by certain statutes, notably the Maritime Freight Rates Act, and the Crow's Nest Pass Agreement, regarding freight rates for grain from the Western Provinces. Although statutory provisions recognizing special interests may have a way of

popularly becoming known as "rights" it should be kept in mind that in this sense, and only in this sense, can it be said that sectional or divisional rights exist, so that the case for the Senate as a guarantor of sectional or provincial rights is perhaps a weak one. Mackay suggests that it is rare that threats against sectional rights or interests come before the Senate by way of legislation, and when they do, it is usually in the form of money bills with which the Senate may not wish to interfere.⁷⁷

Mackay disagrees with Kunz that the Senate has been effective as a federal body. He contends that the Senate has not been a champion of provincial rights for the following reasons:

1. With regard to the extension of the franchise, an early battle between the Provinces and the Federal government, the Senate "switched sides from time to time."
2. It delayed or rejected legislation requested by particular provinces but undesirable politically to Senate majorities.
3. It followed the lead of the Government of the day with regard to separate schools in the provinces and territories.
4. With regard to the railways, it supported provincial objectives and limited the scope of regulation, "but not consistently."⁷⁸

When we speak of the "representational" role of the Senate, we are referring primarily to the ability of the Senate to provide special representation to minority groups, and in particular, the French minority. Mackay notes that there was a general agreement that the protection of minorities was an important function of the Senate. But only minorities that the Founding Fathers had in mind were religious and linguistic, and the only precise minority rights enshrined in the BNA Act related to the use of French and English in the federal Parliament, and the courts

of Quebec. The Senate has rarely, if ever, been called upon to protect either of these rights, so that its responsibility in this respect is contingent, rather than active.

Presently, there are many linguistic, religious, racial, and economic minorities in Canada. If we assume that democracy rests on a basis of equality among a nation's people, then it may be argued quite plausibly that the Senate, as the upper house, has a moral, though not a constitutional, responsibility to prevent discrimination against minorities. It has rarely had to act on this subject, but there is at least one noteworthy instance. In 1944 a franchise bill was introduced which proposed to disenfranchise Canadians of enemy extraction who already had been barred from voting in provincial elections. The bill ran into strong opposition in the Senate. Senator Lambert, nominally a supporter of the Government, declared, "One of the principal traditional responsibilities of this chamber is that of safeguarding the rights of minorities." Senator Euler, also nominally a Government supporter, declared he would fight the bill "to the last ounce of my strength." Senator Calder, a Conservative, declared, "We are here to look after minorities, and it may be that they will be dealt with unjustly by this measure." The Senate amended the bill to debar only persons of Japanese origin in British Columbia, where they had previously been barred by federal legislation.⁷⁹

It can be seen then, that although the Senate has had only infrequent opportunities to protect minorities, whether those originally considered necessary to protect by the Canadian Founders or others, it would appear to be of importance to the nation that there should be somewhere in the Canadian system of government a means of protecting minorities from injustice.

The role of the Senate as a federal house appears to be ambiguous at best. Mackay notes that provincial cases have often been more forcibly argued in the Commons than the Senate. In this instance, it would appear that federalism has not acted to strengthen a parliamentary upper house. In respect to the representation and protection of minority rights, the Senate seems to work only in those rare occasions when a question of this sort comes before it, as the 1944 case shows. In order to find justification for the Canadian Senate as a second chamber, we must look elsewhere, primarily with regard to the legislative functions of the Senate.

Legislative Functions

In examining the legislative role of the Canadian Senate, we shall be concerned with the following activities: 1) the extent to which the upper house is able to initiate legislation; 2) the extent to which the upper house is able to revise and block legislation initiated in the lower house; and 3) the extent to which the upper house is able to investigate legislation independently of the lower house by means of a committee system.

Initiation

Constitutionally, the House of Commons and the Senate are nearly co-equal in respect of the ability to initiate legislation. The only exception to this is in regard to revenue bills. Under Section 53 of the British North America Act, all bills for the raising and spending of money must originate in the Commons. Whether this decisively limits senatorial power in a constitutional sense is unclear. Certainly the fact that all money bills in the United States must originate in the House of Representatives has not hampered the power of the U.S. Senate. But it is a con-

vention of the Westminster model that the monarch or government requests its funds from the people who levy taxes on themselves to pay, and the chamber most directly responsible to the people is, as in Britain, the House of Commons. Furthermore, it has been suggested that this limitation in Canada has been utilized to make doubly certain that the Cabinet will be responsible to Commons and not the Senate.⁸⁰ Whether or not the Senate has the power to amend money bills is a matter of unsettled dispute between the two houses. The BNA Act, Canada's "Constitution," has nothing to say as to the powers of the Senate in amending or rejecting such bills. Standing Order 63 of the House of Commons asserts that since all aids and supplies are the sole "gift" of the Commons, any granting, limiting, and appointing of all money bills is not alterable by the Senate. On the other hand, a special committee of the Senate appointed in 1917 to investigate the question reached the conclusion that, since the British North America Act expressly forbids the introduction of money bills in the Senate, but is silent on the question of amendment, the inference is that the Senate should possess the power of amendment. The committee considered its conclusions strengthened by the fact that, whereas the power of the House of Lords would be comparatively useless since the House could be "swamped" by the Executive, the Senate of Canada with a fixed membership is free from such a danger and was intended to be independent of the Executive and the lower house.⁸¹ The Senate has occasionally amended bills which have dealt exclusively with finance. In such cases, the Commons has generally tended to accept the amendments, adding the "futile" proviso that such amendments were not to constitute a precedent.⁸²

Mackay notes that more legislation has been initiated in the Senate when the same party has been in the majority in both houses. The same

conclusion held for the House of Lords. One explanation may well be that a Government tends to suspect the Senate when the majority of its members are in the Opposition party, and perhaps rightly so. MacKay insists that the Senate has rarely acted arbitrarily in such circumstances, as most legislation introduced by any Government is basically of a non-partisan nature. But ministers, accustomed to party strife in the Commons, naturally tend to assume that the Senate cannot act other than in a partisan spirit. The great increase in the initiation of Government-sponsored legislation in the Senate after 1945, however, has other explanations. The major reason for this increase appears to have been the increase in the volume of government legislation in the post-war period which has induced the Government to make greater use of the Senate in order to relieve the House of Commons of a legislative overflow. The bills listed below were among those initiated in the Senate in recent years. All involved extensive work by Senate committees. They indicate the type of non-controversial legislation which can be suitably handled in the Senate.

1949-- The National Defence Act. This Act consolidated the disciplinary provisions of the various acts relating to the armed services.

1952-53-- The Criminal Code of Canada. This bill was studied for two successive years by a Committee of the Senate, the Minister of Justice preferring care to haste. In the third year the bill, largely as amended by the Senate Committee, was initiated in the House of Commons, the Minister of Justice paying a special tribute to the Senate Committee for its work of revising the original draft.⁸³ It has been suggested that the initiation of such bills as these in the Senate has done much to rejuvenate it.⁸⁴

Perhaps the greatest practical activity of the Senate regarding

initiation lies in its introduction of private bills, Kunz defines a private bill as "one that is designed to confer special powers or privileges on a person, a body of persons, or a particular area and is unrelated to general public policy."⁸⁵ Bills of this type are generally introduced on behalf of a private citizen or organization through one of the houses of Parliament. In recent years, the fee for introducing private legislation into the House of Commons has been raised to \$500, while the fee in the Senate was retained at \$200. The practical effect has been to make the Senate the sole source for the initiation of private bills.⁸⁶ Most of this work takes place in committee, and special Senate committees have conducted investigations for the sake of private legislation on such topics as the mass media, science policy, and poverty. Although many of these procedures are not strictly legislative, they are desirable to the extent that they may pave the way for future legislative action.⁸⁷

Yet this is not to imply that the Senate is being as fully utilized with respect to initiation as it might be. The use of the Senate to initiate non-controversial bills is undoubtedly a trend which should be allowed to continue. That more use can be made of the Senate is evident in the following statement by a recent Leader of the Government in the Senate:

"It is little less than a travesty that this chamber, prepared for work, ready to serve the people of this country, should be compelled to work more or less idly for weeks, perhaps for months, while discussions, which are no doubt necessary under any democratic system, are proceeding in the other chamber, and that a plethora of legislation should be thrown at us in the latter part of each session, when we have no opportunity to do what we ought to do in the way of reviewing it, and all that the house expects of us is that we pass it without thought, without amendment, and without delay."⁸⁸

In part, this situation arises from the procedure of the House of Commons whereby several matters of business are going forward at the same time with the result that procedure is completed on a great variety of items in the last few days of the session.⁸⁹ In this respect, the Senate is the unhappy victim of circumstance, although the phenomenon of the end-of-session "rush" is not uncommon to Westminster-model upper houses, as will be made apparent throughout the course of this study. But it is in the revision of legislation that the Senate, as a house of review, does its work most effectively, as the next session will attempt to illustrate.

Revision

Out of a total of some 4,320 public bills which came up from the Commons from federation in 1867 to 1960, the Senate amended about 840, or approximately 20.4 per cent; of some 3,300 private bills, it amended some 895, or approximately 27 per cent.⁹⁰ Also of note is the presence of an appreciable decline in the percentage of bills amended after 1943 (11%), and, even more radically, after 1957 (7%) when the majority of the Senate was of the opposite party of the new Government. One explanation of this phenomenon would appear to be that, prior to 1947, Government bills were drafted mainly by the department or agency of government promoting the bills. From 1947 on, however, almost all government bills have been drafted by, or in cooperation with, the Department of Justice, so that Government legislation is, by-and-large submitted to Parliament in a more finished form than in earlier years. MacKay disputes the charge that Senate activity on the amendment of legislation has increased significantly when Senate and Commons majorities have been in opposition. He offers as evidence the fact that

in only one period when Senate and Commons majorities were in opposition. does it appear that the Senate had been substantially more active in amending governmental legislation (1922-30 - 26% vs. the 20.4% average).⁹² While it has perhaps done more amending under these circumstances, it does not necessarily follow that amendments have been made more for partisan reasons than at other times. Campbell suggests that it is in the area of technical revision of legislation where the most significant role for the Senate is found. Of course, when when we speak of "technical" revision as opposed to "substantive" review of legislation, the former function should not be demeaned. Campbell quotes a study by Kornberg, Falcone, and Mishler (1972) which concluded that, since 1867, most legislation enacted by Parliament has been of a routine administrative nature rather than far-reaching or innovative.⁹³ Campbell believes that this stems largely from the "style" of Canadian politics which does not lend itself easily to the initiation of that sort of comprehensive and rationalistic proposals which are normally identified with substantive conflicts. In other words, in Lindblom's terms, Canada, like the United States, is a political environment where the market-place ethic prevails and most decisions are made through "partisan mutual adjustment," or bargaining.⁹⁴

It can be reasonably argued that the Canadian House of Commons, like popular legislatures everywhere, may not be a particularly good legislative body. Such factors as party discipline, the parliamentary administrative duties of the ministers who develop and introduce legislation, the attendance at party caucuses and committees required of members, the constant anxiety to court public and press alike, all militate against the sort of calm atmosphere essential to the achievement of legislation of high quality. Under such conditions, then, a good revising chamber could



be considered a minimum requirement for decent legislation. The usefulness of the Senate in this respect may be illustrated by the work done by it on the Bill to Revise the Criminal Code. The bill was originally drafted by a special commission presided over by a distinguished judge, which worked for two years. It was then revised by Department of Justice officials, and introduced in the Senate in 1951. With the approval of the Minister of Justice, it was worked over by a Senate Committee during two sessions. In the first session 75 amendments and in the second some 116 amendments were approved. The bill, with most Senate amendments included, was introduced in the House of Commons the next year, again amended by both Houses, and finally passed.⁹⁶ The Senate, which is not elective and need not spend its time satisfying a constituency, which does not contain in its ranks any ministers with administrative duties, and which does not have the same sort of heavy political atmosphere, is thus better suited for a degree of unhurried amendment of legislation of a technical type than is the lower house.

Of course, many amendments in the Senate are initiated by the Government, or at least assented to by it. The minister concerned may have had second thoughts after criticism of his bill in the Commons, or his officials may have discovered inconsistencies or errors. Curiously, it appears to be the anomalous character of the Senate as a nominated body in an otherwise popularly elected system of government which allows it to function so smoothly in this manner. Governments have come to recognize its work in this field more as an asset than an impertinence. As evidence of this, roughly 90% of Senate amendments are uncontested in the Commons, and many are accepted with gratitude.⁹⁷ The practice of the Senate of referring bills to standing committees where the minister and his officials

may appear and be heard facilitates revision on their initiative and with their consent. This is similar to the situation at Westminster.

The Committee System

If a parliamentary body of 102 members wishes to contribute meaningfully by revision of legislation to the process of government, it would not seem unreasonable to suggest that the formation of a system of select committees would be a useful, if not essential, condition. Even under ideal conditions, it would be a Herculean task to form a quorum and give appropriate attention to every bill which passes under Senate scrutiny, and, as has been observed in the case of the Canadian Senate, conditions are far from ideal.

Select committees (committees less in number than the Committee of the Whole), are of two kinds, Standing and Special. A Special Committee is normally nominated by the mover of a motion who wishes to have the Senate undertake a special inquiry. Standing Committees, however, are nominated by agreement with the Opposition by the Leader of the Government at the beginning of a parliamentary session, and sit for the entire session to consider a number of items. The Committee of Selection consists of nine members and always includes representatives from both parties and from each of the four sections of the country. Normally its recommendation for membership of the Standing Committees is accepted without question. Table I illustrates the number of Standing Committees in the Senate, classified according to function.

The main advantage of a select committee is that it can deal with a large or long-term problem with care and detail, identifying problem areas and suggesting parameters of new or remedial legislation, should such be required. As committee reports are purely expository

TABLE I
Standing Committees by Functions⁹⁹

A. Committees on the Internal Business of the Parliament or the Senate

| Committee | Number of Members |
|------------------------------|-------------------|
| Library (Joint with Commons) | 17 |
| Printing " " " " | 21 |
| Restaurant | 7 |
| Internal Economy | 25 |
| Debates and Reporting | 9 |
| Public Buildings and Grounds | 12 |

B. Committees on Private Bills

| | |
|-----------------------------|----|
| Standing Orders | 14 |
| Miscellaneous Private Bills | 34 |
| Divorce | 25 |

C. Committees Dealing Mainly with Public Bills or Inquiries

| | |
|------------------------------|----|
| Transport and Communications | 50 |
| Banking Trade and Commerce | 50 |
| Finance | 49 |
| Natural Resources | 36 |
| Immigration and Labour | 34 |
| Canadian Trade Relations | 34 |
| Civil Service Administration | 22 |
| Public Health and Welfare | 32 |

TABLE I
(continued)

| | |
|----------------------------------|----|
| Legal and Constitutional Affairs | 18 |
| Health, Welfare, and Science | 23 |
| Foreign Affairs | 23 |
| Banking, Trade, and Commerce | 23 |
| Internal Relations | 35 |
| Tourist Traffic | 25 |

and recommendatory, a select committee report is not hampered by members' misgivings about criticizing defined government policy. MacKay notes that in recent years, Senate select committees have produced a number of elucidative reports on the basis of which Governments have proceeded to draft legislation. A report on land use resulted in fresh legislative approaches to forest utilization and the regional handling of agricultural problems. Another report, on manpower and employment, resulted in new approaches to industrial organization and assistance programs. A joint committee report helped to persuade the Government to establish a federal ministry of consumer affairs. ⁹⁸

Committees are not, of course, "self-starting". Except for formal purposes such as electing a chairman, they meet only when matters are expressly referred to them by the Senate, or under its instruction or authorization, although standing committees are able to conduct continuing investigations into their designated subject areas. Also, an active chairman, or indeed any member of a committee, may stimulate committee activity by raising subjects of inquiry in the Senate and by having the matter referred to his committee as, for example, was done

in 1959 by Senator Wall, who succeeded in getting accepted a motion to instruct the Finance Committee, of which he was a member, to inquire into the threat of inflation in Canada.¹⁰⁰ To some extent, therefore, the activity of a committee depends upon its personnel, and particularly on the initiative of its chairman.

Of the Standing, as opposed to Special, Committees, Banking, Trade, and Commerce is the most active. In a one-year period preceding Campbell's study, it demanded more of the interviewed senators' time than any other Standing Committee (See Table II). Recently, the emphasis on business-and-finance related questions, as opposed to committee work centered on matters of a more general significance, has become less pronounced in favor of a greater emphasis on social-oriented problems. The Banking, Trade, And Commerce, and National Finance committees have lost some of the senators' attention. Most of the new emphasis on social question, however, has been channelled through special investigatory committees.¹⁰¹

Campbell argues that the Senate workload is becoming more evenly split between technical review of legislation, with particular interest in matters which concern the business community, and special investigations with a view to social and systematic reforms.

In Table III, speeches in the Senate related to General Social Significance were the most frequent among senators interviewed by Campbell. This category includes all topics related to broad social questions such as health, welfare, and science; cultural questions, national emergencies (e.g., the social conditions which brought about the emergency which called for the War Measures Act of 1970); and comments on the work of the special committees of Poverty, Mass Media, the Constitution,

and Science Policy. But if speeches related to business and finance are combined, it is seen that these concerns were aired thoroughly in the Senate as well. In fact, speeches on business alone easily outnumbered those made on matters relating to the other sectors of the economy, labor and agriculture. This appears to reinforce Campbell's observation that Senate consideration of legislative issues is divided between review of business and finance, and the study of broad social questions. Campbell believes that the first type of activity is an effort on the part of some senators to serve as watchdogs over Government legislation by challenging provisions that could harm certain segments of the business and financial community, or amount to poor business practice. The second type of activity, namely in-depth study, stems from reformism among senators.

Table II

Committee Meetings Attended, April 1970 - April 1971¹⁰²

| Committee | Avg. Attendance for senators participating | No. of senators participating | Total Attendance |
|--------------------------------|--------------------------------------------------|-------------------------------------|---------------------|
| Banking, Trade and Commerce | 8.65 | 25 | 199 |
| Constitution (Special) | 35.70 | 10 | 357 |
| Foreign Affairs | 7.30 | 23 | 100 |
| Health, Welfare and Science | 4.35 | 23 | 100 |
| Legal and Const. Aff. | 2.67 | 18 | 48 |
| National Finance | 2.29 | 14 | 32 |
| Poverty (Special) | 7.17 | 12 | 86 |
| Transport and Communication | 2.80 | 15 | 42 |
| Means | 8.87 | 17 | 129 |

N.B.: The inclusion of the Constitution Committee (Special) has tended to skew the means upward.

Table III

Speeches of Canadian Senators, April 1970 - April 1971¹⁰³

| Subject | Avg. no. of pgs. for senators participating | No. of senators participating | Total no. of pages |
|--------------------------------|---------------------------------------------------|-------------------------------------|-----------------------|
| Labor | 2.00 | 6 | 12 |
| Farm | 2.83 | 6 | 17 |
| Business | 4.29 | 35 | 150 |
| Regional Problems | 3.00 | 26 | 78 |
| Gov'tl. Structure | 4.55 | 11 | 30 |
| Foreign Systems | 5.75 | 8 | 46 |
| Law and Enforcement | 5.27 | 22 | 116 |
| General Social Significance | 9.70 | 49 | 475 |
| Parliamentary Procedure | 4.15 | 13 | 54 |
| National Finance | 3.86 | 21 | 81 |
| Means | 4.54 | 20 | 107 |

N=71

Those who are involved in work involving social reform may not be "reformers" per se, but they are concerned with problems that require new responses from government. Their work for the most part appears to consist of formulating proposals of the steps that could be taken if the problem area is going to be examined through new governmental action.

One of the more recently formed committees which concerns itself with issues of social concern is the Senate Committee on Science Policy. Prior to 1970, in the House of Commons, there had never been a debate on science policy as such and, reportedly, the "Cabinet Committee on Scientific and Industrial Research" had met only seven times between 1916

(when it was established) and 1972,¹⁰⁴ Since its formation in 1967, the Senate Committee, which has eighteen members-- at least a dozen or so who make active contributions-- has heard testimony from Canadian departments and agencies, groups, associations, and individuals in the provincial, university, and private sectors, and from many individuals from Canada and elsewhere. Senator Grossart contends that the members of the Committee have performed a useful task for the Senate and Parliament by

" . . . providing the first opportunity in Canada for members of the science community en masse to discuss with Parliamentarians in open forum their complaints and problems, vis-a-vis their relationships with the national government. Both the general and the learned press have given more attention to the work of the committee . . . than preceding years of our Confederation."¹⁰⁵

It would appear, then, that through its committees, the Senate has substantial potential to influence the content and direction of policy decisions at the initiation stage, and to a lesser extent, at the revisory stage of the legislative process. However, the Senate has been generally loathe to utilize this potential, especially if the problems concerned required consideration of alternatives which might be considered radical departures from current practices. Campbell illustrates this by recalling that the special Senate Committee recently investigating poverty in Canada experienced the embarrassment of having its key staff members resign during the writing of its report because they complained that the committee members were unwilling to consider or to make fundamental criticisms of the way in which Canada's political structure perpetuates poverty.¹⁰⁶ The resignations serve to illustrate the sort of constraints under which the Senate must labor. In theory, the Senate can provide a systematic and intensive airing of any and all controversial issues that

become manifest in Canadian society. In reality, such conservatism (senators, as professional politicians, tend to come from the top of the social and economic strata of Canadian Society), but also by considerations of what they feel the Government of the day is likely to find acceptable. Canadian governments, as alluded to earlier, do not by nature attempt to be innovative. The general tone of Canadian government and politics does not easily lend itself to proposals favoring drastic change, a fact of which the Senate is undoubtedly aware.

