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ETHINKING THE LORD CHANCELLOR'S ROLE IN JUDICIAL APPOINTMENTS

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The judicial appointments regime in England and Wales is unbalanced. The pre-2005 appointments regime conferred excessive discretion on the Lord Chancellor, but the post-2005 regime has gone much too far in the opposite direction. Today, the Lord Chancellor is almost entirely excluded from the process of selecting lower level judges and enjoys only limited say over the selection of senior judges. In this article I argue that the current regime places too little weight on the sound reasons for involving the minister in individual selection decisions, including the scope for ministerial input to enhance judicial independence, to supply political leadership on judicial diversity and to render more effective the Lord Chancellor in the discharge of the office's systemic responsibility for at the Lord Chancellor. I argue that shortlists reconcile the need to more fully involve the Lord Chancellor whilst at the same time ensuring that candidates satisfy a merit threshold.

RETHINKING THE LORD CHANCELLOR'S ROLE IN JUDICIAL APPOINTMENTS

Graham Gee*

Introduction

What role ought the Lord Chancellor to perform in judicial appointments? Until relatively recently, judicial appointments in England and Wales were almost entirely organised around the Lord Chancellor, a historic office that in its twentieth-century guise mixed significant ministerial, legislative and judicial responsibilities. Subject to taking 'secret soundings' with judges and barristers, and subject to minimal eligibility requirements laid down in statute, the Lord Chancellor had traditionally enjoyed the controlling hand when deciding whom to elevate to judicial office.[1] However, the Constitutional Reform Act 2005 substantially reshaped the office of Lord Chancellor and, in doing so, shifted much of the responsibility for appointments to a new Judicial Appointments Commission ('JAC'). One of the defining features of the post-2005 regime is that Lord Chancellors now have little discretion over individual appointment decisions. Today, the Lord Chancellor has no role in final selection decisions to lower courts and tribunals, which constitute 95 per cent of the judicial workforce, and his or her say over final selections to the senior courts is severely tempered by statute. Most judges and lawyers welcome the marginalisation of the Lord Chancellor. In this article I depart from the dominant view in the legal class to contend that the Lord Chancellor ought to have a greater say over senior vacancies (by which I mean appointments to the High Court, the Court of Appeal and leadership positions such as the Lord Chief Justice and Heads of Division).[2]

There are four main and related reasons why it is important to reconsider the Lord Chancellor's limited role in individual appointments to the High Court and above. First, there has been little sustained attempt to elucidate and evaluate the reasons why Lord Chancellors should have a meaningful input into senior selection decisions. True, some academics have outlined a

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[1] See generally D. Woodhouse, *The Office of Lord Chancellor* (Hart 2001) 133-163. As I explain below, there was a gradual process of formalization during the latter period of the twentieth century, with the Lord Chancellor and officials consulting extensively and on a structured rolling programme with all levels of the judiciary and the senior bar.
[2] My focus in this article is exclusively on appointments in England and Wales, but my arguments apply to appointments to the UK Supreme Court as well.

number of reasons.[3] Reference to such reasons can also be found in official publications such as consultation papers and the reports of parliamentary committees.[4] But, without exception, these are no more than brief (and, in some cases, cursory) sketches of some of the main reasons for conferring more discretion on the Lord Chancellor. Absent from both the policy and academic debate is a close examination of the arguments in favour of more ministerial discretion. More particularly, there has been a lack of in-depth discussion of how these arguments might relate to judicial independence.[5] One consequence of this is that claims are made about the potential for an enhanced ministerial role to subvert judicial independence that ought not to withstand close scrutiny. Notably, many judges and lawyers argue that an enhanced role for the Lord Chancellor risks 'politicising' appointments, and by extension undermining judicial independence. Far from imperilling judicial independence, an enhanced role for the Lord Chancellor in final appointment decisions to senior roles offers an important way of nurturing that independence, or so I argue in this article.

Second, a number of Lord Chancellors have expressed concern about their limited discretion in senior judicial appointments.[6] This could be read as the wholly predictable complaints of ministers lamenting their lost powers of patronage. Alternatively, these concerns could be taken seriously, in the sense of triggering an investigation into just how much discretion over top appointments the Lord Chancellor actually enjoys in practice, and whether such discretion is sufficient. This would require not only close examination of how the selection process works in practice, but also the identification of some criteria to evaluate what constitutes a normatively desirable level of ministerial discretion over senior judicial vacancies. To date, beyond fuzzy references to judicial independence and democratic accountability, no such criteria have been articulated. Rather, most assessments of whether Lord Chancellors possess too much or too little discretion over senior selections rely on (at best) under-determined or (at worst) unarticulated assumptions about the proper role for a minister in senior appointments within a polity such as the UK's. If the primary objective of this article is to make the case for enhanced discretion for the Lord Chancellor in senior appointments, a secondary objective is to elucidate the considerations that ought to inform

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[3] See, e.g., the brief discussion in G. Gee, R. Hazell, K. Malleson and P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015) 186-187 and 192-193; and A. Paterson and C. Paterson, *Guarding the Guardians: Towards an Independent, Accountable and Diverse Senior Judiciary* (CentreForum 2012) 68-69 and 76-77.

[4] See, e.g., Department for Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges* (2003) CP 10/2003 paras 19-26 and 42-52; Ministry of Justice, *Appointments and Diversity: 'A Judiciary for the 21st Century'* (2012) CP 19/2011; and House of Lords Select Committee on the Constitution, *Judicial Appointments* (2012) HL 272 paras 21-37.

