Reforming the Lord Chancellor's Role in Senior Judicial Appointments

Richard Ekins and Graham Gee

Foreword by Rt Hon Jack Straw

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Foreword

Rt Hon Jack Straw
Lord Chancellor, 2007–2010

The redoubtable former President of the UK Supreme Court, Baroness Hale, was absolutely correct when she said of the current system of judicial appointments, 'the Lord Chancellor basically is in an almost impossible position'.

I can testify to that. What happened when, as Lord Chancellor, I sought to exercise the limited powers available to me to express disagreement about a nomination for one of the senior judicial positions tells all one needs to know as to why the scheme in the 2005 Constitutional Reform Act does not work.

This appointment was for the Head of the Family Division. The late Sir Nicholas Wall had been nominated by the special panel for such positions. I knew absolutely nothing about Sir Nicolas's politics (and had no interest in them anyway). Nor was I remotely bothered about his views about opening up the family courts. I simply judged that he would not be competent to do the job. I had formed this view in part from my own experience. I asked to see the file of 'judicial consultees' to which the authors of this paper refer. After some teeth-sucking, the file was produced. It contained responses from about 25 senior colleagues. Despite the guarded language, it was obvious to me that Sir Nicholas was being damned with faint praise. I checked very privately with two senior judges whose opinions I valued (and whose own written references were notable for what they did not say). Both confirmed my view. I asked for the nomination to be reconsidered, having gone to some lengths to ensure that this would not be seen as a partisan act.

There was outrage in some quarters about my impertinence. I had preserved the necessary confidentiality around this appointment; so, I am sure, had those on the panel. But partisans for Sir Nicholas leaked the story to The Times. So close to the 2010 General Election, they knew this would place me in an impossible position. The panel duly resubmitted the same name. I reluctantly conceded – but told those pressing so hard they were making a mistake.

As, sadly, it transpired. Poor Sir Nicholas was not up to the job, and retired on grounds of ill-health thirty month later.

What this sad case also illustrated was that the whole system had become far too introspective – never healthy.

There will probably be more expressions of outrage, and charges of 'political interference' when this paper is published. Such would be wholly misplaced. The issues which the authors raise should be of wide

concern. Their suggested solution – that the Lord Chancellor should be able to select the very senior appointments from a shortlist drawn up by a panel under the JAC is just very sensible – and is not going to lead to the end of civilisation. Indeed, it would simply be a modest step to putting England and Wales' system on a par with Australia, New Zealand and Canada, whose judges are at least as robustly independent as ours – but where more progress has been made on diversity than here.

Introduction

The system for appointing senior judges needs to be reformed. In this paper, we explain what has gone wrong and what should now be done to put it right. We take senior appointments to include the High Court, the Court of Appeal, leadership roles such as the Lord Chief Justice (the Head of the Judiciary in England and Wales) and Heads of Division (Master of the Rolls, President of the Queen's Bench Division, President of the Family Division, and Chancellor of the High Court) and the Supreme Court. Our focus is therefore only on appointments to senior courts in England and Wales and to the UK Supreme Court, and not to senior judicial offices in Scotland and Northern Ireland.

The Constitutional Reform Act 2005 (CRA) significantly reshaped the ways in which judges are selected. Since that time, judicial appointments processes have been an unsettled sphere of public policy, as reflected in multiple official reviews (at least nine between 2007 and 2017). Many stakeholders have criticised the current processes, including in a review commissioned by the Labour Party (2014), a report by a think tank aligned with the Liberal Democrats (2012), reports of the think tank JUSTICE (2017 and 2020), and in academic research. A common critique is that the current selection processes are unbalanced: senior judges now exercise excessive influence over individual appointment decisions, especially for senior roles, whilst at the same time the Lord Chancellor's role in making the final decision about whom to select has been wholly eliminated for appointments below the High Court and squeezed to almost vanishing point in selections to the High Court and above. It is only a small exaggeration to say that the judiciary now selects itself. Almost sixteen years on from the CRA, now is an apt moment for the Government to consider reforms to rebalance the judicial selection processes. Those reforms should centre on increased ministerial input.

Several arguments support increased ministerial involvement in senior appointments. These include the need for a more diverse judiciary. Progress on diversifying the judiciary remains slow, especially at the upper echelons. It is true that the judiciary is today somewhat more diverse in terms of gender, ethnicity and professional backgrounds than was once the case – but the pace of change remains slow, and much of the progress is confined to lower judicial ranks, with the progress in the higher judicial ranks remaining halting. Significant barriers remain for aspiring judges from under-represented backgrounds, notably Black, Asian and minority ethnic lawyers and those from lower socio-economic backgrounds. This slow pace of change in diversifying the judiciary has worried politicians

from across the ideological spectrum, including recent Conservative Lord Chancellors. However, the current judicial appointments system makes judicial diversity hard to achieve and frustrates politicians from exercising leadership to ensure the appointment of well-qualified people from a range of backgrounds. The experience in other common law countries suggests that ministerial involvement in senior appointments can help to secure a more diverse and representative senior judiciary.

The strongest argument in favour of reform is the need to enhance the democratic legitimacy and accountability of senior appointments in the face of ascendant judicial power. No one can seriously deny that judicial power has increased in recent years, although opinions vary about the extent of the change, its causes, and its merits. For our part, we have long argued that the expansion of judicial power is a striking departure from the common law tradition, and one that imperils parliamentary democracy and the rule of law.[1] Parliamentarians have a duty to protect the constitution, which requires them to consider and to evaluate the changing role of the courts, and to intervene to restore limits on judicial power when appropriate. Reform of judicial appointments would help the government, accountable to Parliament, to support these limits. Reform does not put judicial independence in doubt and is necessary to address serious accountability and legitimacy gaps. Senior judges exercise significant public power, ever more so in view of the responsibilities conferred or assumed in the context of human rights law. It is not legitimate for decisions about who shall exercise judicial power to be made without meaningful input from responsible politicians. The system for selection and appointment of senior judges must command the confidence of politicians and the public alike. Once appointed, senior judges rightly enjoy security of tenure, and cannot be removed save on joint address of the Houses of Parliament.[2] Ministerial input into the appointments system provides one of the few channels for ensuring that senior judges enjoy an appropriate measure of democratic legitimacy. We argue a wrong turn was taken in 2005 when the judicial appointments system was overhauled, with the Lord Chancellor marginalised from senior selection decisions. There is a strong case to make for enlarging the role of the Lord Chancellor.

In this paper, we begin by tracing the changed approach to senior judicial appointments. Prior to 2005, senior judicial appointments were premised upon a ministerial model that mixed both political and judicial influences, where judges enjoyed considerable influence, but where the final say about who to appoint was made by or on the advice of the Lord Chancellor. The CRA introduced a much more formal, open and bureaucratic approach to senior appointments built around various selection panels. But this approach is unbalanced, insofar as it confers decisive influence over senior appointments to senior judges themselves whilst blocking meaningful ministerial input. We recommend that the CRA be amended to enable the Lord Chancellor to exercise a real discretion in making senior judicial appointments, selecting from a shortlist of well-qualified candidates. In

1. See for example R Ekins and G Gee, "Putting Judicial Power in its Place" (2017) 36 UQLJ 375.
2. See section 11(3) of the Senior Courts Act 1981.

exercising his or her discretion in relation to roles such as the Lord Chief Justice of England and Wales and Heads of Division, the Lord Chancellor should consider whether the person recommended has the requisite range of management and administration skills to enable them to discharge the leadership role effectively. In relation to all senior appointments, but especially appointments to the Supreme Court, the Lord Chancellor should consider the risk that a particular candidate for judicial office may undercut settled constitutional fundamentals, including parliamentary sovereignty. Even in the absence of legislative reform, we recommend that the Lord Chancellor makes clear that he will use his existing powers to refuse to appoint candidates who have cast doubt on Parliament's authority to make or unmake any law.

The changing landscape of senior judicial appointments

Prior to 2005, the Lord Chancellor was at the very heart of the judicial appointments regime, and enjoyed the controlling hand in appointments to senior posts within a regime defined by high levels of informality, secrecy, and ministerial discretion. The formal position was—and, indeed, remains—that all senior appointments were (are) made by the Queen, but acting on ministerial advice. In practice, the Lord Chancellor was the final appointing authority for the High Court. The Prime Minister was the appointing authority for the Court of Appeal, Heads of Division and the House of Lords, but in practice Prime Ministers almost always accepted the candidates recommended to them by the Lord Chancellor.