The Origin of Cabinet Ministers

One of the most important impediments to true political effectiveness in the Senate appears to be the modern practice of placing few or no senators in the Cabinet. Prior to 1920, one or occasionally two or three members of the Senate received portfolios in the Cabinet. But rarely, since the precedents set by Mr. MacKensie King in the twenties, has anyone but a single minister without portfolio sat in the Senate, as the Leader of the Government in the Senate.¹⁰⁷ Ministers tend to introduce most crucial legislation into the Commons, where they sit as members, while, as previously noted, the Senate has either to sit patiently or adjourn. There can be little doubt that the absence of ministers in the upper house tends to weaken the effectiveness of the Senate as a branch of the legislature. Information is not readily accessible through day-to-day inquiries or debates, and when finally secured it is usually ". . . stale and uninteresting . . . The desire for information is only a living thing when the information can be given in the time required."¹⁰⁸

Recently, there have been changes in practice and procedure which have at least partially overcome this diffidulty. One important step

which had been repeatedly discussed, occurred as early as 1947 when, on the initiative of the Leader of the Government, the Hon. Wishart Robinson, the rules were changed to permit a minister from the Commons to attend and take part in debate when a bill or other matter relating to his department originated in or was being considered by the Senate, a practice which is also used in the Irish Senate. In the few instances when a minister did appear, he was invited to attend the second reading of the bill when the principle was under discussion. But, overall, the results have proven disappointing, as there have been only seven instances since this practice has been utilized.¹⁰⁹

Other developments in practice, which did not require any formal change in the rules, have been more effective. It was already well-established practice forty years ago for the Leader of the Government to have in front of his desk an official or two from the department concerned to coach him on answers to questions on a bill in Committee of the Whole-- a practice long in vogue in the Commons when considering departmental estimates. Theoretically, these officials were not in the Senate as they were on the floor in front of the Government benches. This procedure, now obsolete, was not entirely satisfactory, as officials could not be questioned directly by member of the Senate, nor venture observations of their own.

This limitation, however, does not apply to procedure in a standing committee. According to MacKay, these Ministers and their officials can and do appear and may give evidence and answer questions. Over the past thirty years it has become standard practice to refer all public bills to one or another of the standing committees and to hear evidence from ministers and officials concerned and from unofficial interests who may

wish to appear.¹¹⁰ Indeed, on a good many public bills, appearance before a Senate standing committee is the only opportunity unofficial interests have to be heard. Advantage is often taken by ministers or officials concerned to propose amendments to their own legislation while it is before a Senate committee. There is little doubt that the practice of referring public bills to standing committees has greatly improved liaison between the Senate and the administration as well as giving the interested public further, if not the only, opportunities to be heard.

A third practice, instituted by the Hon. Senator Robinson, is that of giving individual senators the responsibility of explaining particular bills and of piloting them through the Senate. The Leader of the Government normally moves the second reading, and announces to the Senate that he is requesting a particular senator to explain the bill. The new practice has undoubtedly tended to increase interest in legislation, to encourage more specialized knowledge on government bills by individual senators, and to take advantage of the large amount of relatively unused talent, particularly legal talent, within the Senate. A senator selected to take charge of a bill is normally fully briefed by the minister or senior officials of the department promoting the legislation.¹¹¹ There is little doubt that government legislation is more competently handled under this method.

Another practice sometimes resorted to by a committee is to familiarize itself with the text of a bill which has been initiated in the Commons but has not yet emerged from there. The reason is simply to relieve the situation which normally occurs at the end of the session when the Senate is faced with a glut of business which may

prevent adequate consideration of particular bills. The practice is of course quite informal, and is not regularly followed, but on occasion it has proven useful.¹¹² It can be seen then, that within the very definite and major limitation of the lack of ministers with portfolios sitting in the Senate, due to both precedent and the fact that ministers usually prefer to sit in the major house of initiation, the Senate has established and adopted its rules of procedure and has, perhaps, partially succeeded in overcoming its disadvantages.

Conclusion

The Senate has been a check, although a rather intermittent one, on questionable legislation; whatever its legal powers, its "veto" has in fact been a suspensive rather than an absolute one. It has been much more useful as a revising chamber. In recent years, it has become considerably more useful in the initiation of certain types of legislation. It holds debates occasionally and conducts inquiries on broad public issues. Unquestionably it could be more active in these fields, but it does not command the public respect which would lend to its debates and reports, as well as to its revision of legislation, the moral authority essential to the exercise of an influential role in a democracy.

Attendance is a frequent target of critics. It is not unusual, especially in the early part of the session, for the Senate to have barely a quorum, which is only fifteen, and even late in the session attendance is liable to be small. For MacKay, this arises in part from the tendency of some senators to take their responsibilities lightly, especially if they have active business or professional interests remote from the capital.¹¹³ Perhaps also, the feeling that the Senate can do little effective in any case tends to dishearten some of its members. Senators

themselves sometimes complain of the irresponsibility of some of their colleagues. Nevertheless, it is doubtful whether the necessary work of the Senate actually suffers from non-attendance. In any deliberative body, effective work is done by a responsible and interested few. A body of fifteen senators who want to work is more attractive than one of 102 who would prefer not to bother.

Reform of the Senate has traditionally proven to be a topic of lively debate. In 1968, these debates became the subject of discussion in Queen's Quarterly, a periodical which is devoted to the discussion of Canadian politics. In the Spring issue, E. D. Briggs comments on Kunz' thoughts regarding reform:

"...two elements would appear to stand out as being of paramount importance: the manner and speed with which reforms are instituted, and the effects extensive alterations might have on other political institutions and practices. In both cases it seems to be suggested that there are very real, and rather strict limitations which practically exclude the reconstructionist from the outset (primarily the fact that various organs of the parliamentary system are interconnected and interdependent; it is impossible to alter one without affecting the others.)"¹¹⁴

Briggs argues that some dislocation would result from any change, so that it is not a matter of whether to reform, but the degree of reform which would be most beneficial. One of the paramount principles of parliamentary government is, after all, that political change should evolve so slowly as to be almost imperceptible, and should occur without any alteration of outward forms and symbols. However, the Senate has never been held particularly high in public esteem, so that Senate reform could be accomplished on a much wider scale than could, say, reform of the Commons.¹¹⁵

Briggs dismisses outright the idea of a popularly elected Senate, as it

would result in a rivalry between two popular chambers with a cabinet trying to answer to both. But if the Senate is to avoid imitation of the House of Lords it must not fear to examine "foreign elements" simply because they are foreign. For example, Kunz briefly considers patterning the Canadian Senate after the Federal Republic of Germany's Upper House, The Bundesrat. The Bundesrat lends itself as an interesting example for a couple of reasons: first, the West German constitution is of relatively recent origin, and as such it can be considered to be designed for the present age. Secondly, and of greater importance, it is designed for a federal state. As such it should have certain advantages over a system which has evolved from a unitary state and transplanted to a federal and multi-racial one. However, Kinz dismisses the idea on the grounds that the government of Canada is "similar in principle to that of the United Kingdom," particularly in regard to responsible cabinet government. Kunz contends that the Senate should not be expected to do more than it does in the field of provincial representation, and that giving provincial politics a formalized and institutionalized expression in the parliamentary framework would "unduly complicate, disturb, and probably block the operation of the central legislature."¹¹⁶

Briggs replies that any substantial alteration would be "disturbing" insofar as it alters established routines. The question, then, is whether a Canadian Bundesrat (or House of Provinces) would unduly complicate the central government. To begin with, the upper house of the German Federal Republic is a direct instrument of federalism; it is composed of representatives of the federated units (Länder) and these representatives are not merely elected by the Länder governments, but are usually themselves members of their Land cabinets. As regards legislation, it acts substantially as any legislative body is expected

to act, but with the important qualification that the constitution specifically places limitations on the scope of its powers. Specifically, it is given special responsibility for those matters which are considered to be of particular concern to the Länder, and over these matters it has an absolute veto. With respect to all other matters, it has the power of review and amendment, but it cannot bind the Lower House.¹¹⁷

Certainly, as Kunz implies, it was easier one hundred years ago to divide powers into federal and provincial "heaps". But Briggs argues that while these "heaps" were supposedly defined by the BNA Act, they have progressively lost their shape over the years. It is now possible for the federal government to proceed on a whole range of matters by lending only a reluctant ear to provincial voices.¹¹⁸

In other words, Kunz' feared "complications" already exist and it is difficult to see how they would be increased merely by transforming the Senate into a formal and much more efficient instrument for federal-provincial consultation, along Bundesrat lines. A "House of Provinces" would become a second chamber of deliberately increased importance, and it would no longer be possible to ignore or belittle it as has been done by past Governments. But upper house members would not answer to the same electorate as the Commons, so that the upper house would not be able to claim a mandate rivalling that of the popular chamber. The cabinet, then, would remain responsible solely to the House of Commons.¹¹⁹

Other benefits which could result might possibly include the fact that such an arrangement would represent party strength more accurately, as parties other than the two national parties (such as the Social Credit and New Democratic Parties) control several provinces. Also, it would appear

likely that more able persons might be appointed to the Upper House. While there may be many senators of ability currently in service, Briggs notes that, generally, ability is not the main criteria for appointment. Another benefit which could result would affect the nature of amendments to the British North America Act. As it now stands, the provinces are unable to agree to the amendment of various sections of the BNA Act. The possibility of giving the "House of Provinces" a veto over future amendments might be considered. Additional safeguards would be built in, if necessary, to protect the interests of French Canada.¹²⁰

More recently, a private members' bill introduced into the House of Commons suggesting the abolition of the Senate touched off another debate concerning senatorial reform. However, nearly all participants in the discussion preferred retention of the present Senate to abolition.¹²¹

The strong constitutional position of the Senate with respect to legislation generally would, technically, enable it to bring the machinery of government to a standstill at almost any time. Except for the very qualified means of "swamping" by the appointment of four or eight additional senators, there is no legal means of breaking a deadlock between the Houses. Yet the fact remains that the Senate has never brought a Government to a standstill. MacKay notes that no Government, no matter how great its victory at the polls, has an unlimited mandate, although Governments are often inclined to behave as though they have. On the other hand, the Senate has no direct claim to political authority, because it is democratically unrepresentative. The only means of attaining a seat in the Senate is if a given Government of the day desires it. Furthermore, the "life term," even though modified in

1965 to a mandatory retirement age of 75, tends to make the Senate even more anachronistic in the context of a representative form of government. Under these circumstances, then, the performance of its constitutional responsibilities as an upper house, of taking a "sober second look" at legislature, may raise delicate issues. Its legal powers, then, are to some extent a handicap; when it resists a Government's measure it is likely to be accused of acting in the interests of the defeated party and of taking refuge behind its legal defenses, rather than of basing its decision on the merits of the issue. MacKay paraphrases Sydney Low's famous dictum about the unreformed House of Lords-- "Its strength lay in its weakness"--that in the case of the Canadian Senate, its weakness, to some extent, lies in its legal strength.¹²²

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CHAPTER III
THE AUSTRALIAN SENATE

Introduction

"Two sieves are better than one."¹²³

Writing in 1967, J. R. Odgers outlined five functions by which he felt the Australian Senate might best serve the nation:

1. To safeguard the interests of the States in a federal system of government, i. e., to act as a States' House (representative function);
2. To act as a House of Review with the responsibility of expressing second opinions in relation to legislative proposals initiated in the House of Representatives, and,
3. to itself initiate non-financial legislation, as the Senate sees fit (legislative functions);
4. To probe and check the administration of the laws and to keep itself and the public informed; and,
5. To maintain an oversight of the Executive's regulation-making power (through the use of a committee system and by the practice of placing senators at the head of certain Ministries).¹²⁴

As can be seen by the functions placed in parentheses, Odgers' feelings regarding the Australian Senate correspond closely to the general functions of the Senate in Canada and, indeed, of the second chambers in this study. This will facilitate the use of the same format as in previous chapters.

The upper house of Australia differs from its British and Canadian counterparts in that it is a political institution established by a

written constitution, much the same as the Senate of the United States. As such, many of its powers are enumerated, and the possibility of encroachment by the lower house or the executive is diminished. Moreover, not only are its powers enumerated, they are in practice far greater than those of the Senate of Canada. As we have seen the Canadian Senate's power of "veto", which in theory is equal to that of the Commons, is, in practice, a suspensive rather than an absolute one. In Australia, with a Senate based on popular election, the power to veto proposed legislation is a very real one, and is exercised.

Crisp writes that federation of a sort had been achieved in Australia as early as 1885, when an Act of the British Parliament authorized a very limited union of the Australian Colonies in the form of a Federal Council. The Council had authority over such matters as general defenses, quarantine, uniformity of weights and measures, recognition of marriages and divorces, and such other matters as might be referred to it by two or more colonies. But, in practice, the union under the Federal Council was a weak one, roughly comparable to the period of the American Confederacy prior to 1787. Although its powers clearly foreshadowed those of the future Commonwealth, the Council was deliberately disregarded by the federal movement proper from 1890 onwards, and in 1899 passed into oblivion.¹²⁵

In 1890 a Conference of colonial Premiers and Ministers in Melbourne discussed the suggestions for full federation which Sir Henry Parkes, Premier of New South Wales, had propounded in 1889. As a result, a Convention was held in Sydney in 1891 attended by delegations from the six Australian colonies and New Zealand, appointed by their respective parliaments. A draft Constitution was drawn up for the approval of the seven

parliaments and for enactment thereafter by the Imperial Parliament. The New South Wales Parliament failed to approve the draft and the whole issue was substantially dropped in Government circles for two or three years.

After three years of intense campaigning by various groups and individual politicians favoring federation, a further convention met, successively, in Adelaide, Sydney, and Melbourne in 1897-8. Queensland, at the insistence of its Conservative Upper House, and New Zealand were unrepresented. A draft Constitution was drawn up and referred to the various electorates, a direct popular vote on the constitution having been agreed to at a conference at Hobart in 1895. More negotiations followed, and a revised draft was submitted to the people, including Queensland, in 1899. All of the colonies, with the exception of Western Australia, approved it and sent a delegation to Britain to secure its passage through the Imperial Parliament. The Bill for federation passed the British Parliament and Western Australia held a referendum, which decided in favor of union. The Commonwealth came into being with all six colonies as members on January 1, 1901. New Zealand opted for independence.¹²⁶

The Australian Constitution, then, is as much a treaty between formerly autonomous colonies as it is anything else, and the role of the Senate as guarantor of states' rights should not be overlooked. The powers of the Australian Senate, for example, its ability to reject all classes of legislation with the exception of the Appropriation Bill (to which it may still make recommendations), were the price of federation. They were given to the Senate in order to ensure that the rights of the smaller states could be protected.¹²⁷ In its most general terms the

"Small States" or "States' Rights" view was concisely put to the 1891 Convention by Sir John Cockburn:

"We know that the tendency is always to the center, that the central authority constitutes a vortex which draws power to itself. Therefore, all the buttresses and all the ties should be the other way, to enable the States to withstand the destruction of their powers by such absorption..."¹²⁸

The central or federal government, it was argued, should therefore be given as few powers as possible.

Central to the position of the "States' Rights" spokesmen was the constitution of the Senate. It must, they argued, be founded on the equal representation of the States and on the equality of status with the lower house in respect of powers over all classes of legislation except the Appropriation Bill. Thus, the "States' Rights" men and the Conservatives joined hands in demanding a strong Senate. The supporters of "States' Rights" wanted not only a guarantee to the States of the powers specifically or residually theirs, but equality of State representation in the Senate in order to exercise the fullest control over the powers enumerated as national. To this end, Sir Samuel Griffith, then premier of Queensland, who usually expressed strong "States' Rights" views, was quite prepared to abandon the British principle of responsible government, that is, the form of parliamentary government where the executive is responsible solely to the lower chamber from which it originates. He argued that, since responsible government had never been "...written into the British Constitution, Australians need weep no tears and would certainly be none the worse for a sudden break with the tradition in which they had all been brought up."¹²⁹

The Conservatives, like conservatives elsewhere, felt the need for a strong upper house as a chamber of review. Alfred Deakin expressed the Conservatives' view concisely when he stated at the 1891 Convention,

"...the powers entrusted to the Senate should be those powers which have always belonged, under responsible government, to a Second Chamber, namely the power of review, the power of revision, and the power of veto limited in time."¹³⁰

During debates regarding the Senate, members of the Constitutional Convention had in mind the constitutions and records of the Upper Houses of the Australian Colonies - houses which the Liberals considered undemocratic and the Conservatives regarded as "the only bulwarks against the coming of Socialism." Also, the role of the House of Lords in the British Constitution, which was to be more precisely defined in the Parliament Act, 1911, was not forgotten. Finally, and above all, the model of the United States Senate, at that time indirectly elected by the State Legislatures, was constantly quoted and debated.¹³¹

However, Crisp notes that, from the outset, it was plain to the delegates that if the Federal Constitution was to receive either the formal approval or the lasting loyalty of the majority of the Australian people, it could not primarily or obviously serve the economic interests of those who stood against the popular will, no matter where that will might lead. This was clear both to the liberal champions of a Senate with powers coordinate with the lower house, and to those who acquiesced to a Senate with equal State representation for the sole reason that it was an element in the price of union.¹³²

Cormack contends that the Senate, which is composed of ten popularly elected members from each of the six states, has guarded its nearly equal legislative powers with vigilance. As an example, he cites an instance in the early years of federation when it insisted upon due recognition, in the format of Supply Bills and in the Governor-General's speech at the opening of each session of Parliament, of its role as an

equal partner in the grant of supplies. More recently, the Senate successfully opposed proposals for a division of the proposed expenditure in Appropriation Bills in a manner which was considered to seriously curtail the Senate's power of amendment (A fuller discussion will follow in the section on legislation.). In 1967, a small group of Senators successfully organized a campaign which resulted in the defeat of a proposal supported by the major parties to alter the constitution so as to enable the House of Representatives to increase its membership without the necessity for a proportional change in the size of the Senate. Throughout the history of federation, the Senate has asserted its right to "press" requests on those financial measures which, according to S. 53 of the Constitution, it is debarred from amending.¹³³

It can be seen, then, that the Senate of Australia is hardly a moribund institution.

Representative Functions

The Australian States are represented equally in the Senate, with six senators from each state until 1949, and ten thereafter. Senators hold six-year terms, and half of each State's seats are subject to election every third year. The Senate was elected under a simple majority system until 1919, under preferential voting until 1949, and since then has operated under proportional representation. Albinski remarks that, until the advent of proportional representation, the election of senators in what corresponded to at-large elections created "incredible distortions". At one time, for example, the Senate's party composition consisted of 35 non-Labor senators, with a single senator from Labor. At another time, only three non-Labor senators sat in the Senate.¹³⁴ Labor and non-Labor electoral strength is not markedly different state-by-state. The

institution of senatorial proportional representation has, then, allowed senatorial delegations to become quite evenly balanced, and the Senate has acquired a close party balance. PR has also given a few independents a chance to gain Senate seats, and has provided the splinter Democratic Labor Party with its only federal legislative representation, with five senators in 1970,¹³⁵ although that total has been somewhat reduced recently.

The mechanics of proportional representation work in the following manner: in determining the results of Senate voting, a quota is arrived at by dividing the total number of votes by one more than the number of senators to be elected and adding one to the result. A candidate obtaining more votes than the quota is elected and his surplus votes, those in excess of the quota, are transferred to the continuing candidates in proportion to the next preferences indicated on his ballot. If at any time no candidate has a number of votes equal to the quota, the candidate with the fewest votes is excluded and the votes transferred until one candidate secures the quota and is elected. The process is repeated until all the required number of candidates is elected.¹³⁶

For Albinski, the political impact of PR has been two-fold. In the 1960's, the combination of nearly equal Australian Labor Party and Liberal-Country Party representation, and the presence of independent and DLP senators, spelled the loss of Government Senate control, regardless of the party in power. This enhanced the Senate's bargaining power and forced concessions from the Ministry. Second, Senate PR has been a godsend for the DLP. Its Senate foothold and forum, its ability to juggle the balance of power in the Senate and, therefore, to affect the outcome of certain public policies, has tremendously enhanced the DLP's visibility as well

as its credibility as a political force. Given its standing in the Senate, the DLP can claim that its national role is not purely negative, an image which it has carried since it split off from the ALP in 1954-55.¹³⁷ Thus, it can no longer be said with accuracy that the DLP has intended solely to deny control over the lower house and the Ministry to the Australian Labor Party. Its Senate status has shored up its national credibility which has helped it maintain a voter following that is sufficiently large and committed to the allocation of second (if not first) preferences in House elections to help to continue the ALP's presence in the so-called "political wilderness,"¹³⁸ a presence which was broken for the first time in over twenty years in 1973. It is conceivable, then, that had PR not been adopted in the Senate, that in the 1960's the Australian Labor Party might have gained a House majority and thus governed Australia.

But is the Australian Senate truly a "State's House," as envisioned at the time of federation, or has it evolved into an extension of the party politics and government of the lower house? In other words, has the national party system in Australia weakened the Senate as a spokesman for the States?

As early as 1891, argues Crisp, Cockburn had foreseen the possibility of a party future for the Senate, yet in 1897 he still found it expedient to seek election to the Second Constitutional Convention with arguments such as the following:

"The Senate, or Council of States, in which all the colonies, large or small, have equal representation, must have powers co-ordinate with and in no way inferior to the House of Representatives in which representation is based on population. Doubtless majorities should and will rule, but there is every reason why a majority of people in South Australia should not be overruled by a majority of people in New South Wales and Victoria..."¹³⁹

Crisp insists that, in accepting the final provisions for the constitution, status, and functions of the Senate in 1898, the individual members of the Convention had in their own minds very different pictures and hopes of what it was to be and do. Most of them made the mistake of believing that their interests and perceptions in 1898 would be much the same for those men and women who would elect senators or be elected as senators in the years to follow. But once union was complete and national economic policies were laid down, few people ever came to the Senate with the degree of provincialism in their thinking which was so evident in so many members throughout the Conventions.¹⁴⁰

Crisp believes that senators do act as party, rather than State, spokesmen. This is due to the fact that senators are elected from larger, State-wide electorates by the same adult suffrage control over every senator who desires re-election. The main reason for this, he believes, is that,

"...no candidate can hope to make himself personally known in so vast an electorate, and in consequence the party machine rules all....The results of this evil have been further aggravated by reason of the fact that none of the parties has shown any interest in using the Senate nomination to return to Parliament outstanding personalities. Instead, it has been the reward of the 'good party man'..."¹⁴¹

This, of course, suggests that the parties have tended to regard the Senate as a secondary chamber.

As an example of overt party influence in the Senate, Crisp cites Senate Standing Order 36A (Regulations and Ordinances Committee), which was adopted on March 11, 1932, and amended in 1937. The order acknowledges the party make-up of the upper house by providing that nominations to the Committee be made by the Leader of the Government and the Leader of the Opposition in the Senate.¹⁴² But Odgers sees this point of view

as a mistaken one. He argues that when a need is shown, the Senate does indeed function as a State's House.

During approximately the first thirty years of federation, the Senate, with the political parties enjoying a traditional free vote on tariff matters, was very active in protecting State interests in this field. In more recent years, he notes, there has been little amendment in the Senate of tariff proposals due in large part to the early work done by the Senate and the subsequent operation of the Tariff Board.¹⁴³

On other issues there is also evidence that, when the need arises, State interest will triumph over party interest. For example, in 1939 a Gold Tax Bill was introduced by the Menzies Government to impose a tax on gold equal to 75% of the price in excess of £A 9 an ounce. That bill was rejected in the Senate on the second reading on September 20, 1939. Western Australian senators objected to the measure on the ground that the proposal would retard the expansion of the gold mining industry in Western Australia; the voting was 16 ayes and 16 noes, two of the three Government members from Western Australia voting with the Labor opposition (the third Government member from Western Australia was a Minister, and perhaps considered himself bound to support the Government). A second Gold Tax Bill was introduced, which passed into law. Under the new bill the tax was reduced from 75% to 50%.