[5] There has been more analysis of judicial influence on judicial appointments. See, e.g., G. Gee, 'Judging the JAC: How Much Judicial Influence Is Too Much?' in G. Gee and E. Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2017) 152.

[6] J. Straw, *Aspects of Law Reform: An Insider's Perspective* (CUP 2013) 58-59.

future debates about the Lord Chancellor's role. As will become clear, one such consideration relates to the deep-seated diversity deficit that plagues the judiciary in England and Wales, which takes us to a third reason why it is necessary to reconsider the Lord Chancellor's role in senior selections.

Third, progress on diversifying the upper ranks of the judiciary remains painfully slow. Some progress has been made in appointing more women to the lower ranks during the first decade of the JAC-run selection regime. But progress in the senior ranks of the judiciary is extremely slow. Since 2006, the number of women on the High Court and Court of Appeal has increased from 10 to 22 and two to eight respectively, but this represents only 21 per cent and 19 per cent of the number of judges on those courts.[7] The picture for British Black, Asian and minority ethnic ('BAME') judges is even more disturbing, with no BAME judges sitting on the Court of Appeal, and only two on the High Court.[8] Senior leadership positions (the Lord Chief Justice, the Senior President of Tribunals and Heads of Division) continue to be dominated by white men. Most judges and lawyers do not attach much weight to the potential for an enhanced role for the Lord Chancellor to help address the diversity deficit, as neatly illustrated by a recent report on diversity by the law reform group JUSTICE that gives no consideration at all to the case for more ministerial discretion.[9] Departing again from the dominant view in the legal community, I argue that more discretion for the Lord Chancellor can help to support the political will necessary to secure faster and more visible progress on diversifying the top judicial ranks. Growing concern across both the political and legal systems about the slow pace of progress in remedying the diversity deficit ensures that appointments are likely to remain on the policy agenda—and this overlaps with a final reason why it is important to rethink the Lord Chancellor's role in senior selections.

Finally, even aside from the need to address the diversity deficit, questions about the Lord Chancellor's involvement in senior selections are likely to pierce the policy agenda over the next few years. Appointments have been a very unsettled sphere of public policy over the last ten years or so, with nine official reviews of the selection process between 2007 and 2017.[10] Two opposing pressures are likely to operate in a pincer movement to push the Lord Chancellor's role to the fore. From one direction, judges and lawyers will press for the Lord Chancellor to be removed from appointments once

[7] Judicial Office, *Judicial Diversity Statistics 2016: Judicial Office Statistics Bulletin* (Published 28 July 2016. Revised 2 December 2016) pp 6-7.
[8] Of the 3200 professional judges, ethnicity information is known for 84 per cent, with only 174 declaring their background as BAME: Judicial Office, *Judicial Diversity Statistics 2016: Judicial Office Statistics Bulletin* (Published 28 July 2016. Revised 2 December 2016) pp 8-9.
[9] See JUSTICE, *Increasing Judicial Diversity* (JUSTICE 2017).
[10] See Gee (n5).

and for all.[11] There are several reasons for this, not least the fact that the legal community is increasingly dubious of the capacity and willingness of the politicians who occupy the reformed office of Lord Chancellor to serve as an effective guardian of judicial independence. The logical culmination of these doubts is to call for the Lord Chancellor to be deprived of any role in individual selection decisions. From a different direction, politicians concerned about the expansion of judicial power will chafe at the limited ministerial role in senior selections. The prospect of courts in England and Wales acquiring a new prominence after Brexit may provoke more intense political interest in the identity of those appointed to the top judicial ranks. More bluntly put: the Court of Justice of the European Union and the European Court of Human Rights have tended to be lightning rods for some of the harshest political critiques of judicial expansionism, with the domestic judiciary somewhat sheltered as a result. Removing the Luxembourg Court from the domestic legal landscape following Brexit, together with possible changes to the relationship between the Strasbourg Court and the domestic courts as part of long-touted reform to the Human Rights Act, is likely to ratchet up political interest in the identity of domestic judges. Part of the burden on this article is thus to explain why an enhanced role in appointments is a prudent response to this prospect.

This article has three main parts. I begin by mapping the Lord Chancellor's involvement in the JAC-run selection regime. This is an inclusive regime, but the greater involvement of other actors in judicial appointments comes at the expense of the Lord Chancellor. For the central characteristic of the new selection regime is that the Lord Chancellor has been marginalised in both lower level and senior appointments, with influence shifting to senior judges instead. I sketch the Lord Chancellor's involvement in lower as well as senior appointments in some detail since it is important to grasp the full extent of the Lord Chancellor's marginalisation across the selection regime as a whole. This marginalisation is clearest and most complete in respect of lower vacancies, but the largest and most vexing change has occurred in respect of senior selections. I spend some time discussing the appointment of Sir Nicholas Wall as President of the Family Division in 2010. Drawing on confidential interviews with several of those most closely involved in the selection process, I suggest that Wall's appointment illustrates just how little discretion Lord Chancellors now possess over individual selections to senior leadership roles. Next, I make the case for Lord Chancellors having more say over who is recruited to such roles, and in doing so I outline four considerations that should shape future debates about the proper level of ministerial involvement in senior selection decisions. Finally, I suggest that

[11] In 2012, the Constitution Committee suggested that the Lord Chancellor's role in High Court selections should be be reviewed after a further three to five years. We are now at the end of that five-year period: House of Lords Select Committee on the Constitution (n4), para 34.

shortlists reconcile the need to more fully involve the Lord Chancellor whilst at the same time ensuring that candidates satisfy a merit threshold.