There were statutory rules prescribing minimal eligibility criteria, but no legal requirements about how the selection processes should be run, with this falling instead to the discretion of the Lord Chancellor. Indeed, the whole selection regime was closely concentrated around the Lord Chancellor and departmental officials. Informality reigned. For the most part there were no explicitly articulated selection criteria, no job advertisements, no application forms, and no interviews for senior vacancies. Instead, the whole selection process was akin to 'a tap on the shoulder'. The only exception were the light touch formalities introduced in the late 1990s by Lord Irvine, when job descriptions, selection criteria and vacancies were published for the first time for the High Court, but even this occurred alongside the tap on the shoulder.

The Lord Chancellor always consulted with senior judges about candidates for appointment—but this was by convention, rather than a statutory requirement. These secret soundings, as they were known, were taken very seriously and weighed heavily with Lord Chancellors, and thus gave senior judges significant sway over individual selections. But Lord Chancellors were not bound by judges' views about who should be appointed, and from time to time would depart from the judges' views. The result was a ministerial model mixing both political and judicial influences, where judges enjoyed considerable influence, but where the final decision about who to appoint was made by or on the advice of the Lord Chancellor.

The CRA overhauled this approach to senior appointments, introducing a much more formal and open regime for selecting judges, but also one that was much more bureaucratic, lengthy and expensive. Today there is no one single process for appointment to senior judicial roles. Rather,

there are different albeit similar processes for: (i) the High Court; (ii) the Court of Appeal and leadership posts in the English and Welsh judiciary; and (iii) the Supreme Court. Each selection process is organised around an independent selection body, with the different bodies responsible for different types of judicial vacancy.

The Judicial Appointments Commission (JAC) is the non-departmental public body comprising a mix of lay people, judges and lawyers that oversees the selection processes for courts and tribunals in England and Wales, including the High Court. The JAC also convenes and provides administrative support for selection panels for the Court of Appeal and leadership roles in the England and Welsh judiciary such as Heads of Division and the Lord Chief Justice—but, strictly speaking, these panels are special committees of, and include panellists from outside, the JAC. At the same time as it provided for the creation of a Supreme Court, the CRA also instituted a new process for selecting judges to the UK's top court central to which is an ad hoc commission that is convened as and when vacancies arise.

Each of these selection bodies contains a mix of judges, lawyers and lay people, with the exact composition prescribed by statute. Statute also prescribes the parameters of the process that the bodies must follow, whilst also permitting them some latitude to determine how to manage the recruitment process. One fixed statutory requirement is the duty of the bodies to consult with certain officeholders as part of their decision-making process. The consultees vary from vacancy to vacancy but are mostly senior judges. The Lord Chancellor is amongst those consulted for vacancies in the Court of Appeal, Heads of Division and the Supreme Court. The selection bodies can also consult with additional non-statutory consultees, usually senior judges. The selection bodies oversee the advertising of vacancies, shortlisting and interviews, before recommending a single candidate for each vacancy to the Lord Chancellor.

The Lord Chancellor is the appointing authority for senior judicial appointments, with the final say (at least in theory) whether or not to appoint the candidate recommended by the relevant selection body. Statute very closely regulates the options available to the Lord Chancellor on receiving a recommendation from a selection body. The Lord Chancellor has three options: to accept the recommendation, to reject it, to or request its reconsideration. Each of the latter two options are exercisable only once in relation to a particular vacancy. After exhausting all of the options in relation to a specific vacancy the Lord Chancellor cannot select an alternative candidate, and instead must accept either the last candidate recommended to them or any candidate recommended at any earlier stage of the selection exercise so long as the Lord Chancellor had not previously rejected that person. In other words, the Lord Chancellor has a 'negative veto'[3] over senior appointments, insofar as they can reject a name recommended by the selection body, but can only exercise that option once, and thereafter will be required to accept a candidate recommended to them.

Statute provides only limited grounds on which the Lord Chancellor

3. A. Paterson and C. Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (Centre Forum, 2012) 26.

can exercise the options to reject a recommendation or request its reconsideration. The power to reject applies only where the Lord Chancellor concludes that the candidate recommended by the selection body is not suitable for the vacancy. Reconsideration can be requested only where, in the Lord Chancellor's view, insufficient evidence exists that a recommended candidate is suitable for the vacancy, or where there is evidence that the person in question is not the best candidate on merit. The Lord Chancellor must provide reasons in writing if exercising either the power to reject or to request reconsideration of a candidate recommended by the selection body. In practice, Lord Chancellors almost always accept the recommendations. Since 2005 no Lord Chancellor has rejected a recommendation for senior appointments outright, and there is only one example where a Lord Chancellor requested reconsideration of someone recommended for appointment to a senior post.[4] All of this is to say that, even on the strict letter of the law, the Lord Chancellor's final say over senior appointments is very limited. As we explain below, in practice many Lord Chancellors seem to perceive that their real discretion is even more limited than this suggests, and perhaps even illusory.

4. See the Foreword to this paper and pp18-19 below.

An unbalanced appointments system

A bare overview of the selection process does not fully capture the twin dynamics that define senior judicial appointments: namely, excessive judicial influence over individual selections decisions combined with the effective marginalisation of meaningful ministerial input.

Excessive judicial influence

Turning first to judicial influence, it is of course entirely appropriate for senior judges to have some degree of involvement in individual selection decisions. Senior judges, after all, possess unique perspectives on the skills and attributes required for judicial office as well as the needs of the judicial system as a whole, and these should help to shape individual selection decisions. However, the current approach effectively goes too far in giving some senior judges the decisive role in the selection of other senior judges. As Alan Paterson and Chris Paterson note, '[i]t is in no way disrespectful to the judges themselves to recognise that it is deeply problematic in a democracy for one branch of state to have anything like a decisive voice in choosing their own colleagues and successors'.[5]

The starting point is to recognise that the CRA weaves high levels of judicial input throughout the appointment of senior judges. This is clear on the selection bodies, where there is very strong judicial representation. Most of the selection bodies have five members, of whom at least two will be senior judges (with the exception being the High Court, where there are four members, two of whom are from the senior judiciary). The selection bodies for the Lord Chief Justice and Heads of Division have a judicial majority, whilst those for the Court of Appeal and the Supreme Court have a lay majority but are chaired by a senior judge.

Over and above the exact composition of the selection bodies themselves, it has been argued that the senior judges who sit on these bodies exercise a predominating influence.[6] Academic research drawing on interviews with many of those involved in the appointments process has highlighted concerns that lay members on senior selection bodies often defer to the expertise and knowledge of the judicial members in terms of what is needed in senior judicial office and which of the candidates most fully meets the selection criteria.[7] To be clear, it is not that lay members are expected to defer outright to the judicial members, but that the dynamics of the selection bodies are such that the lay members typically play a secondary role of corroborating the assessment of the candidates arrived

5. A. Paterson and C. Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (Centre Forum, 2012) 30.
6. See e.g. G. Gee, 'Judging the JAC: How Much Judicial Influence Over Judicial Appointments Is Too Much?' in G. Gee and E. Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 152.
7. G. Gee, R. Hazell, K. Malleson and P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015). See also S. Shetreet and S. Turenne, *Judges on Trial: The Independence and Accountability of the English* Judiciary (CUP 2013, 2nd edition) 116.

at by the judicial members. This raises the possibility that the lay people on selection bodies are not sufficiently strong counterpoints to and checks on the influence of senior judges.

Judicial involvement stretches beyond the input of the senior judges who sit on the selection bodies. Other senior judges are consulted during each of the selection processes. Academic research suggests that the views of judicial consultees have tended to weigh very heavily with selection panels, with the weight attributed to the views solicited via consultation increasing in line with the seniority of the vacancy to be filled. As a result, and while recognising that their views will not always align, it is senior judges on the selection bodies, combined with the senior judges who are consulted during the selection process, who make the critical assessments of each candidate's strengths and weaknesses.