Referring to the Senate's performance on the gold tax, Senator Sheehan (Labor, Victoria) told the Senate Select Committee on the Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill of 1950 that, during the regime of the Lyons Government (1932-39), "the Senate did gang up from the States' point of view." He continued:

"On that matter there was a division even in the Labor

Party, which called a special meeting to consider it when the matter was being discussed in the Senate...Eventually, the Labor caucus decided that Labor Senators were to have a free hand and could vote in accordance with what they thought was in the best interests of their respective states."¹⁴⁴

It can be seen, then, that States' Rights can and sometimes do place restraints on party politics in the Senate, particularly in those cases where State interest is able to dictate a free party vote.

However, it is not only in legislative matters that the second chamber discharges its functions as the keeper of State interests. One example of this is Question Time. An observer in the Senate during Question Time is able to hear senators from both sides of the House questioning Ministers on a wide range of matters of public interest and an analysis of these questions reveals a strong State element. Of course, it can be argued that such matters are just as easily attended to by the members of the lower house; however, not unlike the Canadian case, and perhaps popular chambers everywhere, the House of Representatives in Australia is much more occupied with the problems and demands of its constituents, while senators are not subject to the "beck and call" of electors (due in large measure to the much larger constituencies of the senators). As such, the Senate has more time to devote to the consideration of broader questions of general state interest, and to the advancement of such causes.¹⁴⁵

The current composition of the Senate, then, is to a large extent influenced by the national parties which, according to Crisp, are regulated by a class basis. And while it may be true that a class "in one State may more likely be readily linked to those of the opposite class in the same state,"¹⁴⁶ the history of the Senate has shown it as a guardian of the federated units when the need arises. As such, it can be stated that federation appears to have played a role in the establishment and

continuance of the power of the Senate in the Australian system of government. Furthermore, the popular basis of Senate elections by proportional representation has freed it from any charges of being "undemocratic" along Canadian lines. The Senate does have a popular mandate, even though it may not be as recent as the last election in the House of Representatives. These federal and representative factors, then, have helped to give the Senate a substantial role in the legislative process of the Australian Parliament. Just how important this role is, and specifically in what areas, is to be examined in next section.

Legislative Functions

In the Australian Parliament, as in most of its counterparts, bills may be classified into two types, Public and Private Bills. A Public Bill is one dealing with matters of public interest, proposed by the Government of the day. None have yet been introduced in the Senate, but such bills would be processed in like manner to Private Bills, except that in the case of the latter, the bill would have to be founded upon a petition of the interested parties. A Private Member's Bill, like Public Bill, deals with matters of general interest, but is proposed by a member in his private capacity and not as a member of the Government. In other words, the Bill is not sponsored by the Government.

Public Bills may be further grouped into two categories-- routine legislation and money bills. The Senate has equal power with the House House of Representatives in respect to all proposed laws, except as to money bills, where the Senate's power is subject to certain restrictions.¹⁴⁷ Odger notes that writers on bicameralism stress

the practice in constitutional forms of government of granting powers in financial matters to upper houses in proportion to their elected or nominee character.¹⁴⁸

Except for the origination of money grants and tax measures, the Australian Senate is invested with powers which, in effect, are equal to those of the lower house. It has the full power to veto and, in respect to money bills which it cannot amend, the Senate has the right to make and to press requests to the House for amendment.¹⁴⁹ There is a very real difference between the power of amendment and the right to request an amendment. According to Odgers, the vital distinction is that, in the case of amendment, the Senate actually alters the form of the bill and it is then left to the House to accept the bill as amended or lose it. In the case of a request, the Senate does not alter the bill, it merely suggests an alteration. If the request is not agreed to by the House, the Senate is faced with the choice of either dropping its request or vetoing the whole bill. The Senate, however, is generally unlikely to veto an Appropriation Bill for a huge sum, such as \$2,000 million, simply because it objects to one item. To do so would result in bringing the Government to a standstill, which is simply unrealistic. Thus, so far as annual Appropriation Bills are concerned, the veto power is, in practice, largely an empty power, and for that reason the request power has little strength. It is the power of amendment, then, more than any veto power, which proves the real strength of the upper house.¹⁵⁰ The sort of bills over which the Senate possesses merely the power of request include bills imposing taxation and bills which appropriate revenue or moneys for the ordinary annual services of the Government.

Over the last thirteen years, Government parties have operated

without a majority in the Senate. With the party composition in the Senate so evenly balanced, it has become essential that the Government, in preparing its legislative program, take into account the reception its proposals are likely to meet in the Senate; and it is inevitable that the minority elements in the chamber will wield an influence. The fact that the Government has been able to function for the past decade without a majority in a chamber as legislatively powerful as the Senate speaks, as Cormack argues, of the responsible attitude which allows the Senate's leaders to attempt to seek compromise solutions if disagreement becomes unavoidable.¹⁵⁴

Table IV

| Party Divisions in the Senate in 1972 ¹⁵³ | |
|------------------------------------------------------|----|
| Government (Liberal-Country Party) | 26 |
| Opposition (Australian Labor Party) | 26 |
| Australian Democratic Labor Party | 5 |
| Independents | 3 |

In his article on the Senate, Cormack states that it is his belief, as President of the Senate, that the Senate is performing its function as a house of review "probably as effectively as its present procedures and practice permit it do do."¹⁵⁵ With this in mind, he outlines two areas where he believes improvement could be achieved.

The first is in relation to the end-of-session rush of legislation. As has already been seen, such a problem is not peculiar to the Senate of Australia. The Canadian Senate and the House of Lords both suffer from this, and those upper houses to be considered in subsequent chapters are not unaffected by such practice. Cormack claims, quite correctly, that the

solution to this problem does not rest with the Senate alone. Indeed, no chamber can possibly claim to be doing its work of review as effectively as it might when it is faced at the end of a period of sittings with a mass of urgent legislative proposals to be disposed of. This is a problem which has concerned the Senate from its earliest years, and has become increasingly severe as time passes. As early as 1941, Senator Keane declared:

"I protest against the closing stage of the Session being used by the Government to bring before the Senate fifteen bills, including that now under discussion, which seeks the sanction of Honourable Senators to the raising of £50,000,000. No opportunity has been given to the Honourable Senators to examine the Bill....Fifteen bills have been hurled at the Honourable Senators since four o'clock this afternoon. The manner in which ministers are handling the business of this chamber is an outrage.¹⁵⁶

There has been a great deal of discussion by both parties on this subject in recent years, and Cormack suggests that there finally may be some corrective action taken. Shortly after assuming office in 1972, Gough Whitlam, until recently Prime Minister, indicated that he would consider the problem as one of government inefficiency requiring correction.¹⁵⁷ Recently, Mr. Whitlam's Labor Party was defeated in a Parliamentary election called under extraordinary circumstances. Whether the new Prime Minister, Mr. Fraser, of the Liberal Party, will fulfill Mr. Whitlam's promise is not known.

The second area of desirable improvement lies in the examination of the bills themselves. Crisp writes that he was in the Senate when the Bankruptcy Bill was first introduced, in the late 1940's:

"Senator Pearce, most painstaking in preparing his brief, laid himself out to give a good explanation of the consolidation of the Bankruptcy Acts of the States. Only three of us bothered to listen to him. Finally, Senator MacDonald of Queensland drew attention to the state of the House, and later on he was hauled over the coals for being so officious as to cause the quorum bells to be rung. It has since been shown that this particular bill was ill-digested. It was my experience

during my short term in Parliament that not more than one-third of the thirty-six members of the Senate could be relied upon to perform legislative duties conscientiously."¹⁵⁸

Cormack is far less critical, although he concedes that with so many pressures on the Senate timetable - from the increasing volume of Government Business, the growing number of items under Business of the Senate which are accorded certain priorities over Government Business (he does not specify these items), and last, but not least, in the eyes of the private Senators, General Business - the Senate may not be able to continue to deal effectively with all bills in Committee of the Whole. Recently, there have been signs of change, particularly in regard to the expanded system of committees in the Senate. For example, a Private Member's Bill, the Death Penalty Abolition Bill, introduced by the Opposition Leader, was in 1971 referred to one of the more recently formed Senate Standing Committees by motion of the Government, and has since been reported upon, amended, passed by the Senate, and transmitted to the House of Representatives for concurrence.¹⁵⁹ The committee system in the Australian Senate will be considered in greater detail shortly.

Section 57 of the Constitution provides the machinery by which legislative disagreements between the two houses may be resolved. The so-called "deadlock provisions" apply only to Bills originating in the House of Representatives. Under the provisions, if the lower house passes a Bill, and the Senate rejects or fails to pass it, or passes it with amendments to which the House will not agree, the Governor-General, on advice of the Prime Minister, may dissolve both Houses simultaneously. This is the so-called "double dissolution" provision. If the disagreement continues after the ensuing elections, the Governor-General, again acting on the advice of the Prime Minister, may convene a joint sitting, and if the proposed law

"is affirmed by an absolute majority of the total number of the Members of the Senate and the House of Representatives, it shall be taken to have been duly passed by both Houses of Parliament, and shall be presented to the Governor-General for the Queen's assent.¹⁶⁰ Because the Senate in Australia is confident of its representative nature, and because of the fidelity with which party lines are observed, there have been several major confrontations between the two Houses when Governments have faced hostile Senate majorities. When a Labor Government was in office during the early years of the Depression, the non-Labor Senate repeatedly scuttled bills, either by outright rejection or, more frequently, by insisting upon amendments which were unacceptable to the Government.¹⁶¹

The double dissolution amendment can be considered in different ways. Prior to 1974, the procedure had been invoked twice, by a Labor Government in 1914, and by a Labor-Country Party Government in 1951. In both instances, the disputed legislation was what Albinski considers of "quite basic importance," i. e., preference for Trade Unionists in Commonwealth employment, and a banking bill, respectively, indicating that on certain occasions the Senate has the fortitude to confront the Government. Subsequently, in both the 1914 and 1951 elections, complementary House and Senate majorities were produced.¹⁶² The absence of either an L-CP or a Labor Senate majority in recent years has produced a situation in which the DLP and a few independents have been able to compel shifts in Government policy, although until 1974 they had stopped short of forcing a deadlock and precipitating a double dissolution which would have been inconvenient to both the DLP and the Government (Labor) parties. However, on April 11, 1974, the Governor-General on advice of the Labor Government, dissolved the two Houses simultaneously. In the proclamation by which he

did so, he stated that the conditions empowering him to take such action had been fulfilled in respect to six proposed laws, which he listed. They included three electoral and two health insurance measures, and a proposal to set up a Petroleum and Minerals Authority. The elections were held on May 18 and returned the Whitlam Government with a reduced majority in the House (66 out of 127 seats) and again without the numbers to control the Senate (29 out of 60 seats). Parliament resumed on July 9. The disputed legislative proposals were again passed by the House, and again rejected by the Senate.¹⁶³ A joint session of both houses was, therefore, summoned.

All 60 Senators and 127 Members attended the joint sitting. The Government could not afford absentees as its Members of Parliament totalled 95 - 66 Members of the House and 29 Senators - and the absolute majority required for passage of each of the proposed laws was 94 votes. Ultimately all six of the proposed laws were passed, the affirmative votes ranging between 95 and 97. The first speaker called was the Prime Minister, Mr. Whitlam, who began his speech by stating the Government's attitude in regard to the sitting:

"This is an historic and unprecedented, and sobering occasion....For, momentous as the sitting is, the reasons for it are not a matter of pride. It has come about because of the repeated refusal of the Senate to pass legislation which has been approved by the House of Representatives. Let it be understood that this joint sitting is a last resort, a means provided by the Constitution to enable the popular will - the democratic process - ultimately to prevail over the tactics of blind obstruction."¹⁶⁴

The second speaker was the Leader of the Opposition, Mr. Snedden, who expressed the contrary view of the Opposition:

"The Prime Minister...in opening this historical sitting said that it had been caused by the repeated refusal of the Senate to pass some bills. That is certainly true. But the constructions put upon it by the Prime Minister was that the Senate and the Opposition were

resolved to obstruct the passage of legislation. We are not resolved to obstruct legislation. We are resolved not to let legislation go through the House of Representatives and the Senate which we believe is bad in principle and which would detract from the constitutional principles of parliamentary democracy. When such legislation is put before either House of Parliament, we will do all we can to prevent its passing, and if that is what 'obstruct' means, then the word has found a new meaning in the dictionary."¹⁶⁵

The validity of certain of the six Acts affirmed at the joint sitting and subsequently assented to has since been made the subject of appeal in the High Courts.¹⁶⁶

As alluded to previously, the double dissolution was only the third in Australian history, and the double sitting unprecedented. Albinski claims that non-Government Senate majorities are mindful that a double dissolution in Australian politics is not merely a piece of theory. The very real prospect of losing a specially called election can, in itself, deter a nongovernment controlled Senate from overstepping itself although, conversely, a Government unsure of its own public popularity may wish to avoid a head-on clash with a hostile Senate and a double-dissolution.¹⁶⁷ However, in 1975, the Senate played a key role in the unprecedented unseating of Labor Prime Minister Gough Whitlam by Governor-General Sir John Kerr. Elected as Australia's first Socialist Prime Minister in 23 years in 1972, Whitlam had been plagued by an annual inflation rate of 15% and the highest unemployment since the Depression. In addition, his Cabinet was involved in a scandal involving the attempt to raise a loan to Arab governments without informing Parliament. As already noted, while the Labor Party had gained a majority in the lower house, no one party controlled the Senate. The Leader of the Opposition Liberal-Country Party in the House, Malcolm

Fraser, was able to forge a coalition with senators of his party and the DLP and succeeded in withholding Senate approval of the Labor Government's budget. It will be remembered that, while the Senate cannot amend the budget bill, it can make recommendations to it, and has the power to veto it. Fraser then offered to pass the budget in exchange for a promise of general elections in June. Whitlam rejected his proposal, and was about to request that the Governor-General call a snap election for half of the Senate seats, in hopes of gaining control from the L-CP, when he was informed by the Governor-General that his commission had been withdrawn. Governor-General Kerr insisted that a new Government and new elections were the only means left to dissolve the deadlock. By dissolving the Whitlam ministry, Governor-General Kerr had used a legal power which had not been touched "...in two hundred years...in a Westminster-style democracy - since George III sacked Lord North to be exact," according to the former Prime Minister. On December 13, elections were held and Fraser's party won the necessary majority in the House of Representatives to form a Government.¹⁶⁸

Whether the recent events of a double dissolution and sitting, and the dissolution of a popularly elected Ministry by a "pre-democratic" vestige of the Monarchy in Australia is meant to signify a trend toward increasing instability in Australian politics is as yet unclear, and perhaps a proper subject of study elsewhere. However, it must be noted that, in the case of Mr. Whitlam's dismissal, the Senate certainly possessed the constitutional authority and the legislative power to make it a force to be reckoned with in Australian politics.

The Committee System

As has been observed, the Australian Senate is very much a party chamber. Although historically there has been little Government enthusiasm for the building of standing committees in either the Senate or the House, in the case of the former the matter eventually passed out of the Government's hands. According to Albinski, it was the scattered party situation in the Senate, the fact that no one party could control a majority, which led to the reforms of 1970-71. ALP, DLP, and Independent Senators, all representing persuasions not included in the Government of the day, were especially energetic in pressing for a major committee system.¹⁶⁹ Some inquiries by Senate select committees had also made it more apparent to senators that they could perform important services through committees if given the chance. Albinski further suggests that the growth of Australian select committee investigations has helped the confidence of the chamber and of its individual members. Only seven select committees sat before World War II. There were a number after the war, including one in the 1960's which prepared the first thorough investigation of Australian television production. An investigation of water and air pollution helped to activate the environmental issue in the country, as well as the beginning of serious state and federal legislative action in the area. The House of Representatives had also used select committees, at times in conjunction with the Senate, as it did when a study on constitutional reform was produced some years ago, but House use of select committees is more sporadic, and is generally used to less advantage than are those of the Senate alone.¹⁷⁰ It is through the new standing committees, however, which were instituted as a compromise to the ALP, DLP, and Independent proposals, that the Senate makes perhaps its most significant

contributions.

On June 11, 1970, the Australian Senate resolved, on the Motion of the Leader of the Government in the Senate, Sir Kenneth Anderson, to appoint five Estimates Committees to examine and report upon the Annual Estimates. In effect the Senate set up the committees for the following reasons:

1. To subject the Government's expenditure proposals to a detailed scrutiny before giving its approval to that expenditure;
2. To refer the expenditure proposals to the committees for examination before the relevant legislative measure, i.e, the Appropriation Bills, are received from the lower house; and
3. When the relevant Bills are received and the committees' reports considered in conjunction with them, to amend or request amendments, or even to veto the proposed expenditure outright by withholding the Senate's concurrence from the Bills.¹⁷¹

Until 1909, the Senate awaited the arrival of the Appropriation Bills from the House of Representatives before discussing them. On August 13th of that year, the practice was established of tabling the Estimates and budget papers and moving that the papers be printed. This was then used as a vehicle for general debate on the Government's proposals. The practice has continued to the present, with the exception that the motion is now "That the Senate take note of the papers."¹⁷² However, although a general debate on the proposals was now made possible, detailed examination of the items of expenditure were still delayed, due to the necessity to await receipt of the Bills from the House. To overcome this, the Senate in 1961 adopted a procedure whereby, after general debate on the budget papers had been concluded, without waiting for the Appropriation

Bills to be received from the House, it resolved itself in Committee of the Whole, where it proceeded to discuss the divisions and items of the Particulars of Proposed Expenditures. In this manner, when the detailed expenditure had been examined, very little debate remained to take place in the committee stage of the Bills.¹⁷³

The Estimates Committees appointed in 1970 made possible an even more thorough examination. Instead of being examined by 60 Senators meeting in Committee of the Whole, the Estimates were now divided into five Committees with questions directed to, and explanations coming from, Government officials as well as Senate Ministers. With the appointment of the Estimates Committees, the overall procedure for the examination of the annual Estimates by the Senate consisted of three stages: 1) general debate on the motion to take note of the budget papers; 2) examination of the details of expenditure in the five Committees; and 3) consideration of the Appropriation Bills and the Reports from the Committees.¹⁷⁴

The five Committees go by the simple titles of Estimates Committees A, B, C, D, and E, and deal with departmental estimates as follows:

- A. Supply, P.M.'s Cabinet Office, Trade and Industry, External Affairs, Treasury and Defence;
- B. Housing, Immigration, Social Services (including Aboriginal Affairs), Health, and Postmaster-General;
- C. Works (and Tourist Activities), Labour and National Service, Education and Science, Attorney-General, External Territories;
- D. Civil Aviation, Interior, National Development, Shipping and Transport, and Customs and Excise;
- E. Air, Primary Industry, Army, Navy, and Repatriation.

The Departmental groupings correspond with the responsibility in the Senate of the five Senate Ministries, that is, those Ministries headed by Senators. Each group includes the particular department for which the Senate Minister is responsible, and the departments of those Ministers of the lower house whom each Senate Minister represents. It was therefore necessary for only one Senate Minister to appear before each Committee. The Committees each consist of eight Senators; Government 4, Opposition 3, Minority Party 1; the chairman of each Committee being a Government Senator, possessing a casting vote. This provision is in accord with the Senate principle that the Government should possess a numerical voting control of appointed committees; however, party strengths in the Senate as a whole were not reflected, as the Government had 27 members, the Opposition 28, the DLP 4, and there was one Independent.¹⁷⁵

The new procedure was first used in 1970. The general debate on the budget papers concluded on September 17, and the Leader of the Government in the Senate then moved then moved to refer the Estimates to their respective Committees. The time spent in public hearings by the five Committees was: Committee A, $14\frac{1}{2}$ hours; B, $15\frac{1}{4}$ hrs.; C, $21\frac{1}{2}$ hrs.; D $15\frac{1}{4}$ hrs.; and E, $7\frac{1}{2}$ hrs. A further 15 hours were later devoted to the Committee of the Whole's consideration of the Estimate's details, so that the total time spent by the Senate in its examination of the Government's proposals for 1970-71 was 89 hours. The average over the previous five years had been $42\frac{1}{2}$ hours. In addition to the five Senate Ministers who were present and answered questions, 251 public servants attended the Committee hearings as witnesses, and 144 actually gave evidence.¹⁷⁶

Senators generally followed their own particular line of questioning but, in general, the matters which appeared to attract the most attention

were:

1. Provision for any new policies, particularly those not authorized by special legislation;
2. Significant variation in any votes as compared to the previous year;
3. Matters included in any documents and reports tabled in the Senate and which might have had a bearing on the items under consideration;
4. The form of the Estimates to ensure that there was proper division of expenditure for the ordinary annual services of the Government, and expenditure which was not for the ordinary annual services, in order to safeguard the Senate's constitutional powers of amendment.¹⁷⁷

If popular sentiment may be regarded as being reflected in the news media, the following quotation from an article in the Melbourne Sunday Observer, dated October 25, 1970, may provide some insight:

"A Revolution in the Senate"

"...the most striking impression gained from a tour of these Committees last week was their informality, lack of nonsense, and absence of political skulduggery...One thing is clear, these Senate Committees are getting the work done and eliciting more worthwhile information than they ever did under the old system."¹⁷⁸

In addition to its standing committees, the Senate also shares a number of joint committees with the House, of which the following two may provide illustrative examples.

The Joint Committee on Foreign Affairs dates from 1952. According to Miller, the Committee is now fully representative of all parties, although some left-wing Labor Party MPs have refrained from nominating for it, supposedly because they consider doing so to be tantamount to associating themselves too closely with a foreign policy with which they disagree.¹⁷⁹ Previous to the Whitlam Government, however, the whole Labor Party refused to serve, as the Committee could only discuss

questions referred to it by the Minister for External Affairs. Also, it possessed no staff and no subpoena powers.