The Lord Chancellor and the JAC-Run Selection Regime

The Constitutional Reform Act 2005 ('the 2005 Act') instituted new ways of selecting judges, replacing the traditionally closed, informal and secretive ministerial model focused on the Lord Chancellor with a formal, open and inclusive regime anchored around the JAC. The JAC's primary function is to recommend people for judicial office in courts and tribunals in England and Wales, and to do so via fair and open competitions that are designed to elicit evidence that can be weighed against explicit selection criteria. The JAC manages a fairly long and structured selection process, which usually includes job advertisements, short-listing by tests or paper sifts, interviews and, for most posts, presentations or role-play activities.[12] It has a heavy and variable workload, overseeing the recruitment of between 300 and 800 judges each year.[13] Partly because of this, the JAC is large by comparative standards, with 15 Commissioners: seven hold judicial office, one of whom is a magistrate, two lawyers and six lay people, one of whom serves as the lay chair.[14] The Commissioners are recruited through an open competition, with the exception of the three senior judicial members, two of whom are recruited by the Judges' Council, with the third selected by the Tribunal Judges' Council.

This new selection regime is designed to be collaborative;[15] that is to say, a scheme that recognises that ministers, judges and the legal profession have a shared responsibility for—and legitimate interest in—judicial appointments. Designed into the JAC-managed selection processes from beginning to end is input from multiple actors, and most notably the mix of judges, lawyers and lay people who sit on, or are otherwise involved in, the JAC's selection processes. There are also important roles for senior judges such as the Lord Chief Justice ('LCJ') and the Senior President of Tribunals ('SPT'), with the Lord Chancellor also involved in ways that are outlined below. In this, the JAC-run regime recognises that no one actor has a monopoly on all of the information or perspectives necessary to reach well-rounded assessments of either a person's suitability for judicial office or—more generally—the overall needs of the judicial system as a whole. What bears emphasis, for our purposes, is the basic dynamic of this

[12] In 2015-16 the JAC's selection process averaged 17 weeks, with the total end-to-end process involving stages outside of the JAC's control taking an average of 22 weeks: Judicial Appointments Commission, *Annual Report and Accounts: 2015-16* (2016) 11.
[13] See Appendix I in G. Gee and E. Rackley (n5).
[14] See Judicial Appointments Commission Regulations 2013, regs 3-11.
[15] See G. Gee, 'Judicial Policy in England and Wales: A New Regulatory Space' in R. Devlin and A. Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar 2016) 145, 153-155.

regime: the marginalisation of the Lord Chancellor, with responsibilities previously exercised by the Lord Chancellor now hived off to the JAC or senior judges such as the LCJ and SPT. Before considering the marginalisation of the minister in individual selection decisions, it is important to recognize that the Lord Chancellor has an important role in shaping policy on appointments, underpinned by continuing ministerial responsibility for the selection regime. This includes ensuring that the JAC is subject to appropriate governance arrangements and approving its strategic objectives.[16] Statute also confers on the Lord Chancellor a number of specific responsibilities relating to the JAC, such as approving the appointment of Commissioners[17] and the Chief Executive,[18] and laying its annual report before Parliament.[19] There is a discretionary power enabling Lord Chancellors to issue guidance to the JAC, but to date no such guidance has been issued.[20] Although retaining extensive systemic responsibilities, the Lord Chancellor's input into individual appointments has been emasculated. This marginalisation of the minister is discernible in both lower and senior appointments.

Lower Appointments

The Lord Chancellor's marginalisation is both clearest and most complete in respect of lower level court and tribunal appointments. Today, the Lord Chancellor is almost entirely excluded from the appointment process. The Lord Chancellor's only involvement is at the very outset. Before the JAC advertises a vacancy, the Lord Chancellor is required to consult with the LCJ in order to determine the details of the job description.[21] All judicial vacancies have minimum entry requirements set out in statute. The Lord Chancellor, in consultation with the LCJ, can augment these by stipulating non-statutory requirements. The power to issue supplementary eligibility criteria is significant, insofar as it shapes the pool of eligible candidates for a particular judicial vacancy. In practice, however, Lord Chancellors have relied on advice from the LCJ and civil servants at Her Majesty's Courts & Tribunals Service. Typical is a requirement that candidates will be expected to have experience sitting in a part-time 'fee paid' judicial role (as a Recorder, for example). Successive Lord Chancellors, supported by senior judges, have regarded experience in a fee paid role as a crucial testing ground for those seeking a permanent judicial position. The imperative to recruit only those well suited for a judicial career is

[16] Ministry of Justice and Judicial Appointments Commission, *Framework Document: Ministry of Justice and Judicial Appointments Commission* (2012) para 3.3.
[17] Judicial Appointments Commission Regulations 2013, regs 9-13.
[18] Constitutional Reform Act 2005 ('CRA'), Schedule 12, paras 22(2).
[19] CRA, Schedule 12, paras 32(4).
[20] CRA, s65.
[21] CRA, s63.

important for several reasons including: the lack of any probation period and formal performance review for newly appointed judges; the prohibition on returning to practice after holding a permanent judicial office; the limited resources available for training new judges; and the limited circumstances in which it is permissible to remove sitting judges. Requiring fee paid experience, however, limits the pool of eligible candidates to the disadvantage of non-traditional candidates. It is not always possible, for example, for solicitors in city firms or high street practices to undertake a part-time judicial role alongside their day job.