To illustrate this, four senior judges were consulted during a selection exercise for the High Court in 2019. Presumably, the views and information provided by these judicial consultees helped to inform the selection body's decision about who to recommend for appointment. In the same year, a recruitment exercise for the Court of Appeal involved consulting with five judges (i.e. the President and Deputy President of the Supreme Court and all Heads of Division) prior to short-listing on the merits and demerits of all of the people who had applied. After shortlisting, the selection body then consulted with all of the Justices of the Supreme Court and all sitting judges on the Court of Appeal on the shortlisted candidates; i.e. up to another 45 judges were included in this second pool of potential consultees.

High levels of judicial consultation are also evident in the selection process for the Supreme Court, where there are two rounds of consultation. The first is undertaken by the selection body itself, which is required to consult with five senior judges in England and Wales (i.e. Lord Chief Justice, Master of the Rolls, President of the Queen's Bench Division, President of the Family Division, and Chancellor of the High Court), the two senior judges in Scotland (the Lord President of the Court of Session and the Lord Justice Clerk) and the senior judge in Northern Ireland (the Lord Chief Justice of Northern Ireland). The only exception is if one of these judges is either a member of the selection body or has applied for the vacancy. The Lord Chancellor, the First Minister for Scotland, the First Minister for Wales and the Northern Ireland Judicial Appointments Commission are also consulted. The second round occurs after the selection body has recommended its preferred candidate, when the views of the same consultees are solicited in order to be taken into account by the Lord Chancellor when deciding whether to accept, reject or request reconsideration of the recommendation. In practice, the amount of feedback provided by the First Ministers is often relatively limited, especially since they will probably not have encountered the candidates in their professional working lives, unlike the senior judicial consultees.

There is, in short, excessive judicial influence over senior appointment decisions by virtue of the combined effect of: (a) strong judicial

representation on the selection bodies, (b) the likelihood that senior judicial members enjoy a predominating influence on those bodies, and (c) the scope for other senior judges to share their views of the candidates via consultation requirements. When combined with the marginalisation of the Lord Chancellor in individual selections discussed below, it is difficult to avoid the conclusion that excessively high judicial input into senior judicial appointments has led to a system that risks becoming self-selecting, if it is not already. This is problematic for two main reasons.

First, there is a very real risk that a largely self-selecting judiciary will be self-replicating, which irrespective of the quality of the individuals appointed risks undermining public confidence in the judiciary. A cloning effect is a risk if judges overemphasise experiences and skills found chiefly in people who resemble themselves. A related risk is that senior judges might seek to influence processes in ways that lead to differential weight being put on diversity for different sorts of vacancies, with more permissive approaches towards judicial diversity focused on the lower courts and tribunals, with much less weight placed on it for more senior appointments. While it is certainly not inevitable that self-replication will follow from high levels of judicial influence, it is a risk that counsels against conferring too much influence on judges in the selection of their colleagues.

Second, there is also a risk of conflicts of interests, with large numbers of senior judges being required to assess their colleagues who are applying for a promotion. As Alan Paterson and Chris Paterson note, one such example of a conflict seemed to occur in 2008, when Jonathan Sumption was in the running for appointment to the Supreme Court only to be stymied by opposition in the Court of Appeal, who objected to a practising barrister leapfrogging into the top court over serving senior judges.[8] Sumption was not appointed in 2008, but he was successful in a subsequent selection exercise in 2011. While we take no view on the merits of Lord Sumption's appointment, the episode illustrates the scope for conflicts of interest to pass unchecked where there are excessively high levels of judicial influence in the judicial selection regime. This example also demonstrates the very considerable informal influence that senior judges can exert behind the scenes over individual senior appointments in addition to the direct, formal and already excessive influence noted above.

The marginalisation of the Lord Chancellor

The second (related) dynamic that has unbalanced the appointments system is the effective marginalisation of the Lord Chancellor. The Lord Chancellor remains nominally responsible for the judicial appointments regime as a whole and must account for its workings to Parliament. But the Lord Chancellor's involvement in individual selection decisions for senior judicial positions has been winnowed away, and this represents a significant change from the traditional position prior to the CRA. Prior to 2005 the judicial appointments regime was concentrated around the Lord Chancellor, but today ministerial involvement is limited to two points in

8. A. Paterson and C. Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (Centre Forum, 2012) 31.

the selection process.

At the outset, the selection body consults the Lord Chancellor, which enables the minister to share his or her views on the sort of skills and qualities that successful candidates should exhibit as well as the broad context in which the appointments will be made. More often than not, this consultation has little real effect on how a selection process is run or the candidates that are ultimately shortlisted. One exception was in 2017, when the Lord Chancellor, Liz Truss, was reported to have required that the next Lord Chief Justice must be eligible to remain in post for at least four years. The body running the selection exercise subsequently announced that candidates would 'be expected to be able to serve for at least four years', which in light of the judicial retirement age of 70 effectively excluded candidates aged 66 or older, including Sir Brian Leveson, whose potential appointment the Government was reported to view unfavourably, and Dame Heather Hallett (as she then was), who was said to have been in the running for the post previously. However, most consultations with the Lord Chancellor do not have this effect, and it remains the case that ministerial consultation pales in comparison to the scale of the consultation with senior judges, who are afforded an opportunity to comment on short-listed candidates.

At the conclusion of the selection processes for senior vacancies, the Lord Chancellor retains the final say over whether or not to accept, reject or request reconsideration of the candidate recommended by the selection body. But, as explained above, this is an entirely negative veto. It affords Lord Chancellors no scope to indicate their own preference amongst the candidates deemed appointable by the selection body, and ultimately the Lord Chancellor must accept a candidate that the selection body has recommended. Moreover, the grounds on which the Lord Chancellor can reject or request reconsideration of a candidate are limited by statute, 'with both the detailed wording [of the CRA] and the expectation in practice mak[ing] it very difficult for the Lord Chancellor to exercise even his limited powers to reject or request reconsideration of a recommendation'.[9] No Lord Chancellor has rejected any recommendation outright, and only once has the option to request reconsideration been exercised.

The one instance was in 2010, when Jack Straw requested reconsideration of the recommendation of the late Sir Nicholas Wall for President of the Family Division. The former Lord Chancellor refers to this episode in his foreword to this paper, noting that he requested reconsideration of this recommendation in light of (arguably) well-founded concerns about Wall's suitability for an onerous role overseeing the family courts in England and Wales which required leadership skills not necessarily possessed by all of those who might otherwise excel as an appellate judge. The selection body reconsidered, but once again submitted Wall's name, as it was entitled to do, and this was subsequently accepted by Straw, with Wall appointed to the role. When Wall's name was submitted for a second time Straw could have exercised his right to reject, but he felt unable to do so, underlining just how little room in practice Lord Chancellors perceive themselves

9. J. Straw, *Aspects of Law Reform: An Insider's Perspective* (Cambridge University Press, 2013) 58.

as possessing, despite being the appointing authority for senior judicial posts. Straw was said to be concerned that continued opposition to Wall's selection would undermine his efforts to foster constructive relations with the senior judiciary.[10] There were also rumours that further opposition to Wall's selection might trigger a judicial review action, although officials in the Ministry of Justice dismissed this as preposterous as a matter of law.[11] Of course, if Straw had rejected the recommendation of Wall for a second time, he would have exhausted all of his powers in respect of this vacancy, and therefore would have had no choice but to accept the next candidate that the selection body proposed. By proposing Wall's name for a second time, the selection body 'effectively painted the Lord Chancellor into a corner'.[12]

This episode illustrates the extent to which the regime for senior judicial appointments has become unbalanced—and we agree with the recently retired President of the Supreme Court, Lady Hale, who commented in 2011 that the current regime is one 'where the Lord Chancellor basically is in an almost impossible position'.[13] In enacting the CRA, Parliament intended a collaborative approach to senior judicial vacancies, with Lord Chancellors supposed to enjoy a real albeit bounded discretion over whether to accept the name recommended by the selection body. This discretion was not supposed to be illusory, but in practice successive Lord Chancellors appear to have treated it as such, taking themselves to be unable to exercise the full range of options conferred by Parliament because of the overwhelming need to maintain the confidence of the judiciary. While it is no doubt important for all ministers to foster constructive relations with key stakeholders, in our constitution the Lord Chancellor is not accountable to the judges. The Lord Chancellor should strive to maintain the confidence of the House of Commons in part by exercising a real discretion and taking responsibility for the appointment of competent senior judges.