The Committee consists of 21 members, 8 from the Senate and 13 from the House. Members are nominated by their parties, following party ballots. The Minister of External Affairs makes information available as he sees fit; the Committee can ask for official papers, but the Minister need not supply them if he does not wish to. Similarly, if the Committee wishes to meet in public rather than in secret the Minister decides. It has yet to do so. Reports are made to the Minister and Parliament is informed that a report has been made. Otherwise, the proceedings of the Committee are not reported to either House. A member of the Committee may add a note of protest or dissent to any report, but he may not introduce matter not referred to in the main report. Written or oral evidence is confidential to the Committee and the Minister. The Committee may appoint sub-committees to consider particular matters and has done so, according to Miller, on many occasions.¹⁸⁰

Cormack suggests that one of the most important ways in which a Senate is able to exercise a check on the Administration is through its "Regulations and Ordinances" Committee.¹⁸¹ Under the Acts Interpretation Act, all regulations for the implementation of Government policy must be laid before each House of Parliament within fifteen sitting days of the making of the regulations. Within fifteen days of tabling, notice of motion may be given in either House for the disallowance of the regulations and if the motion is carried regulations so disallowed thereupon cease to have effect. If, at the expiration of fifteen days after notice of disallowance, the notice has not been withdrawn or disposed of, the regulation shall thereupon "be deemed to have been disallowed." Once

a notice of motion for disallowance has been given; therefore, the Government must ensure that it is dealt with or lose the regulation involved.¹⁸²

During 1970 and 1971, this Committee gave notices of motion for disallowance of 25 regulations or ordinances following inquiries which had been made by the Committee. One such motion was not proceeded with by the Committee; five were proceeded with and agreed to by the Government; and the notices relating to the other nineteen regulations were withdrawn following assurances by the relevant Ministers that amendments would be made to overcome the Committee's objections.¹⁸³

Although not directly related to committee activity, Question Time, the manifestation of direct accountability of the Executive to Parliament, is linked closely to the Senate's investigatory powers. For upwards of an hour, Senate Ministers are subject to the questions of private Senators, both Government and Opposition members, with respect to the administration of their departments and the departments they represent on behalf of the Ministers in the House of Representatives. Questions can be asked without notice or upon notice, only at the time set down for the purpose.¹⁸⁴

While a Minister is not obliged to answer, Cormack does note that no Minister would seriously consider refusing to answer any question simply because it was difficult.¹⁸⁵ Questions upon notice are not called on by the President until after questions without notice have been disposed of. The Standing Orders prescribe no limit to the duration of questions without notice. In practice, some half to three-quarters of an hour is usually occupied on questions without notice, at the expiration of which time the Leader of the Senate may ask senators to put any further questions on the Notice Paper. It is the practice to give the Leader of the Opposition an opportunity to secure the first call from the Chair when

questions without notice have been announced by the President. Questions, unless they relate to the course of public business or to matters of urgency, should not be asked without notice, but should be placed upon the Notice Paper.¹⁸⁶ An overriding rule is that a Question must seek information, or press for action, within a Minister's responsibility. The Chair will disallow any Question where it is clear that it is not within a Minister's responsibility. There are occasions, however, when it is difficult for the Chair to decide whether a matter comes within Ministerial responsibility; in such cases the Minister concerned may decide whether a Question comes within his responsibility.¹⁸⁷

While the nature of Question Time is similar in the two houses of the Australian Parliament, the over-all situations, Cormack contends, are different. In the House there are 22 Ministers to answer Questions relating to their particular portfolios, and to the portfolios of the five Senate Ministries. In the Senate, the situation is reversed: there are only five Senate Ministers to answer questions relating to their own portfolios, and the portfolios of the 22 Ministers in the House. Necessarily, a great number of the Questions which are asked without notice are, at the Minister's request, placed upon the Notice Paper as Questions Upon Notice, as he needs time to secure an answer. Assistant Ministers do not answer questions.¹⁸⁸

Cormack illustrates the importance the closely divided Senate placed upon its rights at Question Time in 1967. A majority of Senators refused to accept the proposition, based upon practice, that a Minister had the right to terminate Question Time by asking that further Questions be placed upon the Notice Paper without proposing a Motion. Until that time, Question Time had normally continued for about three-quarters of

an hour each day. Since then, however, no Minister has ever attempted to terminate Question Time as long as senators wish to ask Questions. The average length of Question Time has increased. In 1970 it was 57.5 minutes; for the first half of 1971, 63 minutes; for the second half of 1971, 82 minutes. Statistics are relevant, and the following which relate to 1971 speak for themselves:

TABLE V¹⁸⁹

| | Questions with Notice | Questions w/o Notice | Total |
|--------|-----------------------|----------------------|-------|
| Senate | 2,439 | 969 | 3,408 |
| House | 1,205 | 2,681 | 3,886 |

If senators wish to do so, through dissatisfaction with the answers given to them in reply to Questions or for any other reason, they have the right under the Standing Orders to move for the tabling, or delivering to them, of papers for investigation. Dissatisfaction in 1967 with the answers being received, or not being received at all, to Questions on the use of V.I.P. aircraft led to the Senate demonstrating in an emphatic manner its powers to call for, and readiness to demand if a majority deemed it warranted, the production of Executive Papers (information).¹⁹⁰

The following year, the Senate ordered the tabling of all documents which constituted the original arrangements made by the Australian Government for the purchase of the F-111 aircraft. In tabling documents, the Leader of the Government in the Senate set out the Government's attitude on the matter. The Government, he said, wished to provide Parliament with as much information as possible, but would not disclose any document, or part of a document, which had a security content, or any document which, being confidential as between the Government of Australia and another Government, could not be disclosed without the

full consent of the other Government.¹⁹¹

The Senate also has the power to call for persons. Only once in its history, however, has the Senate called for and interrogated an official on the floor of the Senate itself. It did so in 1931 when it called the Chairman of the Commonwealth Bank (the "Reserve" Bank of the day), Sir Robert Gibson, to give evidence in relation to the Commonwealth Banks Bill then before the Senate.¹⁹² The recent expansion of the Senate committee system has, for Cormack, to a large extent obviated the possible need or occasion for action of this type. These committees are empowered, in dealing with references, to call for persons, papers, and records. The new Estimates Committees also provide twice-yearly opportunities for senators to ask questions of senior offices of the Commonwealth departments.¹⁹³

It can readily be discerned, then, that there is a strong Committee system established and developing in the Senate. Bullock argues that, as a direct result of the Estimates Committees, and, therefore, as an indirect result of previous Standing Committees, the Senate is now engaged in expanding its Committee system.¹⁹⁴ The Senate's Estimates Committees, therefore, is an important and experimental part of a developing comprehensive Committee system geared towards encompassing a whole range of governmental activities. Albinski believes that the major contribution of Standing Committees in Australia is yet to be made. He goes on to assert:

"There is a feeling that the trend toward government by decree (brought about by the large amount of delegated authority implicit in a great many statutes) requires persistent oversight . . . In Australia, Standing Committees responsible for examining the range of legislative subject matter are nearly non-existent in the House."¹⁹⁵

Therefore, it is of interest to note that the Senate has taken a lead in the development of a committee system in order to obtain some oversight of the Government of the day. There are limitations as to how much control it can actually manage. Witness, for instance, the small number of senators who occupy Ministries. However, within these limits, the committee system, and with it, the influence of the Senate in the governing of Australia, appears to be undergoing a process of continual growth and evolution.

Conclusion

A separate section on the phenomenon of Ministers who sit in the Senate is perhaps unnecessary due to its treatment in the Legislative and Committee sections of this chapter. As has been seen, roughly five out of 27 Ministries are generally allotted to senators. During Question Time, Ministers are responsible in their own Houses for their Ministries plus those which are assigned to Ministers in the other House. As such, this practice leads to a certain amount of additional strain on the Senate Ministers, as five Ministers become responsible in the Senate for 27 Ministers. However, the conventions of the Westminster-style democracies are such that Governments are responsible to the lower house, and it is from this chamber that the Ministers should originate. As will be made increasingly apparent as this study progresses, the Australian Senate is unique among upper houses in the comparatively large number of Ministries it controls.

An additional anomaly of the Australian political system is that the Prime Minister is able to come from the Senate, although generally this would occur only under extraordinary circumstances, as illustrated by

the events of 1968. In that year, the Government party of Australia suddenly found itself without a leader following the drowning of Prime Minister Harold Holt. Although the Liberal caucus alone voted for a new leader, who would then become Prime Minister, the Liberals were governing, as they generally do, in coalition with the Country Party. As it happened, the leader of the Country Party, John McEwen, flatly declared that he would not serve under William McMahon, one of the more likely Liberal prospects for the leadership. McMahon was excluded from consideration. Apparently, one of the factors that obstructed the selection of Paul Hasluck as Prime Minister was that a number of his colleagues in the Liberal Party felt that he would be too soft on McEwen and the Country Party in general. John Gorton emerged as a suitable candidate, but he was serving as a senator, not a member of the House, and it was in the Senate that he received much of his support among Liberal Party members. In order to resolve the anomalous situation of a Prime Minister originating in the Senate, it was decided that, upon his selection as leader of the party, Gorton would resign from the Senate and stand for election to Holt's House seat.¹⁹⁶ It is possible, then, for a senator to become Prime Minister, but only under the most extraordinary circumstances, and only if he is willing to resign his Senate position and run for a seat in the House. Even this characteristic of Australian politics has its precedents in Britain, for a remarkably similar chain of circumstances led to the assumption of leadership of the Conservative party in Britain by Sir Alec Douglas Home.

In his article on the Senate, Cormack concludes by referring to a piece by Lord Shepherd which suggested, rather sadly, that the House of Lords is in a position, at best, to make only marginal contributions to

the improvement of the British Parliamentary system. In comparison, Cormack affirms that the Australian Senate, particularly in recent years, has succeeded in adopting its parliamentary procedures to the extent that, while there is still much room for improvement, it is presently functioning as an effective second chamber. He considers the reason for this to be the "unique capacity (of the Senate) to regenerate itself from within itself."¹⁹⁷

Although Cormack's suggestion has the ring of truth to it, one is inclined to believe that it is less the regenerative capacity of the Senate which is the key to its effectiveness than its popular nature, and in particular the peculiarity of the balance of parties in the Senate. A Senate with the same party composition as the House would undoubtedly behave much the same as the Canadian Senate or the British House of Lords under similar circumstances, i.e., it would be less a substantive revisory chamber and more a technical chamber of review, due primarily to party loyalty. If the two chambers were of substantially different political complexion, the Prime Minister might resolve the difference by calling for a double dissolution and, if necessary, a joint sitting. Moreover, the mere threat of such action is perhaps enough to remind the Senate of its "place." Short of this, the Senate should always remain mindful of the fact that the mandate of the House of Representatives, and therefore of the Government, is a more recent one, as the whole House retires every three years while only half the Senate does likewise. This is why the Prime Minister has the power to call for the dissolution of half of the Senate, as well as to call for a double dissolution or a joint sitting. Thus, the House reflects a more immediate manifestation of the popular will.

What has happened in recent years, however, is that neither of the

two major parties in Australia, the Liberal-Country coalition nor the Australian Labor Party, has been able to produce a Senate majority even after the government has forced a dissolution. This has left a clear opening for the minority Democratic Labor Party and a handful of Independents to ally themselves with the major party in the Senate which does not control the Government. Deadlock situations can result which may necessitate the use of extreme measures, such as the most recent double dissolution. Given this, a politically ambitious party leader may exploit such a situation in order to gain the Prime Ministry, as Fraser did. Although the circumstances that allowed Fraser to gain power through Whitlam's dismissal by the Governor-General were not only extraordinary but unprecedented, the situation that now exists in the Senate makes it possible still. In addition, the Senate appears to be held in fairly high esteem by the electorate. As has already been noted, in 1967 the seemingly innocuous proposal to amend the constitution so as to allow the House to enlarge its membership without a proportional increase in the Senate, despite its endorsement by the L-CP Government and the Labor opposition, was defeated in referendum. This appears to indicate that the general public wished to avoid "too many politicians" in the federal government, and that they were willing to insulate the Senate from any depreciation of its status.¹⁹⁸ In other words, there seems to be a desire on the part of the public to use the Senate as a counterweight to any injudicious behavior by any Government of the day and its majority in the House. As such, the old conception of an upper house as a conservative bulwark still remains. The problem in current Australian politics is whether an elected upper house with a fairly large amount of prestige can or should alter or thwart a popularly elected lower house which is ruled by the precepts of responsible

government, i.e., where the Government is responsible largely or entirely to the lower house. Although the changes made in the Senate in recent years have been of procedural rather than substantive nature, they have tended to increase the power of the Senate; indeed senators are often more influential than individual members of the House, due in large part to their comparative independence from the Government. The problem might not be such a thorny one had it not been for the rise in Australia, as in all western democracies, of organized political parties. In other words, the institutional problem of House vs. Senate is compounded by the partisan problem of a Government-controlled House vs. a non-Government-controlled House. With the situation as it currently stands, the role of the Senate in Australian politics is still very much an open book.

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CHAPTER IV

THE SENATE OF THE IRISH REPUBLIC

Introduction

"...it would pass the wit of man to devise a really satisfactory second chamber." Eamon De Valera¹⁹⁹

While debating the need of a second chamber in the newly-formed Irish Republic, De Valera was not referring so much to political theory as to what he considered to be recent history. Having been elected Prime Minister of the Irish Free State in 1932, De Valera and his Fianna Fail party saw the Free State Senate as "post-British" and pre-revolutionary in nature. The Senate had been devised at least partially as a means of protecting the interests of the Southern Unionists so as to allow the formation of the Free State, which gave Ireland semi-autonomous status within the British Commonwealth.²⁰⁰ Fianna Fail was dedicated to the removal of all Irish political dependency on Britain, and to the ultimate removal of the Free State. In De Valera's words:

"...in the constitutional circumstances in which we were, (i.e., the dissolution of the Free State and the formation of the Irish Republic) I wanted to get rid of a Second House, and particularly I wanted to get rid of the previous Second House whilst a certain piece of constitutional work was being done."²⁰¹

However, De Valera did not oppose the principle of an upper house in the parliament of the new republic, given certain modifications.

"...certain powers might be given to a Second House and... as long as they were limited and the Second House could not be much more than a revising chamber - taking up measures, criticizing them from an independent standpoint and with as great a variety of viewpoints as possible - a Second House might be of some value."²⁰²

In federal states, upper houses can look to their representative

function as a raison d'etre: they provide representation for the units of federation. In unitary states, such as Ireland, this role is non-existent as there are no units of federation. Furthermore, argues Garvin, the representative function becomes even less clear-cut when there is no recognized aristocracy of wealth, authority, or blood, whose interests may need protection, as in Great Britain,²⁰³ although in the case of the Free State Senate, as shall be seen in Chapter V, the former Unionists did receive special consideration.

In order to find a solution to this dilemma, it was proposed that the new Senate should be a corporate one. The idea was not a new one in Ireland, being supported as early as 1922 by the leader of the Labour Party. In 1928, a Joint Committee on the Constitution of Seanad Eireann (the Senate of Ireland) considered a suggestion that the Parliament should select a nominating panel "representative of associations, organizations, or bodies representing the following interests, viz., Agriculture, Labour, Education, Commerce, and National Development." Pope Pius XI expressed his support for such a scheme in the encyclical Quadragesimo Anno in 1931.²⁰⁴ A vocationally nominated Senate would be controlled by "representatives of production" and could act as a counter-balance against party representation in the lower house. How effective the Senate has been in this respect will be covered in the section discussing the representative role of the Senate.

Also included will be a section concerning the use of committees. As the Irish Senate is a relatively small house (sixty members) it will be noted that most revisory work is done in the Committee of the Whole. However, the Select Committee on Statutory Instruments has proven useful. Finally, the possibility of the survival of second chambers in unitary

states will be considered. This topic will be discussed in greater detail, of course, in the following two chapters, which deal respectively with upper houses which have failed, and the future of bicameralism, particularly in the smaller, more recently independent nations.

Representative Functions

The composition of the Irish Senate (Seanad Eireann) is the most idiosyncratic of the chambers under study. The Senate consists of sixty members who can be divided into three categories. The first consists of eleven members who are nominated directly to the Senate by the Prime Minister. The second category consists of six members who are elected by the graduates of the universities in the Republic of Ireland, namely the University of Dublin and the National University of Ireland, each electing three members. The elections are conducted by proportional representation. Nomination by two graduates, with the assent of eight others is necessary in order to stand for election. The third category consists of the remaining forty-three senators who are elected by an electoral college of nearly 900, composed of the members of the Oireachtas (both Houses of Parliament), and the county and county borough councillors. The candidates for election are nominated in five panels by bodies representing 1) National Language and Culture; 2) Agriculture; 3) Labour, both organized and unorganized; 4) Industry and Commerce, and 5) Public Administration.²⁰⁵ Under the Panel Members Act of 1937 as amended, each panel may have not more than eleven nor less than five senators elected. The Act fixed the numbers to be elected to each panel as follows: Cultural, 5; Agricultural, 11; Labour, 11; Industrial and Commercial, 9; Administration, 7. The nominations are made by two

sub-panels in each area, which have the responsibility of making nominations to their respective panels. The first sub-panel consists of nominating organizations which are registered with the Senate Returning Officer, who decides whether to accept their applications; he is given wide discretion.²⁰⁶ The second sub-panel consists of the members of both Houses of the Oireachtas. The maximum number of nominations to the vocational sub-panels depends on two factors: 1) the number of vocational nominating organizations registered to each panel; and 2) the maximum number of vocationally nominated senators who could be elected to each panel; the maximum being those seats not reserved for Dail nominated senators. The number of permissible vocational nominations has remained unchanged at 63, being considerably greater than the number of Dail nominations. When the nominations have been received by the Returning Officer, he divides the panels of nominees into their respective sub-panels, according to the origins of their nomination, vocational or Dail.²⁰⁷

Each voter in the electoral college has five votes, one for each panel and he may vote for either a Dail or vocational sub-panel candidate. He receives a list of candidates stating by whom or by which organizations they were nominated. Five ballots are issued, and the election is conducted by post. A minimum number of candidates must be elected from each sub-panel, leaving a number of "floating seats" to be filled, e.g., for the Cultural panel. A minimum of two senators must be elected from each sub-panel. When either of the two sub-panels have received their minimum number of seats, the votes of the defeated candidates for the filled sub-panel are redistributed before counting is resumed. The early filling of a sub-panel may lead to odd-looking results once the lower preferences are transferred to the other sub-panel. As each panel has

one or more "floating seats," candidates on one sub-panel may be, and have been, elected without reaching the quota. In fact, they may be elected while a candidate for the other sub-panel who has received more votes is defeated.²⁰⁸

Table VI

Distribution of Seats According to Sub-Panels²⁰⁹

| Panel | No. of Seats | Minimum no. for each sub-panel | Number of "Floating Seats" |
|----------------|--------------|--------------------------------|----------------------------|
| Cultural | 5 | 2 | 1 |
| Agricultural | 11 | 4 | 3 |
| Labour | 11 | 4 | 3 |
| Industrial | 9 | 3 | 3 |
| Administrative | 7 | 3 | 1 |
| Totals | 43 | 16 | 11 |

Each panel has a separate election count. Voting is on a preferential basis, with first preferences counted first. If two candidates receive an equal number of first preferences, the other preferences received by these candidates must be counted as well. According to Garvin, the candidates on the Dail sub-panels are generally more acceptable to the electorate than those on the vocational sub-panels. The system of minimum numbers of seats is intended to prevent the electorate's wishes from dominating the election completely. Furthermore, some of the vocational nominations are not truly vocational. This is due to the large number of vocational nominations, which encourage competition between the organizations to put up candidates acceptable to the

voters and capable of gaining party backing.²¹⁰ Elections are co-ordinated with Dail elections, which must occur at least every three years, which, although elections are held more frequently if Parliament is dissolved prior to the three-year period; the whole of the Senate is renewed at one time.²¹¹

Chubb notes that the scheme for the election of the forty-three was admitted at the outset as being only a step toward vocational representation. He goes on to argue, however, that the current system is itself defective. Not only does the structure of the community not correspond to vocational principles, since the country is not "organized along vocational lines," it was also De Valera's intention from the outset that the Senate not be composed so as to be likely to oppose the Government of the day.²¹²

The over-all effect of this method of election has been to permit party domination in Senate elections, which Chubb believes to be complete. Chubb contends that the political parties have controlled the elections to the exclusion of almost all truly vocational elements. Since the Prime Minister's nominees tend to be party men also, the Seanad is composed

" . . . largely of party politicians not very different from their colleagues in the Dail and, in the case of many of them, with only tenuous connections with the interests they affect to represent . . . Naturally, they tend to speak and vote on party lines; they also sit in party groups. Naturally, the prestige of the house suffers from the fact that it is not composed on any basis that corresponds to the social structure of the community, but is merely another selection of party politicians chosen in an unnecessarily complicated manner."²¹³

Yet party control over voting in Senate elections is not really complete. Non-partisan local councillors tend to introduce a certain degree of unpredictability in the elections. For instance,

in the 1957 Senate election, the two major parties gained more seats in the Senate than the numbers of declared supporters they had in the electorate could account for.²¹⁴ According to Garvin, parties sponsor two types of candidates, those whom they merely recommend to the electorate, and those for whom they canvass actively.²¹⁵ The six university senators are generally independent of party ties. Garvin notes that even when these senators have a political affiliation, they continue to possess an independence which arises from their method of election. Graduates tend to vote in groups, such as secondary teachers, doctors, and, occasionally, voting is split by age.²¹⁶ The eleven senators nominated by the Prime Minister are usually reliable party members.²¹⁷ The importance of this group should not be underestimated, as they are nominated to the Senate after the election of the other two groups. The "Prime Minister's eleven," then, help to insure that the party which controls the Dail is also able to control the Senate.