By stipulating non-statutory eligibility requirements the Lord Chancellor can exert significant influence on the pool of eligible candidates for specific vacancies. Beyond this, however, Lord Chancellors have no role in lower level selections. After finalising the job description, the minister drops out of the selection process for 95 per cent of judges in England and Wales.[22] The task of identifying the best person for any given vacancy resides with the JAC, whilst the final decision whether or not to appoint that person lies with the LCJ (for lower courts) or the SPT (for tribunals). It is important to note that until 2014 the JAC recommended candidates for all of these positions to the Lord Chancellor; in other words, the Lord Chancellor was involved at the end as well as the outset of a selection exercise between 2006 and 2014. The Crime and Courts Act 2013 changed this, substituting the LCJ and the SPT in the Lord Chancellor's place as final appointing authority for lower courts and tribunals respectively.[23] Part of the rationale for this reform was that the Lord Chancellor's role as appointing authority was widely seen as a rubber stamp.[24] Under the 2005 Act, Lord Chancellors only had limited scope to do anything other than accept the candidate recommended by the JAC—and, in practice, Lord Chancellors almost always accepted the JAC's recommendations.[25] Over eight years the JAC recommended in excess of 4000 candidates for the lower judiciary to four different Lord Chancellors, with all but four of the recommendations accepted.[26] The bureaucratic burden provided a further reason for

[22] As of April 2016, there were 3,202 professional judges in the England and Welsh courts. Enjoying the final say over appointments to the High Court (108) and Court of Appeal (44) only means that the Lord Chancellor is the appointing authority for around 5 per cent of the professional judiciary in England and Wales. For the overall number of professional judges, see *Judicial Diversity Statistics 2016: Judicial Office Statistics Bulletin* (Published 28 July 2016. Revised 2 December 2016) 6.

[23] See Part 4 of Schedule 13 to the Crime and Courts Act 2013, which amended the 2005 Act and the Tribunals, Courts and Enforcement Act 2007.

[24] See House of Lords Select Committee on the Constitution (n4) paras 29 and 30.

[25] It was commonly suggested that the Lord Chancellor's involvement was therefore meaningless. Not everyone agreed, however. As an official observed, even this minimal level of ministerial input helped to ensure that the JAC's recommendations 'added up' on the basis of evidence gathered during the selection process. The Lord Chancellor performed, in other words, a 'quality control' role. This 'quality control' function is now split between the LCJ and SPT.

[26] During his tenure as Lord Chancellor (2007-2010), Jack Straw requested reconsideration of two of the JAC's recommendations, one of which related to a lower vacancy and arose from a lack of clarity about the selection criteria. The JAC made—and Straw subsequently accepted—a new recommendation. Ken

removing the Lord Chancellor's role: successive office-holders exhibited little interest in, and had little time for, the hundreds of lower vacancies that are filled each year.[27] Compounding the problem was the expansion of the minister's portfolio following the creation of the Ministry of Justice in 2007, one consequence of which was to twin the office of Lord Chancellor with the role of Secretary of State for Justice. The minister now juggles responsibility for prisons and probation (as Secretary of State for Justice) alongside responsibility for the courts and judiciary (as Lord Chancellor).[28] With a stretched portfolio that embraced the politically sensitive issue of prisons, judicial appointments inevitably acquired a lesser importance for Lord Chancellors.

The important point is that the already limited role in individual selection decisions for lower level appointments envisaged for Lord Chancellors by the Constitutional Reform Act was extinguished by the Crime and Courts Act 2013. On the one hand, there are good grounds to believe that, as a partial consequence of this, there is now too much judicial influence over lower level appointments. Judges are involved from the beginning to the end of the process of appointing the lower level judiciary. Judges help to determine the job descriptions, design the qualifying tests and role-play tasks, write references, sit on selection panels, provide views as statutory consultees and—following the Crime and Courts Act—now also have the final say on whether or not to appoint the candidate recommended by the JAC.[29] Involving lay people can dilute the levels of judicial influence,[30] but removing the Lord Chancellor as the final appointing authority eliminates a counterweight that could prevent the system slipping into one where the judiciary is effectively appointing itself. Among the chief concerns with a recruitment process that is dominated by judicial influence is that judges may be inclined to appoint people in their own image (i.e. white men from the bar).[31] On the other hand, the pattern of the Lord Chancellor taking a greatly reduced role in lower level appointments pre-dated the 2005 Act. For most of the last century judicial appointments were characterised by informality, stability and secrecy, but a process of formalisation had began in earnest by the mid-1990s for posts below the High Court. This included interviews conducted by a panel comprised of an official from the Lord Chancellor's Department, a judge and a lay person. Decisions whether to appoint the candidate who most impressed the panel rested with the Lord Chancellor, but the growing size of the professional judiciary meant that

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Clarke (2010-2012) rejected three candidates because they did not have the requisite experience for the vacancies in question.

[27] See J. Straw, *Aspects of Law Reform: An Insider's Perspective* (CUP 2013) 55.

[28] See generally G. Gee, 'What are Lord Chancellors For?' [2014] PL 11.

[29] For a discussion, see Gee et al (n2), at 179-182.

[30] For the argument that lay involvement can intensify as well as dilute judicial influence, see Gee, (n4).