Marginalising the Lord Chancellor is problematic for a number of reasons discussed below, including that (i) it fails to adequately recognise the Government's legitimate interest in individual appointments to senior judicial roles; (ii) it has led to an accountability gap in individual appointments; (iii) it fails to provide for the political leadership that could lead to faster and more visible progress on diversifying the judiciary; and (iv) it fails to secure the type of meaningful ministerial input into individual senior appointments that can promote and protect judicial independence.

As we explain in the next section, there is a very strong case for reforming senior selection processes by enlarging the role for the Lord Chancellor. However, if the current regime is to continue without legislative change, Lord Chancellors should use consultation at the outset of the selection process to articulate the Government's view on the skills and attributes required by senior judicial officeholders, as Liz Truss did with good effect in 2017. This is especially important for key leadership positions such as the Lord Chief Justice, Heads of Division and President of the Supreme

10. G. Gee, 'Rethinking the Lord Chancellor's Role in Judicial Appointments' (2017) 20 *Legal* Ethics 4, 12-14.
11. We trust that this view accurately reflects how a court would approach any legal challenge to the exercise of ministerial discretion in respect of judicial appointments, although one might doubt whether it is today quite so clear cut in view of subsequent developments in the law and practice of judicial review.
12. J. van Zyl Smit, 'Judicial Appointments in England and Wales Since the Constitutional Reform Act 2005' in H. Corder and J. van Zyl Smit (eds), *Securing Judicial Independence: The Role of the Commissions in Selecting Judges in the Commonwealth* (Siber Ink, 2017) 39, 65.
13. House of Lords Constitution Committee, *Judicial Appointments: Evidence*, 24th Report 2010-22 (Q229).

Court. And unless and until there is legislative change, the Lord Chancellor should also be much more willing to use his or her discretion to reject or to request reconsideration of candidates recommended to him or her, which is a discretion that Parliament took care to confer upon them. The Government should stand by a Lord Chancellor who exercises either of those options.

The case for enlarging the role of the Lord Chancellor

There is a compelling case for enlarging the role of the Lord Chancellor, conferring a real discretion on him or her to make judicial appointments.[14] The Lord Chancellor would exercise this discretion with the aid of advice from officials and would be accountable for its exercise to Parliament. In view of the changes that were made in 2005 to the position of Lord Chancellor, who is now no longer required to be a senior lawyer nor required to sit in the House of Lords, it would be difficult simply to restore the status quo ante. There was much to be said for the traditional executive role in relation to senior judicial appointments and it is important to note that judges continue by and large to be appointed in this way in Australia and New Zealand, two similar common law systems in which judicial independence remains robust. As was generally the case with judicial appointments made by successive Lord Chancellors since the Second World War, the ministers responsible for senior judicial appointments in Australia and New Zealand are generally said to eschew partisan considerations, operating in a selection system defined by a commitment to appointing judges with the requisite qualifications, personal qualities, professional experience and independence of mind. (See Appendix for a summary of the executive models of appointments in Australia and New Zealand.) It would not be unreasonable for the Government to propose a return to this system of judicial appointments and it would be unfair to attack such a reform as inimical to judicial independence. However, it would be more prudent, we suggest, for the Government to propose a more limited reform, retaining a continuing role for the selection bodies, which would help provide an assurance that persons appointed to judicial office have the qualifications and temperament necessary to serve. In the next section we argue that the CRA should be amended to require a shortlist of candidates to be put forward, amongst whom the Lord Chancellor would select. However, in this section we first address the reasons why it is important to expand the role of the Lord Chancellor in this way.

First, the current selection processes do not adequately acknowledge that the Government has a legitimate interest in who is appointed to fill senior judicial roles. Ministers are rightly concerned to ensure that the individuals who are recruited for judicial office should have the appropriate skillset. This is true for all judicial offices in the High Court and above, where judges make decisions that affect public policy and society at large, and where ministers have reason to ensure that those in judicial office

14. J. Straw, *Aspects of Law Reform: An Insider's Perspective* (Cambridge University Press, 2013), chapter 3.

have the requisite knowledge, skills, experience and independence of mind. But it has a special relevance for the main leadership roles such as the Lord Chief Justice, Heads of Division and the President of the Supreme Court, where the judicial officeholders must work closely with ministers and civil servants on the management, funding and reform of the court system. In relation to these senior leadership roles, ministers can contribute something distinctive to the assessment of whether someone has the experience and skillset likely to succeed in a role that involves working closely with ministers, civil servants and a range of stakeholders to tackle important policy questions about the working, funding and future of the court system. It is entirely appropriate for Lord Chancellors to have a real say over individual selection decisions given that they must account to Parliament for the judicial appointments regime as a whole as part of that office's statutory duty to ensure that there is an efficient and effective system to support the work of the courts. As demonstrated by the episode involving Jack Straw's concerns about the suitability of Sir Nicholas Wall for the role of President of the Family Division, the current arrangements are lopsided in making the Lord Chancellor responsible for the judicial appointment regime, but without conferring on him or her a real say over individual selection decisions for senior leadership roles.

Second, the current selection processes suffer from a serious accountability gap that is best remedied by enhancing the role of the Lord Chancellor. A democratic accountability deficit was inevitable once the Government decided in 2003 to move away from the ministerial model for judicial appointments. The Lord Chancellor remains formally accountable for the selection regime as a whole, but now only has very limited levers to shape individual selection decisions. The fact that there is no meaningful ministerial involvement in senior appointments weakens the nexus between the selection regime and Parliament, a nexus which the Lord Chancellor is supposed to constitute. Partial redress can be found in the statutory duty of the JAC to publish an annual report, the practice of requiring the person nominated as the JAC's chair to attend a pre-appointment hearing before the Justice Committee of the House of Commons, and the appearance of the Lord Chancellor from time to time before select committees. But this pales in comparison to the substantial direct democratic accountability that flows from meaningful ministerial involvement in individual selection decisions for senior posts. It is also the case that the selection bodies for senior posts (save for the High Court) are ad hoc and temporary, being convened whenever a vacancy arises, and then dissolved once the recruitment round is completed, and thus none is subject to the ongoing explanatory accountability that attaches to the JAC as a public body with a continuing function and statutory reporting obligations.

Third, current arrangements do not enable sufficient political leadership on matters such as judicial diversity, which is a cause for concern given the continuing diversity deficit within the senior judiciary. As a politician who is likely to view the judiciary in its wider social context, the Lord

Chancellor is well positioned to grasp the critical importance of the highest judicial ranks appearing much more reflective of society at large. Electoral incentives may encourage Lord Chancellors to prioritise judicial diversity, including if necessary by checking any judicial conflicts of interest. These reasons resonate with experiences in other common law countries, where political leadership is often cited amongst the most important factors in bringing about change in the composition of the judiciary. Under the present regime, progress towards a more diverse judiciary has arguably been hampered by a cautious attitude on the part of some senior judges and the risk aversion that the JAC has exhibited since 2005 combined with the lack of any real scope for effective political leadership by the Lord Chancellor. It is reasonable to surmise the Lord Chancellor's direct meaningful involvement in senior selection decisions would improve the likelihood of effective action to address the diversity deficit. It is certainly the case that a minister can be held to account for the failure to make satisfactory progress on diversity to a much greater extent than the other participants in the appointments process. However, such accountability must be accompanied by a real and meaningful role for the minister in senior judicial selections.

Fourth, by diluting the role of the Lord Chancellor, the current arrangements for senior judicial appointments do not adequately promote and protect judicial independence. The dominant but erroneous view within the legal community is that judicial independence requires that senior judges themselves, tempered only by the involvement of lay people on the JAC or ad hoc selection bodies, should have the decisive say on senior appointments, with little or no role for ministers. This may be the dominant view inside the legal community, but it trades on an impoverished account of judicial independence. To flourish, an independent judiciary requires, perhaps above all else, a political class that recognises the stake that every politician shares in a system of independent courts, the smooth running of which can help to secure socially, economically and politically desirable goals. Broad-based political support for judicial independence must be sufficiently strong to withstand the inevitable but sporadic tensions that occur from time to time between politicians and judges in a polity such as ours. Critical to the maintenance of a political constituency for judicial independence is an informed and engaged executive that has a firm grasp of its responsibility to ensure that independent judges are able to discharge their constitutional function.