The Senate tends to over-represent the rural areas, with its emphasis on county and county borough councils as a major part of the electorate. In contrast, the Dail as a whole represents the population centers, as almost all popularly-elected lower houses tend to do. Without the "Prime Minister's eleven," the possibility of a Government achieving victory in the Dail and defeat in the Senate would be increased, a phenomenon that would put the two houses at cross-purposes. Naturally, Prime Ministers seek to avoid such occurrences. The "Prime Minister's eleven," then, tend to rig the upper house in a manner that makes it difficult to challenge the executive, as it has a means of controlling that house. Garvin notes that, due to this group, the phenomenon of a Government gaining office while failing to achieve a majority in the

Senate is nearly inconceivable.²¹⁸

As mentioned previously, the elections of the two houses are coordinated, so that it is impossible to dissolve the Senate without also dissolving the Dail. Ultimately, control by the executive over the Senate is incomplete. However, as in all of the other governments under study, it is a majority in the lower house which determines the party which controls the Government and, with regard to bills which the executive deems important enough, there are procedures for breaking Dail-Senate deadlocks. This will be examined in greater detail in the section of legislation. The rural emphasis of the Senate tends to create difficulties for a political party which depends for its support on the urbanized areas of the country, for example, the Labour Party. To win Senate seats a party needs a well-developed organizational structure in local authorities and, if possible, in the vocational bodies. Generally, more than half of the sitting senators are returned to the new house after an election.²¹⁹

In most bicameral legislative systems, members of the upper house are generally older than those of the lower house. In the case of a powerful upper house, this could well have to do with lower house members using the second chamber in order to advance politically, as is often the case with those who enter the United States Senate. In a less powerful chamber, this phenomenon could be linked to "kicking upstairs" once active legislators who have outlived a good deal of their practical usefulness, but have served their parties well, as often happens in the Canadian Senate. But in Ireland, neither of these activities seem to take place. Although, proportionately, the Upper House retains more older members than does the Dail this number has

been reduced considerably, particularly in the period from 1961-65.²²⁰

The Senate contains comparatively few young persons in its ranks, but the most interesting phenomenon of all is that of senators in the 40-59 year age group who use the Senate as an entry into parliamentary politics. In other words, many senators aspire to lower house membership, just the opposite of what is generally the case in bicameral legislative systems. This seems to indicate that the Senate is often used as a "grooming ground" for a large contingent who have run for the Senate immediately after having been defeated in the Dail, indicating that the Senate is often perceived as a "second choice" for those with an active interest in parliamentary politics.²²¹

Generally, the educational level in the Senate is higher than in the Dail. Chubb notes that roughly half of the Dail is involved in farming or small-scale business. Consequently, there are relatively few people with higher education and professional experience of the sort that could enable them to bring modern knowledge and the techniques of business management to bear on large-scale state activity. In this respect, then, the Senate is in a better position than the Dail.

Table VII

| Occupation | Occupation of Senators, 1965 ²²² | Percentage |
|--------------------------------------------------------------------|---------------------------------------------|------------|
| Professional | | 32% |
| Commerce, Finance, Insurance (mostly shopkeepers and publicans) | | 22% |
| Agriculture | | 27% |
| Trade Union Officials | | 7% |
| Persons engaged solely in politics | | 5% |
| Other | | 8% |

Although the small business element (shopkeepers and publicans) make up roughly the same proportion in the Senate as in the Dail, Chubb notes that the proportion of professional people is considerably higher (32% vs. 19% in the Dail), due largely to the presence of the university senators and of other middle-class professionals who are able to combine their occupations with the limited demands of the Senate in a way not possible for Dail deputies.

Successful candidates usually have the support of a political party, the chances of election on a purely vocational plank being slight. Because of the rural bias, that is, of the concentration of most of the electorate in local governments, there is a tendency toward "local" men being elected. To have a local following gives a candidate a head start, but vocational prominence for the most part tends to be an incidental qualification for success in elections.²²³ In Senate proceedings, the articulation of the various vocational interests is strongest in committee, where opinions independent of the parties may be expressed. But in the actual voting of legislation, it is the parties which retain pre-eminence.

Legislative Functions

All bills must be examined by both houses of Parliament before they can become law. As the Government controls the majority in the Senate as well as the Dail, the Senate does only as much work on a bill as the responsible Minister considers desirable; in this sense the Senate is in the same relation to the Government as is the Dail. Non-money bills are sometimes sent to the Senate in an unfinished state, so that in these circumstances the upper house does most of the discussing and amending involved in their passage. According to Garvin, the amendment process in both

Houses is controlled fairly closely by the responsible Ministers. He traces the amendment process as follows: amendments to a given bill are proposed by the Leader of the Senate; these amendments usually originate from the responsible minister or, through him, from the civil service, the party, or on Report Stage in the Senate, from advice given by senators in the form of amendments proposed at earlier stages of the bill. Generally, Government amendments are of a technical type, while substantive Independent or Opposition amendments are taken seriously if they exhibit the sort of expert knowledge on the subject matter which would appear to be a hallmark of the second chambers under study. Amendments of this sort generally result in a similar Government amendment at a later stage. Occasionally, the original amendment will be allowed to stand, but, in general, it is felt that reformulation of the amendment by parliamentary draftsmen is preferred. Much of the Senate's contribution to the legislative process is made in this manner, and it can be considerable. For example, sixty-five amendments were tabled for the Committee Stage of the Transport (No. 2) Bill, 1944. The Bill was designed to set up a national transport monopoly in order to replace the railway, tramway, and bus companies. Thirty-three amendments were proposed by the Labour Government, thirteen by a Fine Gael senator, and three by a representative of the Cattle Trader's Association. On the Report Stage, twenty-two amendments were tabled and twenty were moved. Ten were accepted, all of which were proposed by the Government. But of these ten, seven were substantive and had originated in amendments proposed by Labour, Fine Gael, and National University senators. But Garvin notes that, more recently, senators' contributions do not seem to be as substantial. For instance, with regard to the Broadcasting

Authority Bill, 1959, which was introduced in the Senate, thirty-five amendments were tabled for committee stage. Twenty-three amendments were moved, and only three were successful - two Government amendments and one Fine Gael, and this was successful due only to a tie division. The Fine Gael amendment was eliminated on Report Stage. At this stage, two other amendments were accepted from Fine Gael, but neither was particularly important.²²⁴

Non-partisan bills can be dealt with fairly effectively by the Senate, but bills with strong political implications are usually put through by the responsible minister with little or no amendment. In the case of the Rent Restrictions (No. 2) Bill, 1960, forty amendments were tabled. Five Government amendments were accepted, while all but two of the remainder, which came from all quarters of the Opposition, were rejected.²²⁵ Government ministers, then, generally will accept anything from the Senate that they consider valuable, and will occasionally accept unimportant amendments for reasons of tact. As a rule of thumb, it can be said that the more politically controversial a given bill may be, the more likely voting will occur on party lines. The Government makes it a practice never to permit the Senate to force it into accepting anything unless there is massive support for it elsewhere.

The percentage of non-money bills amended by the Senate has varied anywhere from 8%-40%, with the average being in the 20%-25% range. Money bills may not be amended by the Senate, though it may pass recommendations in them. In practice, such recommendations have been made very rarely, only four times since 1938.²²⁶ Money bills usually have a long Second Stage (i.e., General Debate) in the Senate, usually because of those senators whose training enables them to speak authoritatively on the

economic situation. But the debate almost never leads to amendments in the Senate. By contrast, most committee work done in the Senate is cursory, as money bills originate in the lower house, and most background investigation is done there. Committee work for money bills is done by special rather than standing committees.

The Senate has initiated an increasing amount of Government-sponsored legislation since 1947, but these bills are only a small fraction of the volume that it reviews from the Dail; usually only one or two Senate bills are passed by the Dail each year. The type of bills initiated are generally of a technical or non-controversial nature, such as the Broadcasting Authority Bill, 1959.²²⁷

In the three second chambers already examined, it has been seen that a major contribution in the legislative process has occurred in committee. Chubb notes that, due to the relatively small size of the Irish Parliament in general, and of the Senate in particular, there is "little need" for standing committees of the British type. Currently, there is only one scrutiny committee in the Senate, the Seanad Select Committee on Statutory Instruments, established in 1948 and modeled very closely on a similar House of Commons Committee. Its function is to examine orders made under enabling legislation in order that such orders do not run counter to a number of criteria covering the use of powers, form, language, and publicity. Both this committee and the Dail Committee on Public Accounts, the only two Irish parliamentary committees of any importance, proceed by written and verbal inquiry and they do question civil servants, though not usually ministers. Neither Committee has any power except that of reporting to the parent bodies which might, but usually do not, debate their reports. Neither is allowed to question policy.²²⁸

Chubb believes that these committees are effective within their limitations, which are considerable. Indeed, they are conducive to more careful administration, but coverage in their own fields is far from complete and he suggests that they are mainly concerned with form. Apparently they are not, nor were they ever, intended to be a means by which the Parliament may investigate Government policy or the effectiveness of executive administration. The problem, as Chubb sees it, is that no truly effective committee system can be set up unless the Government wishes to see it initiated. The Parliament, unlike the United States Congress, has no will of its own or conception of itself as a body, independent of the Government, intended to be a constitutional instrument performing functions that would invoke controlling the executive.

Another restraint on the Parliament's, and in particular, the Senate's, effectiveness lies in the attitude of the Members, especially the Opposition. Chubb argues that, as individuals, most senators are unable to equip themselves adequately for the job. Traditionally, they have been too poorly paid to regard their office as a full-time occupation, let alone to employ secretarial assistance. In 1968, salaries were raised to £2500 per year for members of the Dail, and £1500 for senators, both salaries being subject to income tax. In addition, they have free travel between their homes and the Parliament at Leinster House, and free postage. But very few senators have even part-time secretarial help, and help of a more professional nature seems out of the question. The Oireachtas itself is supplied with only eighteen clerks and a library staff of two, so that even official help with organized research is extremely limited.²²⁹

In foreign affairs, a Government is generally expected to have a much freer hand than in domestic legislative matters and this is reflected

in Ireland as elsewhere. One of the more important considerations confronting the Republic of Ireland in recent years has been the question of entry into the Common Market. In 1971-72, both Houses of Parliament met to consider a Government White Paper entitled, "Membership of the European Communities: Implications for Ireland." That the Government felt that approval from the Dail was of greater importance than the Senate is made manifest in the greater amount of time and effort made by the Government in the Dail debates. The Dail met over a period of roughly ten months and devoted a total of 535 pages in its Official Report to debate of the White Paper. Among others present for the debate were the Prime Minister, Mr. John Lynch, the Minister of External Affairs, Dr. Patrick Hillary, and the Minister of Industry and Commerce, Mr. Patrick Lalor. In contrast, the Senate met for a total of 12 hours and 45 minutes over a period of two days, and devoted 163 pages on its Official Report to debating the White Paper. No ministers were present during the debate, and only one Labour senator bothered to speak in opposition. In both Houses, the motion to take note of the White Paper was passed.²³⁰

The Government is particularly anxious to have its legislation dealt with on these three occasions: 1) during times of unexpected emergencies; 2) periods before and after a General Election; and 3) the period leading up to the Summer Recess. This last period is the most important. The Dail would then have to be reconvened, a practice which has never occurred. The number of bills dealt with in this manner has ranged from 26% to 54% in recent years.²³¹ A typical example of this sort of practice occurred in 1961, with the passage of nineteen bills, including the Finance and Appropriation Bill, prior to the Summer Recess. A motion was passed to take the business "...as on the Order Paper - Numbers 1 to 9

inclusive." The attitude of the Government Leader in the Senate was as follows:

"We have a job to do which has been presented to us by Dail Eireann and we have to do it. The length of time it will take to do it will depend...on the members of the House, the number who will speak, and the length of their speeches."²³²

Situations such as this have led to sharp complaints by opposition speakers in the Senate.

The Dail normally meets on more than seventy days a year, which is roughly three times as often as does the Senate. Daily sittings tend also to be longer than the Senate's, being on the average nearly four times as many hours per year as the Senate.²³³ Senators are, as alluded to earlier, basically part-time legislators and cannot give extra days a week to legislative business, preferring to sit late rather than to meet again in the same week.

Generally, a busy period is marked by the Senate's meeting twice or more a week, especially if the sittings are later than usual. Attendance rates at the Senate are usually higher than those at the Dail, and it is rarely necessary to count a quorum. Attendance averages around forty-six, with the lowest figures found usually in July with the approach of summer recess. Numbers usually vary from the mid-fifties to the lower twenties, with critical votes and important business sending up the attendance.²³⁴ Some senators have constituency work similar to a Dail deputy, as their seats do not depend as heavily on pleasing their constituents, due to the complicated voting procedure. The burden of this sort of work is uneven, in fact some university senators have complained of being underworked.²³⁵

Conclusion

In a federal state the upper house is able, at least in theory, to provide for the representation of the units of federation. In a unitary

state, this representative role is unnecessary and the second chamber is placed in a much more ambiguous position, particularly when there is no aristocracy whose interests may be thought of as needing defense along the lines of the British nobility. Garvin suggests that in a state such as Ireland, the upper house must play a role other than a representative one if it is to have any sort of meaningful reason for its existence; the "representative" character of vocationalism being a subordinate element of its make-up. Garvin argues that the Senate fails to represent its vocational elements because its "classes" do not represent coherent groups.²³⁶ Apparently, the only significant manner in which Senate representation differs from that of the Dail is that senators tend to be better educated and to come more often from the rural districts.

In regard to its legislative performance, the Senate is at its best when involved in basically non-controversial bills, where it is able to make technical, as opposed to substantial, amendments, a position reflected in all of the successful second chambers under study. Senators tend to show the most independence from their parties during discussion and debate; party strengths are reflected fairly accurately during divisions. Moreover, the Senate is more likely to resemble the Dail in its voting the more controversial the issue which faces it. The senate is not unsuited to its role as a revising assembly, but it is incapable of acting independently along Australian, or even Canadian, lines.

Chubb cites three reasons for the lack of prestige and the subordinate status of the Senate in Irish law and practice. First, the Senate contains no minister, even though by law it is permitted a maximum of two. This can probably be linked to the parliamentary notion, common

to Canada and Britain, and to a lesser extent, Australia, that ministries should be responsible to that house most directly representative of the popular will. Only once since the establishment of the Irish Republic has a minister sat in the Senate, and this situation occurred due only to the fact that he had been defeated in a Dail election. Second, the Senate's business is subordinate to the Dail, as characterized by the end-of-session rush of bills, not uncommon, it appears, among Westminster model democracies. Third, its consideration of bills is occasionally delayed, interrupted, or impaired by the failure of ministers to attend its sittings as arranged. Added to this are the legal limitations to the Senate's powers. It can delay money bills for only 21 days, and all other bills for one hundred and eighty days of passage by the Dail.²³⁷ Chubb sees this as a vicious circle: because the Senate is Government-controlled, it cannot insist on a more active legislative role; because it cannot become more active, it cannot successfully seek independence from the Government of the day.

Garvin considers many of these problems to be mere exaggerations of the problems facing parliaments in general: namely, that power tends to move toward the central government, and it is therefore difficult for members of Parliament to compete with the civil service for the attention of the government ministries. Garvin's solution is to remove any pretense of political power from the second chamber and convert it into a house containing "judicial, academic, vocational, and administrative" expertise. The method of selection would become irrelevant, as its power would derive from the prestige and knowledge of its membership rather than from any illusions of popular, partisan, or vocational representation.²³⁸

By creating an upper house which has no legislative power of its

own, De Valera de facto created a miniature version of Britain's House of Lords, that is, it rarely acts independently of the Government. As such, whatever strength the Irish Senate has derives in a very real way "from its weakness." However, another source of strength which the Lords possess and the Senate lacks is the prestige which has enveloped the Lords, due in large part to its long history and the natural evolution of British politics. The present Senate of the Irish Republic appears to be fighting the spectre of appearing so weak as to be unnecessary. Added to this is the very real problem of what would become of the Senate if it made any real attempt to assert itself. Occasionally, abolition of the Canadian Senate has been proposed, but it is generally viewed as an idle threat. In Ireland, the possibility of the abolition of the Senate is historically a very real one. The first Senate of the Irish Free State was abolished by De Valera's Fianna Fail party largely because it exhibited an independence which De Valera felt would interfere with his policies. The Senate of the Free State was agreed to as a condition to win the support of the Unionist minority in the South, and De Valera felt that the abolition of the original Senate of the Free State, and its replacement by a Senate whose composition and method of selection was to prove identical to that of the Republic's, was necessary in order to dissolve the Commonwealth-associated Free State and set up the independent Republic.

The Senate of the Irish Republic then, is walking a thin line. There exist the dual possibilities of abolition due either to too much weakness or too much strength. In the following chapter, these two possibilities will be examined in the case of the original Free State Senate, which was dissolved due to its attempts to exercise its right

to delay legislation passed by the Dail, and in the case of the Legislative Council of New Zealand, which was abolished on January 1, 1951, almost literally because it had nothing to do.

NOTES

199. Chubb, Basil, A Source Book of Irish Government (Dublin: 1964, Institute of Public Administration) p. 200.
200. Garvin, Thomas, The Irish Senate (Dublin: 1969, The Institute of Public Administration) p. 9.
201. Chubb, A Source Book, p. 201.
202. Ibid., p. 202.
203. Garvin, The Irish Senate, p. 6.
204. Ibid.
205. Chubb, Basil, The Government and Politics of Ireland (London: 1970, Oxford University Press) p. 21.
206. Garvin, The Irish Senate, p. 21.
207. Ibid., pp. 27-32.
208. Ibid., p. 32.
209. Ibid., p. 31.
210. Ibid., p. 32.
211. Ibid., p. 17.
212. Chubb, The Government and Politics, pp. 204-207.
213. Ibid.
214. Garvin, The Irish Senate, p. 33.
215. Ibid., p. 35.
216. Ibid., p. 37.
217. Ibid.
218. Ibid.
219. Ibid., p. 38.
220. Ibid., p. 65/
221. Ibid., p. 66.
222. Chubb, The Government and Politics, p. 211.

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223. Garvin, The Irish Senate, p. 39.
224. Ibid., pp. 45-46.
225. Ibid., p. 48.
226. Ibid., p. 49.
227. Ibid., p. 50.
228. Chubb, The Government and Politics, p. 198.
229. Ibid., p. 199.
230. See Dail Eireann, Official Report (Dublin: 1971, Cahill and Co., Ltd.) Vol. 247, pp. 1644, 1755, 1813-2026, and 2061-2096; Vol. 252, pp. 639-697, and Seanad Eireann, Official Report (Dublin: 1972, Cahill and Co., Ltd.) Vol. 72, pp. 769-932.
231. Garvin, The Irish Senate, pp. 52-53.
232. Ibid.
233. Ibid., p. 55.
234. Ibid., p. 58.
235. Ibid. p. 59.
236. Ibid., pp. 88-89.
237. Chubb, The Government and Politics, pp. 204-207.
238. Garvin, The Irish Senate, pp. 94-95.

CHAPTER V

TWO INSTANCES OF THE FAILURE OF BICAMERALISM

Introduction

On May 29, 1936, the Governor-General of the Irish Free State signed into law the Bill of Abolition which eliminated the Free State Senate and ended the first attempt at modern Irish bicameralism. Nearly fifteen years later, January 1, 1951, the Legislative Council of New Zealand met a similar fate.

But while the fates of the two chambers were similar, the reasons for their demise were almost entirely at variance: the Legislative Council had become de facto moribund by 1890, and abolition had been proposed by the Liberal Party as early as 1893.²³⁹ By contrast, the Free State Senate took "an active, independent, and effective part in public affairs."²⁴⁰ Its abolition can be traced directly to Prime Minister Eamon De Valera's distaste for a Senate designed to protect class interests and a political minority, in order to insure their political co-operation in the formation of the Free State. Originally, De Valera and his followers had boycotted both the Senate and the Dail, although eventually, using the party name of Fianna Fail, De Valera and his followers took their seats in the Free State Parliament in 1927. The attitude of Fianna Fail and, in all probability, De Valera, was stated bluntly by a Fianna Fail senator:

"I say for myself, and I think I can say for every member of this Party, that we came into (the Senate) on the invitation of the Party. When I came in here, I came in on the definite understanding that, when the time arose, I was to do my bit to wreck this house..."²⁴¹

However, criticism of the Senate was not limited to Fianna Fail.

Ministers of Prime Minister Cosgrave's party, Cumann na nGaedheal, were

known to have considered the Senate a nuisance, and the Labour Party, while supporting the principle of bicameralism, was never enthusiastic about the Free State Senate.²⁴²

The circumstances surrounding the dissolution of the two chambers are so different as to warrant their being treated separately, although in the concluding chapter the problems of the two houses will be considered in light of second chambers in general.

REPRESENTATIVE FUNCTIONS

The Irish Free State Senate

Until the signing of the Anglo-Irish Treaty which created the Irish Free State in 1922, Dail Eireann, the parliament which the Irish Nationalists had established in January 1919, functioned as a unicameral legislature. Mansergh points out that this was as much a matter of convenience as of principle, yet the net result was to leave a "heritage of hostility" among the more extreme Republicans towards the new second chamber imposed by the treaty. Furthermore, the establishment of a second chamber in the Free State was determined not so much by constitutional theory as by an assurance given by the Chairman of the Irish Peace Delegation to the Southern Unionists and to the British Government that a second chamber would be included in the Legislature, and to assure full or even special representation to the Unionists, the Protestant minority in southern Ireland, at least, according to Mansergh.²⁴³ The Unionists demanded an Upper House, sheltered from the direct play of universal suffrage, which would provide an essential barrier to democratic nationalism and would safeguard their interests. They believed that a nationalist assembly might destroy the rights and confiscate the property of these representatives of the old Anglo-Irish ascendancy.

A conservative Senate, then, was to serve as a sine qua non for the acceptance of the Dominion-status Free State by the ex-Unionists. It was to be no easy task to reconcile this guarantee with the demand of other interests for a democratic Senate. Opinion was to become more divided on the question of the powers of the second chamber.²⁴⁴

Although, as will be seen, no protection of the Unionists was given in the Constitution.

As noted in the previous chapter, the problem of the composition of second chambers is provided with a relatively simple solution in federal states. In a unitary state, regional forms of representation are less practicable than in a state which is federal, and three choices were left to the framers of the Free State Constitution; nomination, election by universal suffrage, and indirect election. For Mansergh, nomination presented an abundance of attractions as well as insuperable difficulties. It would have provided a method by which persons of distinction might serve in government, yet such a method would have tended to strengthen the executive at the expense of the legislature. The example of the Senate in Canada was cited. However, owing to the peculiar circumstances existing in the Free State in 1922, nomination provided a "ready loophole for escape" from the problems of composition.²⁴⁵

An interim Senate was composed of thirty members nominated by the President of the Executive Council (the Prime Minister), and thirty elected by the Dail. This provisional method of composing the Senate is of interest in that the Dail resolved that the President, in selecting his nominees, should consult non-political interests. This illustrates the trend of Irish political thought regarding the construction of the Senate. It exposes the strong influence exercised by the idea

of vocational or functional representation, which would become more evident when the Free State was abandoned in favor of the Republic. Of the thirty members to be nominated by the President, fifteen, to be selected by lot, were to hold office for the full term of twelve years, and the remaining fifteen for six years. Of the thirty members to be elected by the Dail (voting on the principle of proportional representation), the first fifteen were to hold office for nine years, and the second fifteen for three years. For the purpose of the future triennial elections to the permanent Senate, the whole country was to form a single electoral area, and elections were to be held according to the principle of proportional representation. The electorate was to consist of all citizens over thirty years of age who complied with the provisions of the prevailing electoral laws. Each Triennial Election was to be from a panel composed of three times as many qualified persons as there were members to be elected, of whom two-thirds were to be nominated by the Dail and one-third by the Senate, plus such former senators as desired to be included in the nominating panel.²⁴⁶

The Constitution of the Irish Free State, which gave it Dominion status in the British Empire, went into effect on December 6, 1922. At the meeting of the Dail held that day, Liam Cosgrave was elected President of the Executive Council without opposition. On the same day he announced to the House his nominations for the Senate. Sixteen of the thirty have been described as belonging to the class known as Southern Unionists, among them Mr. Andrew Jameson and Mr. Henry Guinness, both from important brewing families, and directors of the Bank of Ireland. In the remaining fourteen, commerce and administration were represented, as well as regional interests. Mr. J.C. Dowdall and Mr.