[31] G. Bindman and K. Monaghan, *Judicial Diversity: Accelerating Change,* (Labour Party 2014) para 3.19.

Lord Chancellors relied heavily on their officials to consider the details of individual appointments. Viewed against this background, removing the Lord Chancellor from individual decisions for the lower judiciary under the JAC regime is arguably a less dramatic change than might seem to be the case at first blush.

Senior Appointments

There are different if overlapping processes for appointments to: the High Court; the Court of Appeal; and leadership positions such as the LCJ and Heads of Division.[32] But the Lord Chancellor's involvement is broadly the same for all of them. In each case the Lord Chancellor is involved towards the beginning of the selection process. The precise involvement varies. For appointments to the High Court, the Lord Chancellor must consult the LCJ before requesting the JAC to launch a selection exercise, which is then run in substantially similar fashion to lower level competitions.[33] For the Court of Appeal and leadership positions, the Lord Chancellor must consult the LCJ before requesting that the JAC convene a special panel to recommend a candidate.[34] Statute specifies the membership of these panels and permits each panel some latitude to determine its own selection process. However, the panel must consult the Lord Chancellor during that process.[35] In 2013, as part of the competition to appoint the LCJ, the panel met with the then Lord Chancellor, Chris Grayling, at an early planning stage. The panel was reflecting on the requirements of the role of LCJ at the time of the meeting, and Graying was able to emphasise the need for the successful candidate to have demonstrable leadership and management skills. According to one of the panel members, the Lord Chancellor's briefing was 'most instructive and helpful'.

In each case, the Lord Chancellor also has the final say over whether or not to appoint the candidate recommended by the JAC (for the High Court) or the special panels convened by the JAC (for the Court of Appeal, Heads of Division and LCJ). The JAC or ad hoc panel, as appropriate, recommends one name per vacancy, and must submit a report detailing the recruitment process together with any other information that the Lord Chancellor has requested. On receiving a recommendation, the Lord Chancellor has three options: to accept it, reject it, or to request its reconsideration.[36] The latter two options can only be exercised once in relation to any specific vacancy. After exhausting all of the options in relation to a particular vacancy, the Lord Chancellor must accept the last person recommended to them, or any

[32] For a summary, see Appendix III in Gee and Rackley (n5).
[33] CRA, s87(2).
[34] CRA, s69(2) and s78(2).
[35] See CRA, s70(2)(A) and Judicial Appointments Regulations 2013 reg 6.
[36] See CRA, ss 73, 82 and 90, and Judicial Appointments Regulations 2013 regs 8, 14, 20 and 26.

person recommended at an earlier stage of the selection exercise so long as the Lord Chancellor had not previously rejected that person. Statute also stipulates the grounds on which the options to reject a recommendation or request its reconsideration are exercisable. The power to reject applies only where the Lord Chancellor decides that the recommended candidate is not suitable for the vacancy.[37] Similarly, the power to request reconsideration can be used only where, in the Lord Chancellor's view, there is insufficient evidence that the candidate recommended is suitable for the vacancy, or where there is evidence that he or she is not the best candidate on merit.[38] The Lord Chancellor must provide the JAC or ad hoc panel with reasons if invoking either option.[39] No Lord Chancellor has invoked the option of rejecting a recommendation outright. However, in 2010, the then Lord Chancellor, Jack Straw, requested that the selection panel reconsider its recommendation of Sir Nicholas Wall for the position of President of the Family Division. The panel reconsidered its recommendation, but once again submitted Wall's name, as it was entitled to do under the statute, and this was subsequently accepted by Straw.

The Appointment of Sir Nicholas Wall

It is difficult to know for sure what occurred behind closed doors during the back-and-forth on Wall's appointment, but—drawing on comments on the public record together with confidential interviews with some of those most intimately involved in this selection—it is possible to piece together Straw's opposition to Wall. Above all, Wall's vociferous public criticism of the Government's reforms to the family justice system led Straw to doubt Wall's capacity and willingness to oversee a programme of modernisation. Most notably, Wall had criticised the Government for pursuing reforms on family justice that appeared 'to be driven by a powerful political agenda', with 'no clear rationale', and that ignored the views of the judiciary and the legal professions.[40] As a result, inside the Ministry, there was 'a lack of trust about whether Wall could get on and deliver' the reforms, as a senior official put it. This is an entirely appropriate ground for a Lord Chancellor to resist the appointment of a senior judicial leader such as President of the Family Division. As Straw has noted, Heads of Division 'require not only high skills as jurists, but also considerable leadership and administrative expertise, and the ability to work effectively with the Ministry, the Courts Service and other organs of government'.[41] Heads of Division work closely with officials in the Ministry to develop policy relating to the funding and

[37] See CRA, ss74, 75F, 83 and 91, and Judicial Appointments Regulations 2013.
[38] See CRA, ss75, 75G, 84 and 92, and Judicial Appointments Regulations 2013, regs 9, 15, 21, 27 and 33.
[39] See CRA, ss74(3), 83(3) and 91(3) and Judicial Appointments Regulations 2013, regs 9(3), 15(3), 21(3), 27(3) and 33(3).
[40] Lord Justice Wall, *Justice for Children: Welfare or Farewell?* (November 2009) para 51.
[41] J. Straw, *Aspects of Law Reform: An Insider's Perspective* (CUP 2013) 56.