Viewed in this light, a meaningful role for the Lord Chancellor in senior appointments, such as a discretion to select candidates from a shortlists compiled by an independent selection commission, can help to foster the executive's trust and confidence in the judiciary and court system. Once again, we agree with Lady Hale, who in 2011 observed that '[s]uch a system is very common elsewhere in the common law world, and is in no way inconsistent with an independent and a-political judiciary'.[15] We would go further and suggest that such a system can actually help to promote and protect judicial independence. It can do so by reassuring ministers about

15. House of Lords Constitution Committee, *Judicial Appointments: Evidence*, 24th Report 2010-22 (Written Evidence of Lady Hale) p266.

the quality of the individuals selected and, more generally, the robustness of the processes by which those individuals were recruited. It also helps to buttress ministerial understanding of the roles performed by the senior judiciary, and also reflects and reinforces the real stake that ministers have in the effective working of a system of independent courts. Together, this should make it more likely that Lord Chancellors take seriously their office's responsibilities for the justice system, including the statutory duty to have regard to the need to defend the independence of the judiciary.

We recognise that, for many, the suggestion that an increased role for the Lord Chancellor in individual selection decisions can help to safeguard judicial independence seems paradoxical. Helen Mountfield QC, for example, asks "[i]f judges would not, in some way, be beholden to the government which appointed them, why introduce a level of political scrutiny in their appointment?"[16] The question is clearly intended to be rhetorical. However, the point of introducing (or rather, reintroducing) some political scrutiny into judicial appointments is clearly not intended to ensure that those who are appointed will do the government's bidding. For a start, there is simply no empirical evidence that politicians would seek to appoint partisan lawyers to senior judicial office; if anything, the last 15 years show how cautiously (and we argue, excessively so) successive Lord Chancellors have approached their limited residual role in senior selections. However, more to the point, the security of tenure that all senior judges rightly enjoy means that all serious politicians recognise that there is no effective way to ensure that judges will toe the government line. That having being said, there are many good reasons for political scrutiny in relation to judicial appointments, and to other senior public appointments too, as this section outlines and as many commentators have long argued. Ministerial involvement in judicial appointments, in our constitutional tradition or in other similar common law jurisdictions, has not meant that new judges are somehow indebted to the ministry that appoints them, let alone to the government as an institution. A role for ministers in appointments is entirely consistent with security of tenure and independence in adjudication.

More common is the claim that such a role risks politicising appointments, which presumably is intended to denote improper intrusion of party politics or political ideology when selecting candidates for judicial office. It is equally rare for evidence to be furnished that suggests that this risk is well-grounded. Since the Second World War, partisan considerations have been almost entirely absent from judicial appointments, including since 2005 when successive Lord Chancellors have approached their residual role in senior selections with considerable (and we would suggest excessive) caution. Likewise, in Australia and New Zealand, judicial appointments remain almost entirely a matter for ministerial discretion and yet are not made on partisan grounds.

Past is not prologue of course, and the office of Lord Chancellor was radically remodelled by the CRA, such that it no longer resembles its pre-2005 incarnations. For a start, the office is today a conventional cabinet

16. A. Dean, "The Law and its Limits", *Prospect Magazine*, 20 January 2020.

job, with its occupant no longer required to be a lawyer and/or to be near the end of their professional life. It follows that the Prime Minister can now appoint as Lord Chancellor someone who knows little or nothing of the law or the judiciary. This leads some to worry that any enlarged role for the Lord Chancellor in individual appointments will necessarily imperil judicial independence, especially given the role of senior judges in adjudicating disputes to which the Government is a party. However, this reflects a common but one-sided understanding of judicial independence. It is one-sided insofar as it concentrates only on the role that independent courts play in checking political power, neglecting the important ways in which those courts facilitate such power, for example by stabilising policy outcomes and reducing policy uncertainty. Not only is this understanding of judicial independence one-sided, it is also excessively negative, insofar as it focuses only on the tensions that inevitably surface between judges and politicians from time to time. It places too little weight on the ways that informed and engaged politicians are vital to promoting and protecting judicial independence. It is true that because judicial rulings in politically contentious cases risks political unpopularity, it is necessary to insulate judges against certain political forces. However, this should always be a matter of degree. Involving ministers in senior appointment decisions does not offend judicial independence, especially where the role of the minister is to choose from a shortlist compiled by a selection body composed of judges, lawyers and lay people.

Responding to an earlier Policy Exchange paper,[17] which had recommended that the Lord Chancellor more confidently use his or her existing powers and that the law should be changed to enable choice from a short-list, Lord Falconer, Lord Chancellor from 2003-2007, argued:[18]

> *This is wrong-headed. The more politicians are involved in judicial appointments, the more political judges will become. Not in the sense that they will start to decide issues like abortion, but that they will start to decide cases in a way that will get them promoted by politicians.*

This wrongly assumes that it is not possible to provide for meaningful ministerial involvement in a way that guards against the injection of partisan considerations into senior judicial appointments. It also wrongly assumes that judges in our legal system are likely to abandon their fidelity to law in order to improve their prospects of career advancement. We believe that our judges are made of firmer – less venal – stuff. In relation to appointments to the Supreme Court (or to the Court of Appeal if the institutional structure of the Supreme Court is reformed),[19] Lord Falconer's objection would be moot insofar as promotion would not be possible. Moreover, a strong culture of independence from political actors defines our top courts, which, so far as we can see, new appointees more or less immediately join.

If we were to accept Lord Falconer's careerist logic (and we are sceptical about its force), judges under the present system would be likely to attempt to curry favour with senior judicial colleagues who have an outsized role

17. R. Ekins, *Protecting the Constitution: How and why Parliament should limit judicial power* (Policy Exchange, 2019) 19-20.
18. Charles Falconer, "This government has plans that would destroy the protection of law", *The Guardian*, 12 February 2020.
19. See R. Ekins and D. Wyatt, *Reforming the Supreme Court* (Policy Exchange, 2020).

to play in their promotion within the judiciary. While one should be slow to conclude that judges are likely to compromise their independence in this way, the excessive judicial influence in the appointments process, which has long been a widely held concern, arguably introduces a risk that judges may become too reliant on the goodwill of their colleagues.[20] While senior judges have much to offer to the appointment process, it is wrong for them to have a decisive hand in choosing their colleagues and/or their successors. Real ministerial involvement in appointments is necessary to ensure that judges do not become a self-replicating clique.

20. See D. Heydon, "Threats to Judicial Independence—The Enemy Within" (2013) 129 *Law Quarterly Review* 205.

Legislative reform: the case for shortlists

Under the current statutory regime for appointing senior judges, the selection bodies propose just one name for each vacancy to the Lord Chancellor. The CRA should be amended to require the selection bodies to submit to the Lord Chancellor a shortlist of between three and five names for each vacancy. The Lord Chancellor would then be free to select any of the names on the shortlist.

The Lord Chancellor would be able to reject the shortlist where he or she concludes that none of the names on it is suitable for the vacancy. The Lord Chancellor would also be able to request that the selection panel reconsider one or more names on the shortlist where, in the Lord Chancellor's view, there is evidence that those persons are not the best candidates on merit.

In deciding whom to select from the shortlist, or in deciding to reject the shortlist or to require reconsideration of one or more of the names on it, the Lord Chancellor would be required to base their selection on the explicitly stated selection criteria, which should include scope to select the candidate who would contribute most to the diversification of the senior judiciary. We say some more about how the Lord Chancellor should approach the exercise of this discretion in the next section.

This change would enable an important degree of ministerial choice whilst still ensuring that only well qualified candidates who meet the selection criteria are included in the list of names submitted to the Lord Chancellor – for selection bodies would continue to advertise the vacancy, sift applications, and interview applicants, and then select the strongest names to include on the shortlist. In other words, candidates included on the shortlist would first have had to satisfy the selection body that they meet the merit threshold for appointment, which in turn squeezes out the scope for partisan considerations to feature in the Lord Chancellor's ultimate decision about whom to appoint. Where no candidates meet the selection criteria, the selection body would be required to prepare a report for the Lord Chancellor explaining this.

Requiring selection bodies to prepare a shortlist between three and five names is preferable to requiring them to submit the names of all of the candidates who meet the selection criteria. A shortlist with specified minimum and maximum numbers of names provides for an enlarged role for the Lord Chancellor, whilst ensuring that this is a bounded ministerial discretion. It also avoids creating excessive workload for the

Lord Chancellor. The workload associated with choosing from a shortlist for the relatively small number of senior roles that arise each year should not be overly burdensome, recognising that the Lord Chancellor has to manage a large ministerial portfolio.