Benjamin Houghton were well known figures in commercial circles in southern Ireland. Although O'sullivan affirms that the quality of the list was above criticism, he notes that it did not contain the name of a single lawyer. Moreover, the legal element was missing from the elected half of the Senate, and would remain so for the first year of its existence until the co-option of Mr. S.L. Brown, K.C., the acknowledged leader of the Bar. It should be of interest then, to note that at its inception the Senate was handicapped by the lack of legal knowledge among its members.²⁴⁷

For the thirty members to be elected by the Dail, the system of proportional representation was adopted as was that of the single transferable vote, with certain modifications rendered necessary by reason of the electorate being so small and the number to be elected rather large. According to O'sullivan, the election contained many elements of farce, but the blame for this is attributable not so much to the electoral system as to the circumstances of the time. In the first place, of a total Dail membership of 128, only 86 had taken their seats. Most of the rest were anti-Treaty supporters of De Valera and others had been killed on both sides of the Civil War. Of the eighty-six who sat in the Dail, five, for various reasons, did not vote, so that the effective electorate was reduced to eighty-one. Next, it should be borne in mind that, with the exception of the Labour Party, there were no political parties in any strict sense in the Dail. The main body consisted of roughly fifty supporters of Arthur Griffith and Michael Collins who gave their general support to Cosgrave now that their two leaders were dead, but no ministerial party had yet developed from them. The interaction of these and other factors made the election "one of the most remarkable ever to have been held under proportional representation."

The electors numbered eighty-one and there were 113 candidates for thirty seats. The first preferences were distributed as follows:

| | |
|-----------------------------------------|----|
| Candidates with four first preferences | 1 |
| Candidates with three first preferences | 17 |
| Candidates with two first preferences | 11 |
| Candidates with one first preference | 4 |

Thus, thirty-three candidates exhausted the eighty-one first preferences between them, and the remaining candidates received no first preference at all.²⁴⁸

Among the most noteworthy characteristics of the list of elected members is that it represented two classes which, for O'Sullivan, are essential to the composition of a balanced second chamber, and which were absent in Cosgrave's list. These were farmers (as opposed to large landowners) and organized labour. O'Sullivan views this first Senate of the Irish Free State as more truly a microcosm of the country as a whole than the Dail, as it comprised representatives of the professions, commerce, agriculture, letters, organized labour, banking, and the landlord interest.²⁴⁹

Throughout the thirteen-year history of the Senate, allegations were often made that it was predominately a Protestant (Freemason) body. Statistics, however, do not bear this out. The first Senate consisted of thirty-six Catholics and twenty-four non-Catholics. Not all of the non-Catholics were Protestants; Lady Desart, for example, was a Jewess. The proportion of non-Catholics to Catholics was to decrease as time went on, so that the largest number of non-Catholics ever present in the Senate was twenty-four out of a total of sixty.²⁵⁰ The first general elections for

the Dail under the new constitution took place on August 27, 1923.²⁵¹ De Valera and his followers contested the election under the name of the Sinn Fein Party, which had been the name of Arthur Griffith's movement for national regeneration. De Valera stood as a candidate for County Clare; and was elected by a large majority, despite, or, suggests O'Sullivan, because of, the fact that he was arrested on his appearance in the constituency. The results of the election were as follows:

TABLE VIII

Results of the General Election of August 1923²⁵²

| Party | Candidates Nominated | Candidates Elected |
|------------------------------------------|-------------------------|-----------------------|
| <u>Cumann na nGaedheal</u> (Cosgrave) | 109 | 63 |
| <u>Sinn Fein</u> (De Valera) | 85 | 44 |
| Labour | 44 | 14 |
| Independents | 71 | 16 |
| Independent Labour | 8 | 1 |
| Totals | 377 | 153 |

N.B.: None of the Sinn Fein candidates took their seats.

By the summer of 1925, preparation had been made for the first Triennial Election to the Senate. It should be remembered that, under the Constitution, fifteen original members were due to retire, and added to that number were four others who had been co-opted to fill casual vacancies. These nineteen seats were to be filled by an electorate consisting of all citizens of the Irish Free State, duly qualified, who had reached the age of thirty years, voting in accordance with the principle of proportional representation. They were to choose from a panel composed of three times as many qualified candidates as there were members to be elected, of whom two-thirds were to be nominated by the

Dail and one-third by the Senate, plus such former senators as desired to be included in the panel. Thus, in the circumstances then existing, the Senate had to select nineteen candidates, and the Dail thirty-eight, and to these fifty-seven names had to be added those of the nineteen retiring senators, all of whom intimated their desire to offer themselves for re-election. The result was a ballot paper several feet long, containing seventy-six names arranged in alphabetical order, from which nineteen new senators had to be elected.²⁵³

The selection of the Senate portion of the panel took place on July 1, 1925. There were twenty-nine candidates for the nineteen places. Forty-seven senators out of a possible sixty voted. The result was disappointing. Although it is true that there were some distinguished names among the successful, on the whole the list could not compare with the list of the ten rejected who included, among others, Lady Gregory, the founder of Dublin's Abbey Theater and a noted playwright.²⁵⁴

Of the nineteen retiring senators, eighteen were present and voted. It is perhaps not cynical to assume that some of them might not have been over-anxious that candidates should be returned who would prove formidable rivals at the election. The result was the subject of caustic comment by Senator Gogarty, who expressed the fear that "the Senate might become a refuge and an asylum for pensioners."²⁵⁵

The Dail made its selection on July 3, 1925. The thirty-eight candidates were not especially distinguished, but on the whole were superior to the Senate list. The voting took place on strict party lines, the candidates made up as follows: Government Party, 21; Independents, 9; Farmer's Party, 5; Labour Party, 3.²⁵⁶

The polling day for the Senate general election was Thursday,

September 17. The electorate numbered approximately 1,300,000, and they were expected to make an intelligent choice of nineteen persons from a list of seventy-six names, most of which they had never seen or heard before. The Republicans boycotted the election, and the day was wet in most parts of the country. The result, according to O'Sullivan, was a fiasco. Only about 25% of the electors voted. Of the nineteen outgoing senators, eight were re-elected. Of the eleven new senators, all but two were from the Dail portion of the panel. It was generally understood that the return of Major-General Sir William Hickie and of Brigadier-General Sir Edward Bellingham was due to the votes of ex-servicemen in the British Army. This, with the success of all three Labour candidates, suggests that such a system of election favored the return of those candidates who had the backing of organized groups.²⁵⁷

The next Triennial Election was due in the Autumn of 1928. It was admitted on all sides that the experience of the 1925 election had been a disappointment. Accordingly the following resolution was passed by the Senate on February 15, 1928:

"That it is expedient that a Joint Committee, consisting of five members of the Dail and five of the Seanad, with the Chairman of each House ex officio, be set up to consider and report on the changes, if any, necessary in the constitution and power of, and methods of election to, Seanad Aireann . . ."258

De Valera, who had entered the Dail the previous year, explained his party's attitude:

"We are against the setting up of this particular Committee. We think that the proper thing to do is to end the Senate and not attempt to mend it. It is costly and we do not see any useful function that it really serves."²⁵⁹

O'sullivan asserts that the utility of the Senate at this time was at its height, and that De Valera's hostility was toward the ex-Unionist segment of the Community represented in it. Whether or not anti-Unionist

sentiment was as strong among the public at large as it was in the Fianna Fail Party is an arguable point; however, it is worth noting that by 1928, only twenty out of the sixty members of the Senate could accurately be described as ex-Unionists.²⁶⁰

The Senate proposal for a Joint Committee was agreed to by the Dail with the whole of the Fianna Fail Party voting against it. O'sullivan notes that the idea of the committee was to improve the Senate; as such it might be expected that Fianna Fail would not participate in its proceedings. But De Valera and his principal lieutenant, Mr. Rutledge, went on the committee and made a number of proposals designed primarily to weaken the Senate. Among De Valera's proposals were the following: 1) that senators were to be elected solely by the Dail; 2) that the number of senators should be reduced from sixty to thirty-five; 3) that the Senate's power of suspension should be held to nine months (in opposition to a proposal that the suspension period should be increased to two years). Commenting specifically on the proposal that the Senate be elected solely by the Dail, Sean Lemass, who was later to become Minister of Industry and Commerce, and ultimately to become Fianna Fail Prime Minister, stated:

"The purpose of such amendment is to ensure that if we must have a Senate it will be a body that will be subordinate to this House, held tight in the grip of this body and unable to wriggle unless this body permits it."²⁶¹

The Joint Committee reported on May 16, 1928, and all of its recommendations were implemented by Constitution (Amendment) Bills introduced by the Government which specified the following:

1. The number of senators was to remain at sixty, but the electorate would consist of members of the Dail and Senate voting together on principals of proportional representation (Amendment No. 6 Bill).

Subsequently, the Seanad Electoral Bill was passed, authorizing that before each Triennial Election the Dail and Senate were each to nominate a list of as many candidates as there were members to be elected, each house voting according to the principles of proportional representation. The two lists would then be combined into a single list, the names being arranged in alphabetical order. The two Houses would then vote by secret postal ballot. Retiring senators would not be allowed, as they had in 1925, to have their names placed on the nominating panel as, previously, a special class of candidate. Thus, if there were twenty vacancies, each House would prepare a list of twenty candidates and from these forty candidates twenty senators would be elected by members of the Senate and the Dail, voting by secret postal vote, including retiring senators.

2. The minimum age for a senator was reduced from thirty-five to thirty years (Amendment No. 8 Bill), and the period of office altered. Formerly, one quarter of the house retired every three years, so that a full term consisted of twelve years. Under the new system, one-third of the house retired every three years, and for new senators a full term consisted of nine years.

At the November 1928 Triennial Election, nineteen senators were due to retire. The electorate was to consist of 213 members, 153 from the Dail and 60 from the Senate. As there were nineteen vacancies, it was intended that voting should be from a panel of 38 names, compiled equally from the Senate and the Dail. But this intention was not fulfilled. The Dail portion was completed on November 7, 1928. It contained nineteen names, but eleven of those were duplicated from the Senate portion. Thus there were only twenty-seven candidates for nineteen seats.²⁶³ In the election which followed, Fianna Fail won six seats, the Government Party won four;

Labour one; the Independent Group four; and the unattached Independents four.²⁶⁴

Of the twelve new senators, eight were ex-members of the Dail, and all but one of them had been rejected by the senators, some of them twice in the last few months. Essentially, they were all party politicians and they came into a second chamber in which a formal party system had yet to develop.²⁶⁵

The future of the Senate, then, was placed by the new system into the hands of the two major political parties. One of these was openly hostile to the Senate, and aimed at its abolition. In the meantime, it wished to make the Senate as weak as possible. That it chose its senators according to this view is not surprising. More surprising was the behavior of Cosgrave's party, which sent three newcomers to the Senate who had been rejected the previous year at the polls in the general elections.²⁶⁶

The Triennial Election of November 1931 continued this trend. There were twenty-three retiring senators, and the Constitution now required that the election should be from a panel of forty-six names formed equally from the Senate and Dail lists.²⁶⁷ As in 1928, there was a dearth of candidates. The Senate nominated the twenty-three outgoing senators as its portion of the panel. The Dail portion contained only sixteen names instead of the twenty-three required by the Constitution, and of these sixteen no less than eleven duplicated the Senate portion. As a result, there were only twenty-eight candidates for twenty-three seats and only five new candidates, all from the Dail portion of the panel. Four were followers of De Valera and one belonged to the Cosgrave party. The new result was: Cosgrave party, 9; Fianna Fail, 7; Independent Group, 4; Labour Party, 2; Independent, 1.²⁶⁸ This trend toward party politics and away from

independence in the Senate was to continue throughout the remaining life of the Irish Free State, as Table IX illustrates.

TABLE IX

| Party | Political complexion of the Senate ²⁶⁹ | | |
|-------------------------------------------------------------|---------------------------------------------------|------|------|
| | 1928 | 1931 | 1934 |
| United Ireland (formerly <u>Cumann na nGaedheal</u>) | 19 | 21 | 22 |
| <u>Fianna Fail</u> | 7 | 13 | 19 |
| Independent Group | 12 | 10 | 7 |
| Independents | 15 | 9 | 4 |
| Labour Party | 6 | 6 | 7 |
| Chairman | 1 | 1 | 1 |

The next General Election was in February 1932.

TABLE X²⁷²

| Party | Election Return |
|----------------------------|-----------------|
| <u>Fianna Fail</u> | 72 (56) |
| <u>Cumann na nGaedheal</u> | 57 (66) |
| Independents | 11 (13) |
| Labour | 7 (10) |
| Farmers | 4 (6) |
| Independent Labour | 2 (2) |
| Total | 153 (153) |

Fianna Fail won the election, but only with a qualified mandate. The party numbered less than half of the Dail, and it needed to depend upon Labour for support.

From 1932 on, the Senate faced a Government openly hostile to its existence. The power of amending the constitution by ordinary legislation

had been extended from 1930 to 1938 by virtue of a bill passed in 1929; the power of the Senate to force a referendum on constitutional change was given up as a part of the 1928 reforms. The Senate had allowed for those changes primarily in order to assure the increase in its suspensory power from nine to roughly twelve months.²⁷³ Because of a fortuitous set of circumstances, then, De Valera and his party now possessed the means to imperil the existence of the Senate at any time they might feel the need to do so.

New Zealand

New Zealand, like Ireland, is a unitary state, and it faces similar problems regarding representation, although it had not encountered the same sort of violent upheavals in its history. The first effective legislation to provide New Zealand with representative institutions was "An Act to Grant a Representative Constitution to the Colony of New Zealand" passed by the Imperial Parliament in 1852. The Act did not grant responsible government. The Constitution Act provided that the Queen might authorize the Governor to make such appointments as she thought fit. However, direct interference by the Imperial Government in the appointment of Legislative Councillors was largely precluded by New Zealand's remoteness, and the Governor's instructions authorized him to make appointments without prior approval. In 1856 after a General Election the Elective Council was formed from Ministers supported by the majority in the Lower House. The development of responsible parliamentary government and institutions in New Zealand closely paralleled its development elsewhere; appointments were being made on Ministerial advice by 1867. In 1868 an Imperial Act confirmed all previous appointments and placed the appointing power in the hands of the Governor. By the 1890's the convention was well established

that in this, as in other matters, the Governor could not reject Ministerial advice. The Act also authorized the Governor to make appropriate appointments to the Upper House as he saw fit.²⁷⁵

It might be expected that an upper house would be used as a counter-weight to balance representation between the two main islands of New Zealand, giving the legislature semi-federal character. Such a move might have given the house a strong position vis-a-vis the House of Representatives, and have given it a claim to speak for the country as a whole. Unfortunately, this opportunity was missed. Jackson writes that, if anything, the composition of the upper house tended to reinforce the lack of balance in the lower house.²⁷⁶ In practice, although geographical representation played an important part in the selection of nominees to the council, the process was a matter of rule-of-thumb: no quotas were ever derived for selection. For example, in the early years Auckland representation predominated. This predominance declined in 1862 and dropped rapidly after the seat of government moved from Auckland City to the more central site of Wellington, as Table XI indicates.

TABLE XI

| Auckland Membership as a Proportion of the Total Membership of the Legislative Council (upper house). 1853-1867. ²⁷⁷ | | |
|---------------------------------------------------------------------------------------------------------------------------------|-----------|-----------|
| 1853 30.7 | 1858 45.0 | 1863 35.7 |
| 1854 42.7 | 1859 40.0 | 1864 34.6 |
| 1855 46.6 | 1860 47.0 | 1865 22.8 |
| 1856 58.3 | 1861 45.0 | 1866 17.1 |
| 1857 50.0 | 1862 40.0 | 1867 16.6 |

The 1852 Act had authorized the appointment of not less than ten Legislative Councillors for life, although the Legislative Council Act of 1891 provided that all future appointments were to be for seven years, with eligibility for reappointment.²⁷⁸ There appears to have been no single cause for the failure of the life appointments. One of the reasons for

the life term had to do with an intention to make the Council the part of the government with the greatest amount of permanence, but by 1857 over 50% of its members had already left. The rate of turnover was not so high subsequently, but it continued to be greater than expected.²⁷⁹ Moreover, it was not confined to the young and politically ambitious, but was spread fairly evenly over the age ranges and over 25% served for no more than four years (Table XII).

TABLE XII

Rate of Turnover of Personnel, 1853-75²⁸⁰

| No. of Years | No. Holding Office | Percentage |
|---------------|--------------------|------------|
| Less than one | 5 | 5.38 |
| 1-2 | 9 | 9.68 |
| 2-4 | 11 | 11.83 |
| 4-6 | 5 | 5.38 |
| 6-8 | 7 | 7.35 |
| 8-10 | 11 | 11.83 |
| Over 10 | 45 | 48.37 |

The House of Representatives, and to a lesser extent, local and provincial politics, exercised a constant attraction on Councillors throughout the period 1853-1875, and 18.33% of all resignations were due to members transferring to other fields of political activity - more than half to the lower house. Such movement certainly harmed the Council in the eyes of the public (Table XIII).

Jackson notes that all the members who transferred or attempted to transfer from the Council to the House of Representatives during the period 1854-75 were of ministerial rank, and it is therefore not surprising that only one experienced any difficulty in making the change.²⁸¹

TABLE XIII

Analysis of the Causes of Vacation of Seats, 1853-91²⁸²

| Cause | 1853-75 | | 1876-91 | |
|-------------------------------------------------|---------|------------|---------|------------|
| | no. | percentage | no. | percentage |
| Local Politics | 5 | 8.33 | — | — |
| Health, Old Age, Death | 4 | 6.69 | 27 | 64.30 |
| Return to England | 14 | 23.33 | 1 | 2.38 |
| Stand for lower house | 6 | 10.00 | 2 | 4.76 |
| Disqualification for Absence | 5 | 13.33 | 4 | 9.52 |
| Disqualification for reasons other than absence | 5 | 8.33 | 2 | 4.76 |
| Business Commitments | 2 | 3.33 | — | — |
| Other reasons | 5 | 8.33 | 2 | 4.76 |
| No data | 11 | 18.33 | 4 | 9.52 |
| Total | 60 | | 42 | |

The movement appears to emphasize that, for the politically ambitious, the lower house quickly became the forum of legislative activity. In this sense, there is much to be said of the old House of Lords' rule in Britain which, prior to 1963, prevented such transference, because the Legislative Council, particularly in its early years, needed prestige very badly.

The change in tenure from life to seven years in 1891 clearly weakened the status of the Council even further. This provision, combined with the evolution of a convention that ministers, rather than the Governor-General, were responsible for the appointment of Councillors and the absence of a limit to the size of the Council very nearly completed its emasculation. McLintock argues that, until the 1890's, the Council had shown little hesitation in using its powers to amend or reject bills passed by the House. But a chamber which could be "packed" by men of the Government's choice

and whose members were dependent on the Government for reappointment were not in any position to be as independent.²⁸³

From 1892 onwards, clear changes began to take place in the composition of the Council. The dominance of the large farmers broke down and there was also a shift away from Law, Professional, and Commercial groups. More emphasis was placed on appointments from trade and journalism and, simultaneously, working men and trade union secretaries gained representation for the first time.²⁸⁴

How much did these changes in composition from 1892 onwards stem from the change in tenure? It would appear that the attitude of successive Governments was the key factor in determining the nature of the personnel appointed, and change would have occurred without any alteration of the system of tenure. It seems, then, that the restriction of tenure reduced the need for resignations, but the death of nearly half the Councillors while still in office underlines the character of the upper house. It had become, in effect, an old folks' home.²⁸⁵

Strong hopes had been voiced in the early years that the Council might provide representation to the native Maori interests. Dillon Bell, although he spoke of the new institutions as open to all, clearly had in mind representation of Maori interests by the European Legislative Councillors when he declared:

"For my part, I am inclined to think that, if the population of New Zealand were all of European race, I should prefer the legislation of the country be carried on by one chamber....But in the circumstances of this colony, with the fact before us that a majority of the Queen's subjects is of another race, which at present is, and must remain for some time, wholly unrepresented in the popular chamber, I confess I see strong grounds for establishing a second legislative body, in which the acts of the representatives would come under review, and where the benefit of second thoughts would be had upon many subjects more or less directly affecting

the interests of the large number who are unrepresented in
 the elections...." ²⁸⁶ and in
 the elections...." ²⁸⁷

The decision to give Maoris four seats in the House of Representatives in 1867, although intended to be of a temporary duration, was followed by two appointments to the upper house. For Jackson, the appointment of Maoris for life to the upper house appears to have been influenced by political or symbolic motives. But, by 1890, the Council and the Maori race had come to have something in common. W. P. Reeves declared:

"I think myself, we should treat the Council as we do the remnants of the Maori race - treat them as the venerable remains of a noble race...let them die peacefully." ²⁸⁸

The development of cohesive political parties after 1891 affected the Council as it enhanced its value as an area of patronage. Demand for place, which had developed from the 1860's, was represented by the growing size of the Council. In particular, the Council was used to reward ex-members of the House as a place of retirement, or as a haven for defeated candidates, not unlike the Free State Senate in its later years. Between 1891 and 1935, 52.86% of all first appointees had had previous experience in the lower house. A further 38.57% had held local government or Trade Union office, leaving twelve out of a total of 140 who were appointed without previously holding elective office. ²⁸⁹ Occasionally, the use of Council seats for party purposes openly overstepped the bounds of propriety, as when unwelcome candidates were offered Council seats to urge them out of running for the House of Representatives. ²⁹⁰

Clearly, it can be seen that the Legislative Council failed as a representative body on all counts. It did not provide for geographical representation, and tended to reinforce the representation of the more heavily populated areas already represented in the House of Representatives. Further, it missed its chance to acquire semi-federal characteristics by

failing to provide for equal representation of the two main islands. Representation of the native Maoris in the Council was attempted for basically cosmetic purposes, after representation in the lower house had been already provided. Finally, the rise of political parties tended to make the Council a center of patronage activity and, from 1892 onwards, there was marked tendency for Governments to reward those who had rendered faithful party service with Council seats. Such characteristics as these could not help but contribute to the Council's inability to deal effectively with legislative matters.