management of the courts. They must take difficult decisions about how to allocate resources and how to address problems of under-performance in different parts of the judiciary. Decisions such as these can be unpopular with some judges, and a Head of Division must thus be willing to explain and defend those decisions to judicial colleagues. As a former Permanent Secretary observed, Heads of Division must exhibit both the 'judicial skill and the judicial will' to reform the justice system. In addition to concerns about Wall's suitability for the role, Straw also believed that Lady Justice Hallett was a better candidate. Though her main expertise lies in criminal law rather than family law, Hallett had impressed Straw as one of only a handful of senior judges who (according to an insider at the Ministry) 'got the point straight away' that the judiciary had to do much more to address inefficiency within the courts. No doubt also attractive to Straw was the fact that there had only been one women appointed as a Head of Division, which remains the case as at the time of writing.[42]

This episode is instructive in illustrating just how little room in practice the Lord Chancellor has as the final appointing authority for senior vacancies. Straw's reasons for opposing the selection are precisely the sort of grounds envisaged by Parliament. The 2005 Act provides that Lord Chancellors can only request reconsideration of a selection where, in his or her view, 'there is not enough evidence that the person is suitable for the office concerned' (which tallied with Straw's opinion of Wall) or 'there is evidence that the person is not the best candidate on merit' (which was in line with Straw's view of Hallett).[43] After the selection panel re-selected Wall after Straw's initial request for reconsideration, it was still possible for Straw to reject Wall. [44] If Straw had rejected Wall at that stage, the panel would have been required to select another candidate. In practice, however, Straw felt unable to press the issue any further. One reason was the impending general election in May 2010. But another reason was the overriding imperative for the Lord Chancellor to maintain the confidence of the senior judiciary. This was a pressing concern after relations between ministers and judges had become strained in 2003 (when, without consultation, the Government initiated a series of reforms to the judicial architecture, which ultimately culminated in the 2005 Act),[45] with a further deterioration in 2007 (when the Ministry of Justice was created, once again with little consultation with the senior judiciary).[46]

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42 Dame Elizabeth Butler-Sloss served as President of the Family Division between 1999 and 2005.
43 CRA, s74(2)(a) and (b). The statute requires either condition to be met.
44 See CRA, s73.
45 See Lord Windlesham, 'The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change: Part 1' [2005] PL 806; and Lord Windlesham, 'The Constitutional Reform Act 2005: The Politics of Constitutional Reform: Part 2' [2006] PL 35.
46 House of Lords Select Committee on the Constitution, *The Cabinet Office and the Centre of Government* (2009-10) HL-30 paras 208-217.

Interviews suggest that Straw was concerned that continued opposition to the selection would contaminate his relationship with senior judges.[47] Wall was popular with and highly regarded by other judges, with some officials in the Ministry suspecting that some of Wall's colleagues were responsible for press reports of Straw's opposition during what was supposed to be a confidential process. Rumours reached the Ministry that further resistance to Wall's selection might trigger a judicial review action, although such an action was rightly dismissed by officials as 'absolutely preposterous' as a matter of law. Nevertheless, it underscored how poorly judges viewed Straw's request that the panel reconsider Wall's selection. It bears emphasis that in reacting so strongly to Straw's request, the judiciary demonstrated little respect for the legitimate interest that ministers have in judicial appointments. It is possible that some judges thought that for the minister to resist the promotion of a serving judge on the basis that he was unsuitable for the office concerned was 'tantamount to a breach of respect for judicial independence because of what such a rejection would imply about the track record of the judge'.[48] Any such view would be mistaken, however. It involves no disrespect for judicial independence for a minister (or anyone else for that matter) to have good reasons to believe that an otherwise excellent jurist is ill-suited for a specific leadership role.[49]

The point is that the Lord Chancellor felt unable to force the matter lest this undermine his relationship with the senior judiciary, and by extension compromise the wider programme of modernisation that the Ministry was developing with judicial input. As a former occupant of the office noted, 'no one appointed Lord Chancellor would last five minutes if they lost the confidence of the senior judiciary'. In a similar vein, another former Lord Chancellor stressed that it was the fear of 'disapproval' from senior judges that explained why he always accepted the names recommended to him. Inside the Ministry this episode cemented a feeling among some (but not all) officials that the new selection regime was unbalanced, with Straw said to view the recruitment process as 'tilted in favour of the senior judiciary'. Under the 2005 Act Parliament intended a collaborative approach to senior vacancies, with Lord Chancellors supposed to enjoy a real discretion over

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[47] Amongst Straw's policy priorities when appointed Lord Chancellor in 2007 was 'to repair fences with the judiciary': J. Straw, *Last Man Standing* (MacMillan 2013) 498.

[48] 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 Commissions in Selecting Judges in the Commonwealth* (Siber Ink forthcoming).

[49] It might be argued that Straw's reluctance to promote such an outspoken critic as Wall might chill judges' willingness to publicize their concerns. I do not have much sympathy for this argument, at least as applied to Wall. The speech by Wall that caused so much consternation inside the Ministry was not expressed in the measured terms suitable for a judge entering the arena of public policy, and thus failed to exhibit the comity owed to the executive. Other avenues were open to Wall to articulate his concerns (e.g. to discuss them with the President of the Family Division, who could then raise these with officials at the Ministry). Arguably, Wall failed to exhibit the small-p 'political' skills and judgment required of judicial leaders.

whether to accept the candidates recommended by a panel, albeit that the minister's ability to reject or request reconsideration of a name could only be exercised for limited reasons. This discretion was not supposed to be illusory, but in practice is rendered nugatory by the overwhelming need for the Lord Chancellor to maintain the confidence of the senior judiciary. Not only is the Lord Chancellor's involvement much more marginal than Parliament intended, it also represents a considerable change. The gradual formalisation of selections for the lower judiciary underway by the 1990s did not extend to senior posts. Though placing weight on the judges' views, the Lord Chancellor's discretion was largely untrammeled. Lord Chancellors always retained 'the controlling hand', as a former official put it, displaying little qualm at selecting someone other than the judges' preferred candidate.[50] If the pre-2005 regime was lopsided by conferring too much discretion on the Lord Chancellor, the current regime goes much too far in the other direction by denying the minister a real say in senior selections.