One possibility to further structure the Lord Chancellor's discretion would be to require the selection body to rank the candidates on the shortlist. The Lord Chancellor would be free to depart from the ranking but would be required to supply reasons for doing so. However, the risk with a ranked shortlist is that it would in practice undercut the element of choice for the Lord Chancellor that shortlists otherwise introduce. Another (and more attractive) possibility would be to include a diversity component on the shortlist, which would require the selection bodies to include at least one candidate from an under-represented group on the shortlist, with a duty to offer an explanation whether this was not possible (for example, because of the size and composition of the pool of eligible candidates for the vacancy in question).

It might be suggested that for many senior judicial vacancies there are simply too few candidates who cross the threshold for appointment to make a shortlist workable. We view this suggestion with scepticism: other common law systems make shortlists work for senior judicial office, and it would seem odd if our legal system was unable to do so. Indeed, it might even be the case that requiring a selection panel to produce a shortlist would shift the mindset of the panellists from searching for 'the best' candidate to identifying the strongest three to five candidates from amongst all of the shortlisted candidates deemed appointable. It might also be suggested that shortlists might deter well qualified candidates from applying for a senior vacancy, either because they will be put off by the fact that the minister will have the final say over whom to select from the shortlist or the risk that the names on the shortlist leak to the media. Neither objection is weighty. Well qualified people accepted judicial office under the pre-2005 ministerial model (where the Lord Chancellor's discretion was only very lightly regulated) and have continued to do so under the post-2005 model (where at least in theory the Lord Chancellor may reject or request reconsideration of the single name recommended by the selection body). As for leaks, the names of 'runners and riders' for senior judicial office occasionally become public under the current selection system, and is—alas—an almost ineliminable feature of an appointment system where the stakes are high and where professional jealousies are at play.

Shortlists are consistent with judicial independence, insofar as they offer bounded ministerial discretion that recognises the executive's legitimate interest in senior judicial appointments. Presenting a minister with a shortlist for senior judicial appointments is a practice found in other parts of the common law world. Our recommendation for selection bodies to present the Lord Chancellor with a shortlist tracks closely the approach to executive involvement in Canada, where since 2016 an independent advisory board presents the Prime Minister with a shortlist of names of candidates for appointment to the Supreme Court of Canada.[21] Moreover,

21. See further the appendix to this paper.

the use of shortlists has been, and remains, a feature of how the UK judge on the European Court of Human Rights is selected. Enlarging ministerial involvement by ensuring that the Lord Chancellor has scope to exercise a meaningful choice over the person to be appointed is a much better solution than including the Lord Chancellor (or some other minister or MP) on the selection body, as some have suggested. Including a minister or some other politician on the selection body presents challenges (e.g. the other members of the selection body, especially the senior judges, might feel inhibited from speaking openly and frankly about the candidates in front of a minister), without securing sufficient accountability. Involving the Lord Chancellor on the selection body would then raise the question of who should be the final appointing authority. It also suggests that the minister's involvement should be equivalent to that of lay people or judges, whereas our claim is that the nature and extent of the executive's legitimate interest in senior judicial appointments warrants a real and meaningful ministerial involvement as the final appointing authority. In short, requiring the selection body to present the Lord Chancellor with a shortlist is a much simpler and more appropriate remedy for the current unbalanced appointments regime.[22]

22. It has been suggested that selection panels for the Supreme Court, the Lord Chief Justice and Heads of Division should comprise three judges, three lay people and three parliamentarians: see A. Paterson and C. Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (Centre Forum, 2012) 66. However, this would repeat many of the same concerns with including the Lord Chancellor on such a panel. It would present other difficulties as well, such as which parliamentarians to include, recognising that there are multiple party systems in the UK (e.g. which parties should have parliamentarians included on a panel selecting candidates for the Supreme Court? To what extent should politicians from Plaid Cymru be included on senior appointments made in the English and Welsh legal system?).

Political responsibility and judicial appointments

One response to our recommendations might be to suggest that the Lord Chancellor is not in a position to exercise informed judgment about candidates for senior judicial office, especially given that the modern Lord Chancellor need not be a lawyer. The response fails. The current legislative scheme acknowledges that the Lord Chancellor has some (albeit, in our view, an overly limited) discretion, including the possibility of rejecting a candidate that the Lord Chancellor deems not to be suitable for the vacancy, or requesting reconsideration if the Lord Chancellor deems the candidate not to be the one best qualified for the vacancy. The current appointments process also recognises that lay people can contribute to the assessment of individual candidates for senior office. If one rejects that premise, the implication is that judges should simply appoint other judges. If one accepts the premise, then one should also accept that a Lord Chancellor who is not a lawyer can also arrive at an informed assessment of the suitability of candidates for judicial office.

For reasons discussed earlier in the paper, we think that the Lord Chancellor can not only arrive at an informed assessment of individual candidates, but can also contribute something valuable to individual selections, by exercising effective political leadership in relation to diversity and by evaluating the capacity of candidates to exercise leadership in key positions such as Head of Division. Two considerations should weigh especially heavily with the Lord Chancellor when selecting from a shortlist prepared by the independent selection body. The first relates to the competence of the shortlisted candidates. The Lord Chancellor has a statutory responsibility to uphold the rule of law and the independence of the judiciary. This includes using their role in the judicial selection process to ensure that only those with the requisite skills are appointed to senior positions. For appointment to the High Court, Court of Appeal and the Supreme Court, this requires the Lord Chancellor to be satisfied that candidates have the knowledge, experience and judge-craft required for a supervisory and appellate jurisdiction. (For most vacancies, especially those to the High Court or Court of Appeal, the Lord Chancellor will likely be able to rely with confidence on the selection body's assessment as to the candidates' legal competence.) For those senior judicial posts with significant leadership responsibilities where the bulk of the day-to-day work involves management (i.e. the Lord Chief Justice and Heads of Division), the Lord Chancellor must be satisfied that the person to be

appointed has the necessary administrative skills. It would be entirely appropriate for the Lord Chancellor to select from the shortlist the candidate who has the skills, experience and judgement most likely to perform those administrative responsibilities effectively. This reflects the executive's entirely legitimate interest in the running of the court system, for which it is accountable to Parliament.

The second consideration which should weigh heavily with the Lord Chancellor when selecting from a shortlist is whether the candidates accept settle constitutional law. This consideration will have the most relevance for appointments to the UK Supreme Court. In addition to the statutory duty to uphold the rule of law and the independence of the judiciary, the Lord Chancellor—like all ministers, and indeed all parliamentarians—should also uphold the constitution and the balance of powers for which it makes provision. In exercising their discretion in relation to senior appointments, the Lord Chancellor should attempt to appoint judges who are disposed to be good judges, upholding and faithfully applied settled law, including constitutional law. Insofar as a candidate for judicial appointment does not accept, or seems cavalier about, settled constitutional principles, the Lord Chancellor should not select that person. The principles in question include parliamentary sovereignty, but also responsible government and the integrity of the political constitution in which the government is held to account. These principles march hand in hand with the rule of law, for the latter principle requires judges, like every other subject of the law, to observe the disciplines of the law, and not simply to remake it in adjudication. It may often be difficult for the selection body or the Lord Chancellor, or indeed for other senior judges, to evaluate the judicial philosophy on which a candidate for senior office is likely to act. For this reason, candidates for the highest roles (in particular, the UK Supreme Court) should be required as part of the appointment process to articulate their view on the appropriate role for and limits on courts in the UK's constitutional democracy, and in particular their view on the courts' duty to uphold the legislation of the UK Parliament. This is akin to the sort of questions that have featured in recent processes for selecting the Justices of the Supreme Court of Canada.[23]

It is a matter of record that some serving judges, and some senior barristers, have publicly articulated their scepticism about the doctrine of parliamentary sovereignty, musing about the possibility that some future court might quash Acts of Parliament. Short of this course of action, which would be a revolutionary rupture of our constitutional order, some candidates for senior judicial office may license judges to interpret statutes in ways that are avowedly inconsistent with the lawmaking intentions of the enacting Parliament, thus subverting the law Parliament enacted. The Lord Chancellor has a responsibility to exercise his or her powers in relation to judicial appointments in order to avoid the constitution being transformed by stealth, which is what would take place if a majority of apex appellate judges were to succeed in overthrowing, or simply subverting, the doctrine of parliamentary sovereignty. While the point is hard to

23. See Paul Daly, 'Can the UK learn from how Canada appoints its judges?' *Prospect Magazine*, 2 March 2020.

prove, it seems likely that in times gone by some senior judges, otherwise very able and distinguished, were not appointed to the highest judicial office precisely because their scepticism about parliamentary sovereignty was a matter of public record. This is as it should be. Likewise, one might question the fitness for appointment to high office of a candidate who argued that it was open to judges to give domestic legal effect to unincorporated international treaties or that judges should serve as *the* guardian of the constitution, compensating for imagined deficiencies in the political process.