LEGISLATIVE FUNCTIONS

The Irish Free State

O'Sullivan considered the legislative powers of the Free State Senate to be severely restricted compared with second chambers elsewhere,²⁹¹ yet the powers appear comparable to those accorded to the chambers under consideration in this study, with perhaps the exception of Australia.

Under Article 35 of the Free State Constitution, the Dail was given exclusive authority over Money Bills, although every Bill of this type was to be sent to the Senate for its recommendations. The Senate was obliged to return the Bill within twenty-one days, and the Dail might accept or reject all or any of the Senate's recommendations (Article 38).²⁹²

With regard to Bills other than Money Bills received from the Dail, the Senate was given a power of suspension of 270 days. The Senate had the full power of amendment over such Bills, but should Senate amendments prove unacceptable to the Dail, after a suspensory period the Bill as passed by the Dail would be considered as passed by both Houses. This suspensory period of nine months was subsequently lengthened to twenty months, but it could be lessened by an intervening dissolution of the

Dail, was considered as passed within sixty days of its reassembly.²⁹³

TABLE XIV

Initiation of Bills in the Senate, and the Number of Senate Amendments accepted by the Dail, 1927-1933²⁹⁴

| Year | Bills initiated in the Senate | Bills initiated in the <u>Dail</u> |
|------|-------------------------------|------------------------------------|
| 1928 | 2 | 51 |
| 1930 | 3 | 53 |
| 1932 | 0 | 45 |
| 1933 | 2 | 66 |

| | Senate Amendments | Senate Amendments Accepted by <u>Dail</u> |
|------|-------------------|-------------------------------------------|
| 1927 | 269 | 268 |
| 1928 | 67 | 59 |
| 1929 | 58 | 56 |
| 1930 | 80 | 80 |
| 1931 | 87 | 85 |
| 1932 | 94 | 86 |
| 1933 | 178 | 160 |

As Table XIV illustrates, the use of the Senate to initiate Bills was almost non-existent. A few days before the dissolution of August 9, 1923, the Government relieved some of the legislative congestion in the Dail by initiating three short Bills in the Senate which needed no amendment. This was to be effectively the extent of the initiation in the Senate of legislation. On one occasion, May 21, 1924, Cosgrave stated that it was his intention to initiate Government Bills in the Senate; however, no matter how sincere his intentions, O'Sullivan notes that the general attitude of the Government towards the second chamber, and still more the attitude of the Dail, was one of detachment, dislike, and distrust, and its

function with regard to initiation was kept to its constitutional minimum. By the time De Valera came to power in 1932, this condition had become stabilized. In any case, the hostility of the new President and his Ministers towards the Senate precluded any change in what had become the status quo.²⁹⁵

A much greater power than that of amendment or suspension was the right given to the Senate by Article 47 of the Constitution to force a referendum. A Bill passed (or considered to have been passed) by both Houses might be suspended for ninety days on the demand of two-fifths of the members of the Senate, presented to the President of the Executive Council (the Prime Minister) within seven days after the Bill had passed. The Bill had to be submitted to a referendum if such was demanded within the period of ninety days, either by a resolution of the Senate assented to by three-fifths of its members, or by a petition signed by at least one-twentieth of the electorate. Apart from the right to demand a referendum, it will be seen that Article 47 operated indirectly to increase the Senate's power of suspension from nine months to twelve. The referendum procedures did not apply to Money Bills, or to Bills declared by both Houses to be necessary for the immediate preservation of the public peace, health, or safety. Article 47 was undoubtedly valuable safeguard, but until its deletion from the Constitution in 1928, no occasion arose for its exercise by the Senate.²⁹⁶ Deletion of Article 47 came about as part of the attempt to improve the functioning and composition of the Senate in 1928, and as such it was acceded to by the Senate. However, in light of subsequent events, notably the dissolution of the Senate, where the power of referendum might have been a preventative, it can be seen that Article 47 was a much more important

safeguard than anyone, including the Senators themselves, realized.

Senators were excluded from membership in the Executive Council (that is, the Cabinet). The Executive Council was to consist of not more than seven nor less than five Ministers (Article 51), all of whom had to be members of the Dail (Article 52). Under Article 55, Ministers who were not members of the Executive Council might be appointed by the Crown on the nomination of the Dail, the total number of Ministers (including those members of the Executive Council) not to exceed twelve. Such "Extern Ministers," as they came to be called, were to be responsible solely to the Dail for the administration of the Departments of which they were head (Article 56). In the absence of any restriction in the Constitution, the Extern Ministers could have been members of either House, or of neither. In the short period during which this provision was operative (the life of the Free State), no member of the Senate was appointed. All the ministers, however, were given a right of audience in the Senate under Article 57.²⁹⁷

The attitude of the Government and the Dail towards the Senate can perhaps best be described in O'Sullivan's words as one of "imperfect sympathy." The reasons for this are fairly simple. The country had just recently won a partial independence after a bitter struggle in which all of the members of the Government and many members of the Dail had actively participated. The Senate, on the other hand, was thought to be composed largely of men whose attitude during this struggle was considered, according to O'Sullivan, to have been, correctly or not, one of apathy or even hostility, due to their alleged unionist sympathies. Added to this was the fact that the Dail was the product of universal suffrage and thus regarded itself as the repository of popular sovereign rights, and, in

respect of law-making, it intended to share these rights as little as possible with the "unrepresentative" Senate. Moreover, the Dail had been in existence for four years prior to the Senate so that the Senate was considered to be something of an interloper. O'Sullivan writes that it was a situation in which the remedy lay in experience, time, and above all, a change of Government,²⁹⁹ although not a change to one that would be as hostile to the Senate as Fianna Fail.

Under the Constitution, Ministers had the right of audience in the Senate; and although Parliamentary Secretaries had no such right, when their presence was desirable permission was specifically accorded from the Chair. Unfortunately, the two Houses often sat at the same hour and it frequently happened that the Minister or Parliamentary Secretary in charge of a Bill before the Senate would be unable to attend, as his presence was required in the Dail. In such cases, debate had to be postponed, or the measure proceeded with in the absence of its sponsors.

Another grievance of the Senate was the manner in which large blocks of bills were sent to it, especially before the Christmas and summer recesses, and required by the Government to be passed on short notice on the grounds of administrative urgency. This, as has been seen in other parts of this study, is a problem that is general to nearly all second chambers of the Westminster type. Although the President of the Senate, Lord Glenavy, frequently protested this state of affairs, it did not appear to disturb him greatly. Prior to the summer recess of 1924, he informed the Senate that:

"...there are nineteen bills for our consideration when we meet tomorrow. Twelve months ago it would have occurred to me that that would mean two days protracted sitting of the Senate. But seeing that we have despatched fifteen bills

today in the space of an hour I see no limit to the speed and powers of this House. Therefore, I think we will be quite able to dispose of these nineteen bills tomorrow."³⁰⁰

One remedy would have been for the Government to initiate more non-controversial bills in the Senate, which would have subjected them to a high level of criticism from that body, while, correspondingly, taking a degree of pressure off the Dail. On one occasion Cosgrave informed the Senate that it was intended to adopt this procedure, but, because of a strong anti-Senate bias or for some other reason, it was never adopted. Finally, the Senate took matters into its own hands by refusing to hurry legislation, and the Standing Orders were amended so as to provide that there should be an interval of three days between receipt of a bill (other than a Money Bill) from the Dail, and its appearance on the Order Paper, and also so as to prevent more than one stage of a bill being taken on the same day.³⁰¹

De Valera sponsored, on June 7, 1933, the Constitution (Amendment No. 19) Bill, the purpose of which was to curtail the Senate's power of delay from eighteen months to three months. In so doing, it would appear that he had decided against abolishing the Senate for the foreseeable future. He made it clear, however, that this was not the case, stating in his Second Reading speech that the Government intended to bring in proposals "to end the present Senate, at any rate." The present Senate "did not perform any function which could not as well be performed by a Committee" of the Dail. He called it absurd that the second chamber should act as "a mere reflex" of the Dail, yet it will be recalled that, sitting in the Joint Committee of 1928, De Valera had done what he could to make the Senate as accurate a reflex of the House as possible. The bill to limit the Senate's suspensory period was passed by the Dail on

June 28, and came before the Senate on July 11, when Senator Coughlin moved that the Second Reading be postponed pending the setting up of a Joint Committee of both Houses to consider the constitution and powers of the Second Chamber. The Second Stage was postponed by 30 votes to 7, and the following resolution was passed and incorporated in a message to the Dail:

"That it is expedient that a Joint Committee consisting of five members of the Senate and five members of the Dail, with the Chairman of each House ex officio, be set up to consider and report on the changes, if any, necessary in the constitution and powers of the Senate."³⁰²

Although the resolution was printed on every order paper to the Dail for nearly three years, it was ignored by the Government. The suspensory period of eighteen months expired on December 27, 1934. Meanwhile a bill to abolish the Senate had passed the Dail and had been rejected by the Senate. December 27 passed, and Mr. De Valera failed to act, although it was generally assumed that the Senate was soon to be abolished. Then, on April 11, 1935, he proposed a motion in the Dail for the purpose of sending the bill limiting the suspensory period a second time to the Senate under article 38a of the Constitution, giving as his reason that, even if the Senate remained in existence for only a short time, the Government still desired its power of delay to be restricted. The Bill was again considered in the Senate, where it was rejected, 21 votes to 20.³⁰³ Under Article 38a of the Constitution the Senate now had only sixty days to reconsider the Bill, and this period terminated on June 10, 1935. At that time, on or after June 11, the Bill could have become law by the mere passage of an enactment resolution by the Dail, yet no such resolution was proposed, and the Bill never became law.

As a revising chamber, the Senate performed its work admirably,

as Table XIV illustrated. Yet, with the rise of strong parties in the Dail, this function was rendered less necessary. The Senate initiated legislation only with the Government's approval, and did so rarely, although there is no reason why non-controversial bills, or private member bills, could not have been initiated there. Perhaps, with the passage of time, this might have occurred. As we have seen, while the responsibility of the Senate's abolition must rest squarely with De Valera and the Fianna Fail Party, it has been seen that inter-house conflicts had developed even during the Cosgrave Government's time in office. Had the Senate retained the power to force a referendum, it is possible that abolition might have been avoided, but this is by no means certain. However, it is not the fact of abolition itself or the manner in which it was accomplished which is of note, but the underlying reason behind it, the dissolution of the Irish Free State.

New Zealand

The decline in the Legislative Council's role can be seen most clearly in the sphere of legislation, both in its initiation and revision. Jackson writes that the most important work of the Council throughout its existence was to be found in its role as a revising chamber. In the 96-year existence of the Council, ~~34%~~ of the Bills from the House of Representatives which passed through the Council were amended. But the distribution was uneven throughout the Council's history. Between 1854 and 1890 some 50% of legislation submitted was amended, compared with 26% from 1891 to 1950. Another feature was that the Council was concerned primarily with the amendment of Government Bills, and in its later years many amendments were made at the instigation of the Government representative in the Chamber. Also, we see again the problem of the end-of-session rush;

it was by no means unusual for Councillors to sit for a nine-week session, deal with a handful of legislation in the first seven weeks, and be faced with 50 or more bills in the final two.³⁰⁴ There can be scarcely any doubt that this limitation, which now appears to be general among second chambers of Westminster origin, coupled with the Council's own lack of activity in the initiation of legislation, restricted the effectiveness of the Council. Although some bills lapsed in the Council at the end of the session, more often they were forced through, receiving little, if any, attention. It would seem that the continuance of this practice over a long period of time did much to weaken the Councillors' own belief in their role as legislators.

In New Zealand, there were no legal restrictions on the power of a Government to introduce bills into the Council. The Parliamentary Privileges Act of 1865 provided that both Houses were to have the same privileges as the British House of Commons. But the British convention that money bills and all important policy bills should be introduced first into the lower house was accepted in New Zealand. There were also conventions that the cabinet was responsible to the lower House and that ministers who were heads of departments normally sat in the House of Representatives. As noted in other chapters, it is unlikely that a Minister would want to see his bills introduced into a house where he would be unable to take complete charge of their passage.³⁰⁵ It is of interest to note that of the sixteen administrations between 1891 and 1950 one failed to appoint a minister from the upper house, and nine appointed one only. It was often the practice for the portfolios of Internal Affairs and/or Attorney General to be in the upper house. This is a comparatively better situation than has been found in most of the other

systems under study, but even this practice ceased after the early 1930's, and in 1942, when the portfolios of Industrial Manpower, Labor, and Civil Defense were allotted to two ministers in the Council, a member of the House of Representatives complained that:

" . . . it is casting a stigma on the intelligence of the elected members of this chamber when a member of the Legislative Council is appointed to a Cabinet."³⁰⁶

The highest proportion of legislation initiated by the Council, just over one-quarter of the total initiated by the New Zealand General Assembly as a whole, was in the years prior to 1869. But even at that time the Council considered itself far from fully occupied and a Select Committee complained in 1868 that it could see no reason why so many of the bills submitted to Parliament should not be submitted first to the Council.³⁰⁷ Between 1869 and the end of the century, the proportion of legislation initiated by the Council dropped slightly, but despite some fluctuations, it averaged roughly one-fifth of the legislation initiated by the Government of the day. Until the mid-1890's, most Governments were willing to introduce a significant proportion of their legislative programs for first consideration in the Council, and it was not until after 1894 that the decline set in. With a growing emphasis on party discipline and representative accountability to the electorate, Governments insisted upon the introduction of a larger proportion of their legislation into the House of Representatives. Because of the lack of private and private members' bills, this practice led to a decline in the overall initiating activity of the Council, and one more aspect of legislative capacity was wasted, further emphasizing the serious imbalance of legislative activity.³⁰⁸

Jackson considers petitions from private citizens as having long

been an important feature of the New Zealand political scene. In a sense they provide a scale of the relative popularity of the two houses. It is conceivable that the Council, with more time to devote to such matters, would attract a large number of petitions, but, again, its role was a modest one at best. Indeed, at a time when many petitions were being held over for periods of a year or more, the Council was left without work. Jackson finds it difficult to understand why a potential of this sort was squandered. If we consider the Canadian example, such a circumstance might have been corrected. At a time when its role in the initiation of private bills went into decline, the Canadian Parliament remedied the situation simply by increasing the charge for the introduction of a bill into the lower house to \$500, leaving the charge for a similar service in the Senate at \$200. The result was that from 1934 onwards the Canadian Senate assumed a virtual monopoly on the introduction of private legislation.³⁰⁹ In the House of Representatives there appeared to have been little understanding or interest in making the bicameral system work, and a member of the lower house summed up the general attitude when he declared:

"It is called the Legislative Council, but to legislate is the last thing we want it to do. The province of legislation is ours alone. As the elected representatives of the people, it is our job to legislate and not the job of anybody else.... I suggest it is rather hard on some of the capable people who do occupy the benches in that Chamber to reproach them for inactivity which has been forced on them and to deduce from that enforced inactivity incapacity on their part."³¹⁰

The strongest power that the Council possessed was that of rejecting legislation, although on what grounds this power was to be used was never made clear. The implication was that it would be for the "good of the people," even though this involved a nominated House overturning the

the legislation of a popularly-elected House. Originally, the Council was expected to protect property and the monarchy, but a role of this nature requires popular support, which was never apparent in New Zealand. Accordingly, the role of the nominated Council conflicted with the precepts of responsible government, particularly after 1879, when a system of triennial elections was introduced for the House of Representatives. The main period of use of the veto was between 1873 and 1896, when there were often divided counsels in the lower House, or, in particular, when the Liberal Government came to power in 1891 and the Council fought to retain what power it had. The use of a veto by a nominated chamber is always a double-edged weapon; its possibility is always more impressive than its actuality, and this is a fact that Councillors ignored at their own peril.³¹¹

A formal mode of rejection could take a number of forms. A bill passed by the House might be withdrawn or discharged in the Council, or a bill might lapse. Usually, the latter situation resulted from failure to reach agreement at a conference with the House of Representatives, although it could also occur due to a lack of time in the end-of-session rush or because the Council passed a motion to "report progress." The usual method of outright rejection was to pass a motion that the measure in question be read a second time "that day six months," insuring that it would lapse for that season. If reintroduced in the following session, the bill would have to go through the whole parliamentary process again. When the Council desired to reject a bill but wished to make it clear that it was not opposed to the measure in principle, a bill would be "laid aside."³¹²

The frequency with which bills were rejected by the Council varied

at different states in its history. Judged only in terms of the number of bills rejected, its role from 1856 to 1876 was a limited one. Furthermore, the Council was generally concerned more with the rejection of Private Members' Bills than with those of the Government. Although 118 of 184 bills which failed to pass the Council between 1876 and 1891 were rejected, only 32 of these were Government bills, an average of two per year.³¹³ After 1892, the Council's role of rejection dwindled. A number of bills lapsed on occasion, but few Government bills were rejected. From 1896 onwards, even this activity ceased and bills from the House of Representatives were no longer lost in the upper house.

It can be seen, then, that on almost all counts the legislative potential of the Council was wasted. As opposed to the Senate of the Irish Free State, Councillors of exceptional ability generally were not appointed, particularly in the later years of its existence. Due to the non-democratic nature of appointment vs. popular election for the lower house, members of the House of Representatives could rightly claim that legislative responsibility was largely or wholly theirs..

ABOLITION AND ITS CONSEQUENCES

The Irish Free State

When Prime Minister Cosgrave introduced the Constitution Bill into the Constituent Assembly in 1922, he divided it into three parts:

1. The Articles contained in the Anglo-Irish Treaty. The Government made these a matter of confidence; the Assembly could reject or amend them, but in such case it would have to find a new form of government.
2. The Articles inserted as a result of agreement with the Southern Unionists. The Government's attitude towards these was the same.

The agreement with the Southern Unionists comprised proportional representation in the elections for the Dail; a second chamber with specified powers and personnel; and University representation--in the Senate as originally agreed, but later transferred by consent to the Dail.³¹⁴

3. All the remaining Articles, in regard to which the Constituent Assembly would have a free hand.

At the time the Senate Abolition Bill was in the process of becoming law in 1934-6, two other Bills were also before Parliament. One of these proposed to abolish university representation, and the other, in O'sullivan's words, "recast the electoral areas in such a way as to render proportional representation of little value to minorities."³¹⁵ Should these three Bills have become law, then, there would have been little left of the agreement with the Southern Unionists.

Garvin notes that it was the rejection by the Senate of a Bill forbidding the wearing of uniforms except by State-authorized organizations, a move aimed mainly at the semi-fascist Blueshirts, that was the immediate cause of De Valera's desire to abolish the upper house.³¹⁶

It is necessary to understand exactly what the Abolition Bill was to accomplish. O'sullivan contends that it did not set up a unicameral system in the normal sense of the term, that is, with safeguards against any forms of legislative tyranny. Rather, it simply deleted all references to the Senate, so that a Constitution designed for two houses came to have only one. This method is perhaps explained by the haste with which the measure was drafted. De Valera left the Senate at 11 p.m. on March 21, 1934, determined to abolish the Senate after its rejection of the Blueshirt Bill. The Senate Abolition Bill was introduced

in the Dail the next day.³¹⁷

Nearly the whole burden of piloting the Bill through the Dail was Mr. De Valera's. On the Second Reading of the Bill, De Valera said " . . . The principle of the Bill at the present stage, anyhow, is to have a one Chamber Legislature."³¹⁸ De Valera had repeatedly expressed his willingness to consider with an open mind any workable scheme for a second chamber. But for nearly a year the Senate's request for a Joint Committee on the subject had been appearing on the Dail Order Paper. When questioned by Mr. MacDermot on this point, he said that his experience taught him that such a Joint Committee would consider the question "from a narrow political standpoint."³¹⁹ He was referring to the period for which the Bill would be in suspension after the anticipated rejection by the Senate, but, during that period, no commission was set up. Once the Senate had disappeared on May 29, 1936, little time was wasted. Eleven days later, De Valera set up his commission to investigate a new Second Chamber which was obliged to work in extreme haste. Its report was requested by the following October 1, in view of the imminence of the new Constitution.³²¹

On May 30, 1934, the Bill to abolish the second chamber came before the Senate. Mr. De Valera spoke only for a few minutes. Having stated that he did not anticipate that the Senate would pass the Bill, he conceded that there were certain articles in the Constitution guaranteeing democratic rights, and it was his intention to entrench these Articles by specifying some fraction of the total membership needed for amending these articles, such as four-tenths of the Dail. This promise was never fulfilled. Following De Valera's speech, an unusual incident occurred. The Chairman of the Senate requested that he be per-

mitted to address the House from the Chair. He stated that in view of his special knowledge of the Senate's work, he could not remain silent. There followed a speech that lasted for nearly two hours, in which several of Mr. De Valera's arguments were reviewed and answered by the Chairman.³²³

He began by referring to the persistent misrepresentations of which he claimed the Senate had been the target, specifically to a statement by the Minister for Justice in January 1933 that every bill passed by the Dail was being held up in the Senate. The Chairman pointed out that apart from the Oath Bill, the Senate had received twenty-two Bills from the De Valera Government from its inception until the January 1933 dissolution, of which sixteen were passed unamended. Of the six that were amended, a total of ninety-four amendments were inserted and of these, eighty-eight were agreed to by the Dail and the remaining six were not insisted upon by the Senate.

Taking the decennial period of 1923-1932, the Chairman gave exact figures regarding the work of revision done each year by the Senates of Canada, South Africa, and the Irish Free State, which showed that the Free State Senate had done in this area roughly three times the work of the Canada Senate and more than ten times the work done by the Senate of South Africa. He then asked what substitute could be provided that would be capable of performing the function of revision in such a manner.

The Chairman considered the power of delay and showed that no less than thirty-three bills had been rejected by the Canadian Senate and thirteen by the Senate of South Africa. The number in the case of the Irish Free State was only three; thus it could hardly be said that such a power caused the Senate to be pernicious.

One of De Valera's strongest arguments had been that the Senate had

not proven to be an impartial body, and that its attitude towards his Government had essentially been different from its attitude towards Cosgrave's. The Chairman refuted that argument by giving the facts. As regards the work of revision, he showed that the proportions were similar. As regards the power of delay, two bills had been suspended in Mr. Cosgrave's time, and under Mr. De Valera, four out of a total of 109.

The Chairman then entered on the concluding phase of his speech. He asserted that Mr. De Valera's real object was a dictatorship, and he undertook a vigorous defense of the Senate's Independent Group:

"The rest of us have learnt to know and respect the qualities of intellect of these men, their high-mindedness, their inborn love of liberty, their genuine devotion to Ireland....After our twelve years' experience, I, for one, am not going to stand here and allow my friends to be calumniated. Speaking as an Irishman, to Irishmen, of Irishmen, I acclaim these men as my brothers."³²⁴

Mr. De Valera left the Chamber immediately on the conclusion of the Chairman's speech and did not return until the third day, in time to conclude the debate.