The Case for Reform

I now want to make the case for why Lord Chancellors—expertly advised by their officials and accountable to Parliament—should possess a real say over individual selections to senior vacancies. Four main considerations underpin this case for reform. First, the executive has a legitimate interest in the attributes of the individuals who fill senior roles, and the selection regime should (but currently does not) give adequate expression to this. Ministers are rightly concerned to ensure that the individuals recruited for judicial office have the appropriate skill-set. This is true of all judicial roles, but has a special relevance for leadership roles (where judges work closely with ministers and officials on the funding, management and reform of the justice system) and the higher courts (where judges often enjoy significant powers over public policy). It is appropriate for Lord Chancellors to have a real say over individual selection decisions given that they must account to Parliament for the appointments regime as part of the office's overarching duty to ensure that there is an efficient and effective system to support the work of the courts.[51] The current arrangements are lopsided in making the Lord Chancellor responsible for the appointments regime as a whole, but without conferring on them an adequate say over individual appointment decisions.

Second, the Lord Chancellor is not only capable of arriving at an informed assessment of a candidate's suitability for judicial office, but can contribute

[50] See generally J. Rozenberg, *Trial of Strength: A Battle Between Ministers and Judges Over Who Makes the Law* (Richard Cohen 1997) 13-17.
[51] See s1 Courts Act 2003.

something important and distinct to the overall process of selecting senior judges. The claim that a minister is capable of making an intelligent and informed evaluation of this or that person's suitability for a senior judicial position ought not to be contentious. Lay people are involved, after all, on the panels that recommend a candidate for appointment to the High Court and above. Similarly, the claim that the Lord Chancellor, as a minister and politician, can contribute something important to the process of recruiting individual judges should be equally uncontroversial. The selection regime recognises, after all, that different stakeholders make distinct contributions to the appointment process (judges and lawyers, for example, are uniquely well placed not only to evaluate a candidate's skills of legal analysis, but also to bring first-hand knowledge of the demands of judicial office, whilst lay people instill fresh perspectives and the latest human resources know-how). Ministerial involvement can inject a substantial degree of democratic legitimacy and accountability into the selection regime—and, by extension, into the judiciary as an institution of government. Involving a minister in individual appointment decisions ensures that the executive has a genuine stake in and responsibility for the selections regime and 'cannot entirely wash their hands of what is happening'.[52] It also means that senior judges can partly ground their authority on the executive's participation in their selection.

Third, there are several reasons to suspect that ministerial involvement can furnish the political pressure necessary to advance the diversity agenda. As a politician who is likely to view the judiciary in its larger political and social contexts, 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 might encourage Lord Chancellors to prioritise judicial diversity (although it is also true that popular concern about diversity might not be evenly distributed throughout the electorate, and as such politicians might have an unreliable focus on it).[53] In addition, the Lord Chancellor, the LCJ and the JAC are each under a statutory duty with regard to diversity, but Parliament is able to hold a Lord Chancellor to account for the failure to make progress in ways much less true of the JAC or the LCJ.[54] These reasons resonate with experiences in some other common law countries, where 'political leadership' is cited as amongst the most important factors in bringing about change in the composition of the judiciary.[55] What Cheryl Thomas terms 'the leadership factor'[56] takes many

[52] House of Lords Select Committee on the Constitution, *Judicial Appointments Process: Oral and Written Evidence*, p135, Lord Woolf, Q285.
[53] A. Lynch, 'Diversity Without a Judicial Appointments Commission—The Australian Experience' in Gee and Rackley (n5) 111.
[54] See CRA, s137A.
[55] C. Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions A Review of Research, Policies and Practices* (The Commission for Judicial Appointments 2005) 114
[56] Ibid at 114.

forms, including using the ability to shape general policies to encourage or even to require other stakeholders in the selection process to make quicker and more visible progress on diversifying the senior judiciary. The current arrangements in England and Wales assume that it suffices for the Lord Chancellor to deliver political leadership on diversity by making policy for the selection regime as a whole (although in practice the ability of any one minister to champion bold policy changes on diversity is hampered by the cautious attitude of the judiciary, which in turn has led the JAC to be risk-averse during much of its first decade).[57] However, it seems reasonable to surmise that alongside using the office's systemic responsibilities to agitate for faster progress, the Lord Chancellor's direct involvement in individual selection decisions could form an important element of a successful policy response to the diversity deficit. Differently put: by marginalising the Lord Chancellor from appointment decisions, the current arrangements have not adequately capitalised on the role that political leadership could play in promoting diversity.