Quite apart from the CRA's amendment, the Lord Chancellor would act properly in exercising his or her responsibilities to reject a candidate for appointment on the grounds that there were reasons to suspect that the candidate would not act in accordance with the law of our constitution. In acting in this way, the Lord Chancellor would help to uphold the rule of law. If or when the CRA is amended, the Lord Chancellor should be willing to use his or her powers of selection in order to avoid appointing judges who there are reasons to suspect is unlikely to hew close to settled law or is likely to extend the constitutional role of the courts beyond its proper scope.

Again it may often be the case that neither the selection body, including relevant senior judges, nor the Lord Chancellor is readily able to discern any such disposition on the part of a candidate for judicial office. It may well be that some candidates for judicial office might obscure their true colours during or before the selection process, only revealing, say, scepticism about parliamentary sovereignty when securely on the bench. This would not reflect well on the individual in question but is of course a risk. Judges who do openly muse about abandoning parliamentary sovereignty, whether in judgments or extra-judicial speeches, are playing with fire, inviting political attack and undermining the constitutional settlement under which they serve. However, if successive Lord Chancellors were to make clear that they were willing to use their authority in order to help ensure that senior judges are persons who do honour the rule of law and other fundamentals of our constitution, this would help support a sound judicial and constitutional culture. As Professor Paul Daly has said in the Canadian context, 'it is not inconceivable that the mere fact that [questions about the role for courts in a constitutional democracy] are being posed… might concentrate judges' minds on the issue of whether their powers are being exercised appropriately'.[24] In short, exercising powers of appointment, in concert with the role of the independent selection bodies in ensuring candidates for office are well-qualified, is a means to avoid the risk that some judges may illegitimately transform the constitution. Selecting judges who are less likely to indulge in such a course of action is a legitimate way to protect our constitution and to protect the judges themselves from political controversy.

Evaluating an earlier iteration of this argument, Lord Falconer writes:[25]

24. See Paul Daly, 'Can the UK learn from how Canada appoints its judges?' *Prospect Magazine*, 2 March 2020.

25. Charles Falconer, "This government has plans that would destroy the protection of law", *The Guardian*, 12 February 2020.

> *At the heart of Ekins's independence-reducing idea is the view that some – not all – judges do not respect the supremacy of parliament and, for example, construe statutes in ways that do not give effect to the intention of parliament, or decide judicial review cases in a way that seeks to frustrate the will of parliament. Giving the politicians more say in weeding out those judges who are too "activist" will, he believes, ensure a cadre of senior judges who respect the line between the courts and politics. As he must know, it will lead to judges who defer to the executive being promoted more.*

We do not accept that encouraging the Lord Chancellor to use his or her existing powers, or to enable him or her to choose from a shortlist of three to five names, is in any way, shape or form an attack on judicial independence. Deciding not to appoint a candidate to judicial office is radically different to "weeding out those judges who are too 'activist'". Judicial independence rightly places very tight limits on the conditions under which any judge may be removed from office. Lord Falconer's objection to the Lord Chancellor's involvement in judicial appointments amounts to an assertion that judicial independence was absent in the United Kingdom before 2005, or is absent from Australia, Canada or New Zealand now. The assertion is risible. Under our prescription, in order to be appointed to high judicial office, or to be "promoted" to higher judicial office, a candidate will need to satisfy an independent body that he or she is well-qualified and will then need to be selected by the Lord Chancellor from amongst a shortlist of appointable candidates. In a constitutional democracy, it is entirely proper for the responsible minister to decline to appoint to high office a person whose commitment to constitutional fundamentals, including the rule of law, is reasonably in doubt. In the constitution as it stood before the CRA, the Lord Chancellor routinely and rightly appointed, or promoted, judges who were in no sense unduly deferential to the executive. The Lord Chancellor very likely also passed over appointees who seemed unwilling or unable to recognise the constitutional limits of judicial power. This would have been a responsible exercise of the appointments power. Similarly, it is entirely appropriate for a Lord Chancellor to decline to appoint someone to a senior leadership role where there are well-founded doubts about whether they have the requisite administrative skills.

It would be a mistake to politicise judicial appointments, attempting to misuse the power for partisan advantage or as a means of patronage. Increasing ministerial involvement in appointments, in concert with a continuing role for the relevant selection bodies, is not to politicise judicial appointments. It is to restore a much-needed measure of political responsibility for senior appointments, the exercise of which is likely to help support judicial independence, encourage judicial diversity and to support the constitution, avoiding its transformation by stealth. Judges should not be free to choose their colleagues or successors. Reforming the role of the Lord Chancellor in the judicial appointments process would help put to right the constitutional imbalance introduced by the CRA, from which responsible government has been unreasonably excluded.

Other related reforms

As well as proposing legislation to require the selection bodies to submit a shortlist to the Lord Chancellor, the Government should look at other ways to promote greater accountability in the system for selecting senior judges. The current system involves various different selection bodies: (i) the JAC for the High Court; (ii) a special committee of the JAC, which includes senior judges who are not members of the JAC, for appointments to the Court of Appeal, Heads of Division and the Lord Chief Justice; and (iii) an ad hoc commission for appointments to the UK Supreme Court. This contributes to an accountability gap in senior appointments, insofar as most of these bodies are temporary, with a membership that changes from year to year.

The selection body for the Court of Appeal, Heads of Division and Lord Chief Justice operates outside of the JAC's usual processes, and it includes members from outside of the JAC. It is little surprise therefore that the JAC does not take full responsibility for selections to these positions. So far as we can see, the only reason why these positions fall outside the JAC's usual processes – and thus outside its usual responsibility – is in order to give senior judges greater say over these senior appointments (that is, by providing for senior judges from outside the JAC to sit on the special committee and to enable the Lord Chief Justice to chair the committee that oversees appointments to the Court of Appeal and as Heads of Division). For the reasons discussed earlier in this paper, this risks the senior judiciary becoming, and publicly appearing to become, both self-selecting and self-replicating. The Government should legislate for the JAC to take responsibility for these appointments and should require that only members of the JAC sit on the panels that select the names that would be included on the shortlist submitted to the Lord Chancellor.

The JAC is the public body tasked with managing judicial appointments in England and Wales, and it would not be appropriate for it (or for its counterparts in Scotland and Northern Ireland) to be solely responsible for selections to the UK Supreme Court. Instead, the Government should legislate to create a UK Supreme Court Appointments Commission, which sits on a continuing basis, rather constituting an ad hoc and temporary body, as is the case with the current selection commission. The commission's members should *not* be drawn from the existing appointments bodies, but rather should be appointed solely to this commission. It should have a lay majority, and be chaired by a lay person. Academic lawyers should not be permitted to count as lay people for these purposes. There should be judicial representation, but this should not draw on the existing members

of the Supreme Court. Appropriate judicial members could include the Lord Chief Justice of England and Wales, the Lord President and the Lord Chief Justice of Northern Ireland. As well as preparing shortlists for Supreme Court appointments, the Commission should be responsibility for compiling shortlists for the selection of the UK judge on international courts, such as the European Court of Human Rights.