It should be noted here that under an amendment made to the Constitution in 1929, it was possible to effect Constitutional amendments by means of ordinary legislation, without recourse to a referendum. Furthermore, during his speech to the Senate, Chairman Bennet stated that he had sought legal advice, which was that the Bill to abolish the Senate had not been an amendment to the Constitution within the meaning of the Constitution. Why then, was the Abolition Bill not brought to the Courts? The answer lay in two previous decisions by the Judicial Committee of the Privy Council which precluded such action. In the cases of the State (Ryan and others) vs. Lennon and others, and of Moore and others vs. the Attorney General of the Irish Free State and others, the

Committee delivered a series of opinions in late 1934 and 1935, that 1) the extension from eight to sixteen years of the power of amendment over ordinary legislation (Amendment No. 16) was a valid amendment; 2) the power of amendment of the Constitution (as distinguished from the Constitution Act) conferred by Article 50 was unrestricted; and 3) the power of amendment included the power of repeal.³²⁵

Other reasons, unconnected with law, may have also prevented those who supported the Senate from taking the initiative. As noted earlier in this chapter, the view of the members of the Dail and Government towards the upper house, even during the Cosgrave years, had been one of imperfect sympathy, and some of Cosgrave's Ministers could not be said to have been particularly sympathetic. Also, it should be born in mind that since the electoral reforms of 1928, the Senate had become increasingly a partisan house, whose composition shifted, however slowly, in the direction of the Government of the day. As a result, the outcome of the next Triennial Election, of December 1937, could be predicted with a degree of certainty. It would probably have resulted in,

| | |
|--------------------|-------------------|
| <u>Fianna Fail</u> | 27 |
| United Ireland | 18 |
| Independent Group | 7 |
| Labour | 6 |
| Independent | 1 |
| Chairman | 1 |
| Total | 60 ³²⁶ |

The Government party, with its Labour allies, would thus have dominated the Senate, and it is difficult to see any enthusiasm on the part of the opposition United Ireland Party of coming to power and facing the Senate

under these circumstances.

At length the formal motion of enactment, the final step necessary for the abolition of the Senate, was set down in the Dail for May 19, 1936. The Chairman of the Senate summoned the House for that day, and in a final speech allowed no recriminations, appealed for a respect of the law, and thanked all who desired the advancement of the state. He then declared the Senate adjourned and vacated the Chair.⁵²⁷

The motion of enactment of the Abolition Bill was not taken up until May 28. In his opening speech, De Valera admitted to a "hankering after a Second Chamber," an admission that MacDermott later described as an "interesting revelation," as it now implied that he was ridding himself of this particular Senate because he knew it would reject the quasi-republican Constitution for which O'Sullivan claims De Valera had no mandate from the people. This also serves to explain De Valera's refusal to consider the Senate's offer to restore the referendum for constitutional amendments in 1934, and, finally, its offer to consent to its own abolition, provided that another Second Chamber were substituted for it, in 1936.³²⁸ When the division was taken, the motion was carried by 74 votes to 52. The Constitution (Amendment No. 24) Bill, 1934, was signed by the Governor-General on the following day, Friday, May 29, 1936, and on that day the Senate of the Irish Free State ceased to exist.

New Zealand

The idea of abolition of the Council was not a new one. Sir George Gray, former Governor and later Prime Minister of the nation, had proposed in the 1870's "one great chamber composed of at least a hundred Members." Prime Minister Richard Seddon and his Liberal Party adopted abolition, together with an elected Governor, as part of the platform of the 1893

election. Later the Labor Party espoused the principle of abolition. But it was never taken very seriously, argues Jackson, and it was never widely popular.³²⁹

When the issue of abolition was resurrected in the 1940's, it was considered a dramatic example of pragmatic party politics, as the proposal of abolition originated in the National Party (Conservative), which in principle supported bicameralism. On the other hand, Labour, which had formally advocated abolition of the Council, became staunch in its defense.³³⁰

In order to understand this situation it must be realized that the Council in the 1940's had become primarily a source of patronage, and successive Governments had allowed it to run down to such an extent that it had become, in Jackson's words, a "redundant" institution.³³¹ Abolition, it was claimed, was not a radical or revolutionary change, but rather a recognition of the status quo. More importantly, it was a matter of politics, as Holland, the Leader of the Opposition, saw an opportunity to embarrass the Labour Government.

An Imperial Act of 1857 had given Parliament the power to alter, suspend, or repeal any part of the Constitution Act except certain enumerated sections, one of which provided for a bicameral Parliament. The Colonial Laws Validity Act of 1865 had given the colonies, in general, the right to make laws altering their constitutions, provided that such legislation was passed in the manner prescribed by law then in force in the colony. When the first Abolition Bill was in debate in 1947, the Attorney-General raised doubts as to the competence of the Parliament to give effect to such legislation, on the grounds that it was not known whether the Act of 1865 gave New Zealand the power to alter the sections of the Constitution entrenched by the Act of 1857. Holland's Bill failed, but it succeeded

in causing the Government to adopt sections 2-6 of the Statute of Westminster, 1931, thereby making New Zealand legally sovereign and providing powers by which the Council could be abolished if required.³³²

While these changes made abolition legally possible, another change was helping to make it politically possible. Holland had argued that the money saved by abolition would be applied to a super-annuation scheme for M.P.'s, and in 1947 the Labor Government passed a Superannuation Act which provided for such a scheme for Members of the House of Representatives, thereby reducing any further need to use the Council as a "retirement home."³³³ From 1947 on, then, abolition became a practical possibility.

As a result of Holland's activities, both Houses set up select committees with the power to sit jointly to consider the desirability of making the House of Representatives the sole legislative Chamber, or of establishing a new revising body. Material was obtained from 22 countries and individual submissions were made, but no agreement could be reached in the committee meetings. The Leader of the Council explained:

"When the factual summary came before the Joint Committee, practically no consideration was given to it. Some of the Members stated that they were not interested in what evidence was given, that they had made up their minds totally and finally that the Legislative Council should go . . ."³³⁴

The Prime Minister did not favor a referendum on the issue because his party, Labour, did not favor bicameralism, merely supporting the present Council as a source of patronage. Therefore, he had no wish to see a new or strengthened Upper House acting as a brake on future Labour Governments' legislation, and it was probable that this was what a referen-

dum might produce. Experience has shown that attempts to abolish Upper Houses by referenda have almost consistently failed. Denmark is one of the few countries which has succeeded in abolishing its Upper House in this manner, and even in that case, the vote was very close.³³⁵

Although it is difficult to gauge public opinion, in retrospect, it is doubtful whether there was any widespread support for unicameralism. The majority of newspapers (which normally supported the National Party) were opposed to the existing institution but, almost unanimously, were bicameral in sentiment. The issue became one of 24 planks offered by the National Party in the general-election campaign of 1949. With the National Party's victory in that election, the new Prime Minister was free to introduce his third and final Legislative Council abolition Bill. The Bill consisted of only two main clauses, one abolishing the Council as of January 1, 1951, and the second protecting the Crown from any claims by ex-Councillors against abolition. A "suicide squad" of party faithful committed to voting for abolition was appointed to the Upper House to ensure that the Bill passed the Council by 26 votes to 16.³³⁶

On January 1, 1951, New Zealand became a unicameral state. Jackson believes that abolition has contributed to an important series of constitutional developments during the 1950's and 1960's which are still not complete.³³⁷ What remained after the abolition of the Council might best be described as a truncated bicameral system, as no one knew whether unicameralism was to be temporary or permanent. The Prime Minister's proposal had been simply to eliminate the Upper House and "see how we get along," so that in a very real sense the present situation is only a continuation of the pre-1950 conditions.

Jackson notes that the immediate results of abolition were minor.

A Select Committee was empowered to sit during the recess to recast the procedure of the lower house to suit the needs of a unicameral legislature and to consider any other amendments likely to facilitate the despatch of business (the last major revision of the Standing Orders had been made in 1929). To enable the public as well as members to have the opportunity to examine bills which had been substantially amended in Committee of the Whole House, it was proposed that a period of delay should succeed the committee stage and that a bill should be reprinted with amendments after adoption of a report and before the third reading, thereby allowing interested parties the possibility of making representations. Another innovation provided that a bill, after passing all stages of the House, could be referred back to the House by the Governor-General for amendment.³³⁸ However, in 1961 it was found that even this period of delay was unnecessary and was abolished.³³⁹

Some newspapers, and the Constitutional Society, continued to urge a written constitution and an upper house, but according to Jackson, by the mid-'60's it was difficult to avoid the conclusion that this was a lost cause. By May, 1970, the Constitutional Society had foundered, and presently public interest seems to have turned more to improving the existing system. Typical of the more recent approach is a proposal at the 1967 National Party Conference suggesting that, "as apparently no acceptable second chamber can be set up, the present House of Representatives be increased to twenty members."³⁴⁰ The general situation is perhaps best summed up in a newspaper editorial published in 1956:

"It would be incorrect to say that the people of New Zealand are disturbed at the failure to reinstate a second Chamber of the Legislature - just as incorrect as it is for the National Party delegates to claim that 'the taxpayer battled for years to do away with the Legislative Council.'

The people in fact did not care very much whether the Legislative Council lived or died. They were rather surprised that the National Government, on entering office, made such haste to abolish it. Many other matters interested them much more . . .

Now the people-- meaning the great majority-- are equally complacent over the failure to establish a new second Chamber . . . :341

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CHAPTER VI

FINAL CONCLUSIONS

"Cromwell and his followers set foot upon this 'pons asinorum' of democracy without suspicion of its dangers."
Morley³⁴⁶

As a concluding segment was not included in the preceding chapter, and as there is a body of thought which holds that the abolition of second chambers constitutes a trend of some importance, a few remarks regarding the abolition of the chambers in New Zealand and the Irish Free State are in order.

The Senate of the Free State, argues Mansergh, was intended to provide for the representation of the Unionist minority in Ireland as well as to act as a legislative chamber. It was hoped that, in time, the former function would disappear and the Senate would have only two functions to fulfill: to delay legislation where popular support was uncertain, and to revise legislation which was improperly drafted. For these purposes, its powers were sufficient; otherwise, its powers were negligible.³⁴⁷

Mansergh goes on to argue that it was the nature of ministerial responsibility to the lower house in the Free State which was to determine the status of the upper house. With the rise of a Cabinet responsible solely to the Dail, and with the development of organized political parties, the position of the Senate as an independent and non-political revisory body became increasingly anomalous and ambiguous. When De Valera's party, hostile to a second chamber of pro-Unionist antecedents came to power, the fate of the Senate was sealed.

Mansergh asserts that "the two most successful" upper houses of modern democracies are found where the cabinet system is not used, in

the United States and Switzerland, and this fact is not without significance. The systems of both countries separate legislative from executive power; the Government does not sit in, and control the legislature. In both the U.S.A. and Switzerland, the constitution is federal, and it is therefore often assumed that a Senate founded solely on a federal basis is likely to be successful. But in reality, Mansergh argues it is the absence of the Cabinet system of government, where the Cabinet is formed from the majority party in the lower house, and is responsible to it, which gives these Senates their influence. When the ministry is not responsible to a lower chamber, that chamber will lose its predominant power over the Senate.³⁴⁸ Hence, the U.S. Senate is a truly coordinate chamber.

Mansergh concludes by arguing that, had the Cabinet system been modified in Ireland, as was intended by the use of "Extern" Ministers based on the Swiss model, the influence of the Senate could have been more substantial. It was the dependence of the Executive Council (the Cabinet) on the Dail that was eventually to allow the Senate's abolition.³⁴⁹

Jackson writes that the abolition of an upper house implies not just a preference for a single-chamber system, but also a recognition that the existing upper house has failed. It is generally believed that the existing upper house has failed because of the assumption that the growth of popular representation in lower houses undermines the need for alternative forms except where strong social traditions persist (as in Britain), or where alternative forms of representation are introduced, such as the corporative-type second chamber of the Irish Republic. Thus, if the selection of members of an upper house is beyond

democratic control, and, as the claims of the electorate become more insistent, the power of the second chamber will decline, co-ordinate authority will cease to exist, and, eventually, abolition and/or reform will be demanded.³⁵⁰

What was ironic about the abolition of the Legislative Council in New Zealand was that it was brought about by the National Party, which was, in principle, opposed to unicameralism. Pressure groups played no real part until after abolition had been effected and the public, disillusioned with the Council but unsure of any alternatives, was almost completely uninvolved. Abolition came about as the result of a determined party leader being given propitious circumstances. In effect, the National Party was only the vehicle for change. In an almost casual fashion, Jackson argues, New Zealand attained the unique distinction of being the only country in the world, certainly among Westminster-type governments, without either an upper house or some sort of written, entrenched constitution. The final, and perhaps greater irony, is that few New Zealanders appear to realize the peculiarity of their constitutional arrangements: they live in a country with a single legislative chamber which is sovereign and unrestrained by either a second chamber or by a constitution which includes certain entrenched provisions concerning, for example, political or civil liberties.³⁵¹

In the Irish Republic, as has been noted, vocationalism represents the raison d'être of the present upper house, but this has become something of a red herring. Successful candidates, with the possible exception of the University members, originate normally from the nominating bodies controlled by the political parties, or else are candidates actively backed by them; this is reinforced by the fact that Senate elections are

held co-ordinately with the Dail. Because the vocational principle has yielded to party politics, the independence and authority of the upper house has virtually disappeared. It should be borne in mind that party majorities in both houses have continually been co-ordinate since the inception of the Republic. Any independence that the Senate is able to exhibit from the Dail usually occurs either in committee or on the voting of non-controversial bills. As a general rule, the more controversial the bill, the more closely voting will follow along party lines. An additional constraint on the Senate's effectiveness as a house of independent review is that senators are too poorly paid and too poorly staffed to consider themselves as anything but part-time legislators. This consideration is compounded as the Senate meets on only about one-third as many days per session as does the Dail, although attendance at Senate sittings is generally higher than at the Dail's. Within its constraints, the Senate acts as an effective house of review, but it suffers from the fact, common to all Westminster-type parliamentary systems, that it has no conception of itself as a body independent from the Government.

The House of Lords, the original second chamber, has become less of an hereditary house due to the passage of the 1963 Peerage Act. Hereditary "backwoodsmen" rarely bother to vote unless there is before the Lords a bill of particular importance, or a measure which might affect their interests. As a revising chamber, the Lords still tends to favor the Conservative Party when it is holding office, and amendments to Conservative bills which are proposed in the Lords are generally of a technical nature. The Lords is much more mischievous when Labour is in power, tending to delay and substantially revise bills which it finds to be objectionable and while the Lords cannot reject legislation, it can make passage difficult.

If Labour is suspicious of the Lords, it is not without reason. A fairly large proportion of ministers originate in the Lords due to the recognition of a Lord's lack of constituency duties and his possession of the detailed knowledge thought necessary to head a ministry, as well as a legal recognition of a Government's obligation to head a certain number of ministries with Lords. Committee work in the Lords is generally of high quality, but again suffers from the lack of independence that a parliamentary upper house may exhibit, although this constraint is a much more minor one than it is for the Irish Senate, due in large part to the historical prestige of the Lords. As for the composition of the House of Lords, it is of particular interest that it is far less a "political" House than is the Commons. By this is meant that there are representatives in the Lords of a wider variety of elites than in the Commons; elites of business, the professions, the intelligentsia. As such, it can be argued, the Lords is a more "representative" house than the Commons, and therein lies a certain amount of strength in that Chamber. Although reform of the Lords is constantly proposed, any change in its powers or composition is likely to be piecemeal sort of tinkering (such as the two-writ scheme) rather than a comprehensive restructuring.

The Canadian Senate consists of members nominated by the Government of the day, as is a portion of the active members of the House of Lords, and as was the second chamber of New Zealand. Like Britain, party service is a predominant factor in determining appointments: Governments tend to appoint senators of the same party, rather than opposition members. Although Prime Minister Trudeau has appointed some minor-party senators and members of the academia, it would appear that by-and-large, the Canadian Senate is much less representative of non-political elites

than is the House of Lords. Initiation of legislation in the Senate, as in other second chambers, is largely minimal. The general rule appears to be that Governments are wary of introducing legislation into a chamber where they may be unsure of the support of a majority of that chamber's members, particularly when defeat of such legislation need not be construed as a vote on no-confidence against the Government. Revision of legislation from the lower house, on the other hand, while of a generally technical nature, is usually of high quality, due in part to a committee system which is much more highly developed than its counterpart in the House of Commons. As a representative of federal interests, the Senate does not receive high marks, largely for the same reason that it is not particularly representative of non-political elites: appointment to the upper house is controlled by the central Government; the only federal criterion imposed is that of residence. The strongest argument for retention of the present system in Canada stems from the large and vocal French minority. It is of interest to posit the fate of the Senate should Canada have been, like New Zealand, a smaller, unitary, and more socially homogeneous nation.

In the Australian case, it does not appear to be federalism, or even the fact that the Senate is popularly elected, that insures it a more powerful position than its counterparts in this study; rather, it appears to be the peculiar situation of an almost equal split between the two major parties in the Senate, with a third party successfully negotiating for power with them. This situation has arisen directly from the electoral system of proportional representation which was introduced in 1949. If the Government party could decisively control the Senate, that House would, in all probability, take on the characteristics

of the Canadian Senate under Liberal Party rule, or of the House of Lords under Conservative rule. If the Opposition party controlled the Senate, the powers of double dissolution and double sitting would always comprise an implied threat to a mischievous or hostile Senate. It is usually said that it is not only the presence of a third party which explains the power of the Australian Senate, but the fact that it is popularly elected on a state-wide basis, and that its powers are constitutionally protected which contribute to its strength. Surely these facts cannot be ignored, but it is important to remember Crisp's contention that party organization in Australia is on a class basis, and that a class is more likely to identify itself with the same class in another state than with a different class in the same state.

In addition, Crisp argues that one cannot ignore the fact that only half the Senate is re-elected every three years. The majority in the House of Commons, where elections occur at least every three years for the entire House, therefore constitutes a fresher mandate from the electorate than does the Senate election held at the same time. therefore, the Senate's claim to popular representation is always a somewhat weaker one than is a similar claim made by the House.³⁵² Further, Crisp, writing on the eve of the introduction of the PR system of election for the Senate, noted that the position of the Senate, as regards the sheer discharge of business, was satisfactory enough, but that this did not always add dignity and lustre to Senate proceedings. He quotes one retiring Senator as commenting privately that "one requires a thick skin and a sense of humor" in order to serve in the Senate.³⁵³ Therefore, it must be concluded that, while the hypothesis that upper house representation in unitary states does not tend to differ from that of the lower

house is demonstrated to be true, the hypothesis that the power of upper houses in federal states is greater than in those of unitary states due solely to federalism is not demonstrably true; rather, it is the electoral system which has allowed the Australian Senate its comparatively greater power and status as against other upper houses in this study.

The question arises as to just what need there might be in the twentieth century for a second chamber where the tradition has not been established. Generally, experiments with unicameralism have been associated with revolutionary upheavals, as with England under Cromwell or France in 1790. It is, notes Jackson, as if the principle of bicameralism has acquired the characteristics of a talisman which is significant to ward off instability whether the actual second chamber is effective or moribund.³⁵⁴

Of course, any attempt to study bicameralism in a Commonwealth context necessarily implies comparison with the House of Lords, a body which as we have seen, is nearly impossible to imitate effectively. Until the middle of the twentieth century, nearly all colonies aspiring to self-government were endowed, or saddled, with bicameral institutions, and it is only recently that the scope of a counter-trend has become obvious. For instance, over half the members of the U.N. have unicameral systems of government, and these include many with "impeccable" democratic credentials, such as Finland, Denmark, and Sweden. Many of the newer post-war states have either adopted or converted to single chamber governments, the most recent being Sri Lanka (Ceylon).³⁵⁵ The significance of the abolition in New Zealand of the second chamber, then, is that it came at the beginning of a marked trend toward unicameralism, especially in the smaller states, after World War II.

But is abolition the only road to take? Britain probably could function effectively without its House of Lords if it simply appointed special committees of the House of Commons to revise bills: but alternatively, the existence of a third or fourth house as revising chambers need not be considered pernicious, as no bill can ever be revised to perfection. In New Zealand, as has been seen, one newspaper wondered why the Government took the trouble to dismantle the Legislative Council at all.

Speaking of reform of the Senate of the Irish Republic, Garvin suggests converting the second chamber into a smaller assembly possessing negligible political power. It would contain within its ranks administrative, judicial, vocational, and academic expertise, chosen by election or otherwise. Such a House, which would exist in order to advise on revision rather than to actually revise, would thus derive its power from the prestige and special knowledge of its members rather than through any legal grant. The electoral principle may not be necessary, as an administrative chamber of this sort need not be elected to be effective. It would even be possible for the Prime Minister to nominate some of its members directly; since the chamber would possess no political power independent from the Government of the day, there would be no need to appoint members for political ends. The reconstituted Senate, then, would become truly a revising chamber, and would not pretend to be anything else.³⁵⁶

It would not be realistic to expect radical reform in the House of Lords, as tradition and practice weigh too heavily against it. Even a reform as minor as the two-writ scheme of voting and non-voting Lords appears at present to be an unlikely prospect, so that the possibility of A Lords constructed along quasi-federal lines, as suggested by Lord

Ogmore, would seem even more remote. In Canada, reform is frequently considered, such as Briggs' proposal to make the Senate a more truly federal body by having the provinces appoint members of their own governments to the chamber, but the ability of the Government of the day to exercise a degree of control on its membership, the demands of the French community, and the fact that the Senate, as it now stands, contains many able members with considerable political experience, make large-scale reform unlikely. In Australia, popular support of the Senate tends to undermine reform suggestions by both major political parties; even such a relatively minor matter as changing the proportion of senators to representatives has been impossible to achieve.

It is likely, then, that where effective, or even partially effective second chambers exist, abolition or radical reform is unlikely. If a second chamber possesses little power for good, it also possesses little power for evil.

NOTES

346. Connolly, Sen. John J., "The Senate of Canada," (The Parliamentarian: April 1972, vol. liii, no. 2) p. 103.
347. Mansergh, The Irish Free State, p. 100.
348. Ibid., p. 101.
349. Ibid.
350. Jackson, "The Failure," p. 18.
351. Ibid., p. 24.
352. Crisp, The Parliamentary Government, p. 180.
353. Ibid., p. 179.
354. Jackson, "The Failure," p. 17.
355. Ibid.
356. Garvin, The Irish Senate, pp. 94-95

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