There is a case for strengthening the UK Parliament's role in a subset of senior appointments, namely for the most senior roles such as appointment as a Justice of the UK Supreme Court or as Lord Chief Justice or other roles with significant administrative responsibilities in which parliamentarians may be likely to have a particular interest. This would be consistent with the approach taken in relation to other weighty public appointments and would in no way infringe judicial independence and indeed could help support it by fostering a more informed parliamentary understanding of the court system and judicial role. If scaffolded onto our proposal for shortlists, such a role could involve the person selected by the Lord Chancellor appearing before a select committee (e.g. the Lords Constitution Committee, the Commons Justice Committee or a specially created joint committee) to answer questions from parliamentarians prior to the finalisation of the appointment. Such an appearance would be subject to the well-defined rules that govern judicial appearances before select committees. The committee would not have a veto over the appointment but could issue a short report setting out its views on the candidate. In this way, Parliament's involvement could operate as a check on the risk that the Lord Chancellor misused their ability to select his or her preferred candidate from a shortlist. It could also help to sustain a constructive relationship between the senior judiciary and the Westminster Parliament as well as providing some additional transparency in the process for selecting our most senior judges.

This approach would be broadly in line with Canada, where the Prime Minister has selected recent candidates for appointment to the Canadian Supreme Court from a shortlist prepared by an independent advisory board, with those candidates subsequently appearing before a parliamentary committee to answer questions from politicians. These appearances have been moderated by a legal academic, and the questioning is generally regarded to have been polite respectful and (even rather) boring, including the questioning about the candidate's legal philosophy. In parallel, the Minister of Justice and the chair of the advisory board have appeared before a parliamentary committee to answer questions about the appointment process. Of course critics of any proposal to involve the UK Parliament in senior judicial appointments would invoke the spectre of confirmation hearings in the United States, where the person nominated by the President must be confirmed by a majority voting in the Senate, with this vote following a hearing before the Senate Justice Committee. But such a response is an "Aunt Sally", failing to take into account the specifics of both the judicial confirmation process (i.e. the Senate is intended under the Constitution to operate as a check on the otherwise

substantial discretion of Presidents to nominate whoever they choose) and the very specific constitutional context (i.e. the Supreme Court of the United States enjoys very considerable political power, including to strike down state and congressional legislation, and its role was increasingly politicised throughout the twentieth century, which unsurprisingly has raised the political stakes whenever a vacancy arises).

There is a reasonable case, then, for strengthening Parliament's involvement in the most important senior judicial appointments and this could usefully be subject to wider debate. However, the crucial way to inject democratic legitimacy into the senior appointments process consistent with the UK's constitutional tradition is to make provision for meaningful ministerial involvement. This should be the priority when thinking about how to revise the process of senior appointments.

Appendix: Judicial Appointments in Australia, Canada and New Zealand

1. Australia

Section 72 of the Commonwealth Constitution provides for the appointment, tenure and remuneration of federal judges. Section 72(i) states that justices of the High Court and of the other courts created by Parliament shall be appointed by the Governor-General in Council.

In practice, judges are appointed by the Governor-General in Council on the basis of a decision by the federal Cabinet acting on the recommendation of the Attorney-General. The federal Attorney-General's website states that "as the nation's first law officer, the Attorney General is responsible for recommending judicial appointments to the Australian Government". This includes appointments to the four federal courts. In the case of a vacancy on the High Court of Australia, the Attorney-General must consult with state attorneys-general before recommending a candidate.[26] Members of state courts are appointed by the Governor in Council on the advice of the state government.[27]

2. Canada

The federal government appoints judges to the federal courts, the superior courts of the provinces/territories, and the Supreme Court of Canada.[28] The Commissioner for Federal Judicial Affairs administers a series of judicial advisory committees, representing each province and territory, which assess the qualifications of the lawyers who apply for federal judicial appointments. There are similar eligibility requirements for provincial and territorial appointments.

All federally appointed judges are appointed by the Governor in Council. This consists of the Governor General acting on the advice of the Prime Minister for judges of the Supreme Court of Canada and chief and associate chief justices in the provinces; and on the advice of the Minister of Justice for all other superior court judges.

In relation to Supreme Court appointments, a new process was adopted in 2016, and again in 2017 and 2019, with the establishment of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments.[29] In 2016, the Board included four members nominated as follows:

26. Section 6 of the High Court of Australia Act 1979 (Cth).
27. H.P Lee, "Chapter 2 Appointment, discipline and removal of judges in Australia" in *Judiciaries in Comparative Perspective*, edited by H. P. Lee, (Cambridge University Press, 2011), 28-30.
28. Canadian Constitution Act 1867, s 96; Supreme Court Act, s 4(2)).
29. See further the website of the Office of the Commissioner for Federal Judicial Affairs: https://www.fja-cmf.gc.ca/scc-csc/2019/index-eng.html

- A retired judge nominated by the Canadian Judicial Council;
- Two lawyers, one nominated by the Canadian Bar Association and the other by the Federation of Law Societies of Canada; and
- A legal scholar nominated by the Council of Canadian Law Deans.

The other three members, including two non-lawyers, were nominated by the Minister of Justice. In 2019, the Board had eight members selected in accordance with a memorandum of understanding between the governments of Canada and Quebec.

The Advisory Board's role is to provide the Prime Minister with non-binding, merit-based recommendations of three to five qualified and functionally bilingual candidates for consideration. The Advisory Board also provides an assessment of how each candidate meets the statutory requirements and the extent to which they meet the government's stated criteria for appointment.

The Minister of Justice consults on the shortlist of candidates with the Chief Justice of Canada, relevant provincial and territorial Attorneys General, relevant cabinet ministers and opposition counterparts, as well as members of the House of Commons Standing Committee on Justice and Human Rights, and the Standing Senate Committee on Legal and Constitutional Affairs. The Minister of Justice presents recommendations to the Prime Minister who then chooses the nominee.

Once the Prime Minister has chosen the nominee, the Minister of Justice and the Chair of the Advisory Board appear before the House of Commons Standing Committee on Justice and Human Rights to explain how the chosen nominee meets the statutory requirements and the government's appointment criteria. The nominee also takes part in a moderated question and answer session with members of the House of Commons Standing Committee on Justice and Human Rights and the Standing Senate Committee on Legal and Constitutional Affairs.

3. New Zealand

As in Australia, judicial appointments to New Zealand courts are made formally by the Governor-General, on the recommendation of the Attorney-General who acts independently of party political considerations.[30] According to the Ministry of Justice, "putting the responsibility for all these [higher court] appointments in the hands of the Attorney- General is intended to help to ensure a consistent and principled approach".[31]

The formal appointment of judges is by the Governor-General who by convention acts on the advice of the Attorney-General, with two exceptions. The first exception is the Chief Justice who is appointed on the advice of the Prime Minister. This is ostensibly because of the importance of the office as head of the judiciary, and the fact that when the Governor-General is not available to fulfil the duties of the office, the Chief Justice assumes the place of the Governor-General as Administrator. The second exception is the Maori Land Court whose judges are appointed by the Governor-General on the advice of the Minister of Maori Affairs.

30. Courts of NZ, Courts of New Zealand, Ministry of Justice (NZ), Appointments https://www.courtsofnz.govt.nz/about-the-judiciary/role-judges/appointments/

31. Ministry of Justice (NZ), High Court judges appointment protocol (April 2013) http://www.crownlaw.govt.nz/uploads/appointments.pdf.

Appointments to the Supreme Court and Court of Appeal require a different appointment process to that followed in respect of the High Court.[32] Appointments to the appellate courts are usually made from the serving judiciary and, as such, potential candidates will be known to the Attorney-General. The Appointments Unit does not therefore place public notices calling for expressions of interest.

Rather, the Attorney-General consults with interested persons and bodies seeking their views on suitable candidates. The Attorney-General will then, with the agreement of the Chief Justice, who, in the case of appointments to the Court of Appeal, will confer with the President and, in the case of appointments to the Supreme Court, will confer with the other Judges of that Court, settle a shortlist of not more than three possible appointees. The Attorney-General may ask the Solicitor-General to confidentially consult relevant persons or bodies on his or her behalf.

The Attorney-General then considers those on the shortlist. In addition to the criteria by which all judges are selected, the Attorney-General will consider the overall make-up of the court, including the diversity of the bench and the range of experience and expertise of the current judges. The appellate courts should consist of judges who collectively represent a range of expertise, skills, experience, qualities and perspectives.

Once the Attorney-General has chosen the most suitable candidate from the shortlist, he or she will notify Cabinet of his or her decision and recommend the appointment to the Governor-General.

32. Judicial Protocol as at April 2013 (updated April 2014). Page 10. https://www.crownlaw.govt.nz/assets/Uploads/judicial-protocol.pdf

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