Fourth, there are also several reasons to suppose that an enhanced role for Lord Chancellors in senior appointments can promote and protect judicial independence. To flourish, judicial independence requires, perhaps above all else, a political class that recognises the stake that political actors share in a system of independent courts that delivers socially, economically and politically desirable goals. This broad-based political support for judicial independence must be sufficiently strong to withstand the inevitable but sporadic tensions that will occur from time to time between politicians and judges. Critical to the maintenance of a 'politically effective constituency'[58] 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, meaningful involvement for the Lord Chancellor in the appointment process can help to foster the executive's trust and confidence in the justice system. It does so by reassuring ministers as to the quality of the individuals selected and, more generally, the rigour of the process by which those individuals were recruited. Allowing Lord Chancellors to participate in selections decisions as an engaged and informed partner can also help to buttress ministerial understanding of the roles performed by the judiciary. Together, this should make it more likely that Lord Chancellors take seriously the office's responsibilities for the justice system, including the statutory duty to have regard to the need to defend judicial independence.[59]

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[57] See generally G. Gee and E. Rackley, 'Introduction: Diversity and the JAC's First Ten Years' in Gee and Rackley (n5) 1.
[58] S. Holmes, 'Judicial Independence as Ambiguous Reality and Insidious Illusion' in R. Dworkin (ed.), *From Liberal Values to Democratic Transition: Essays in Honour of János Kis* (CEU Press 2004) 3, 11.
[59] CRA, s3(6).

To date, the scope for an increased role for Lord Chancellors in individual selection decisions to lead to the sort of effective political engagement that strengthens judicial independence has not been widely acknowledged. On the contrary, most judges and lawyers have argued precisely the opposite: an enhanced role risks 'politicising' appointments and hence endangering judicial independence. Seldom is it spelt out what precisely is meant by 'politicisation' in this context,[60] but presumably this catchword is intended to denote the improper intrusion of party politics or political ideology in the selection of individual candidates for judicial office.[61] It is equally rare for evidence to be furnished that suggests that this risk of politicisation is well grounded. Since the Second World War, partisan considerations have been almost entirely absent: even when exercising effectively untramelled discretion prior to 2005, successive Lord Chancellors had eschewed party politics when appointing people to even the highest judicial offices.[62] Past is not prologue, of course. Circumstances have changed in both the political and legal realms, and continue to change. For a start, the office of Lord Chancellor is now a conventional cabinet post, with its occupant no longer required to be either a politician with fairly substantial experience in legal practice or a lawyer who shares the political sympathies of the government of the day.[63] It follows that the Prime Minister can now appoint someone as Lord Chancellor who knows little or nothing of the law or the judiciary. More generally, the spectre of judicial power looms larger today than at any point in the last fifty years following the expansion of judicial review and the enactment of the Human Rights Act. It is possible that domestic courts will occupy an even more central place on the constitutional stage following the UK's withdrawal from the European Union, which might in turn entail more frequent and turbulent clashes between the executive and the judiciary. For most in the legal community, then, the worry is that the politicians who now occupy the job of Lord Chancellor might be tempted —if confronted by more assertive domestic courts—to misuse an enlarged role in senior selection decisions, with judicial independence eroding as a result.

At one level, such concerns are understandable. Judges and lawyers are rightly anxious to avoid any threats to judicial independence. However, at another level, concerns about the Lord Chancellor's input into individual

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[60] See e.g. House of Lords Select Committee on the Constitution (n4) para 26.

[61] See generally G. Gee, 'The Persistent Politicis of Judicial Selection: A Comparative Analysis' in A. Seibert-Fohr (eds), *Judicail Independence in Transition* (Springer 2012) 121.

[62] At the time of the 2005 reforms there was widespread agreement among politicians, judges, lawyers and academics that the Lord Chancellor's power to appointed judges had not been abused 'in modern times', which was commonly understood to mean since the Second World War. See Department for Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges* (2003) C 10/03, para 22. For the most detailed academic discussion of the Lord Chancellor's patronage powers, see Woodhouse (n1) 138-142.

[63] See CRA, s2.

appointments tend to treat politicians as relevant to judicial independence only to the extent that judges must always remain above the political fray in order to supply an effective check upon political actors. 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 independent courts facilitate such power by, for example, stabilising policy outcomes and reducing policy uncertainty. Not only is this account of judicial independence one-sided, it is excessively negative as well, 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 can promote judicial independence. It is true that because judicial rulings in politically contentious cases risk political unpopularity it is necessary to insulate the judiciary against certain political forces. However, this should always be a matter of degree: insulating judges from the pressures and temptations of ordinary political life does not mean isolating them from all political forces. The dominant but erroneous view within the legal community is that judicial independence requires that the judges themselves, tempered only by the involvement of lay people on the JAC or ad hoc selection panels, should have the decisive say in the appointment of other judges, with ministers having little or no role in individual selection decisions. It is this view that is reflected in the current selection regime—but the current arrangements go too far in excluding ministers from individual appointment decisions. It is with this in mind that I want to make the case for shortlists.

The Case for Shortlists

Under the current arrangements the Lord Chancellor receives only a single recommendation for each senior vacancy. This not only denies the minister any real choice, but also assumes too simplistic an understanding of merit insofar as it suggests that there will always be one 'best' candidate for each and every senior vacancy. It seems likely that from time to time the Lord Chancellor may come to a different conclusion than the JAC or the ad hoc selection panel about the exact balance of skills and experiences required for a specific senior vacancy. This might, in turn, lead the Lord Chancellor to reach a different conclusion from the recommending panel about which from a handful of candidates is the strongest person to fill a particular job. Reflecting this, the JAC (for the High Court) and the ad hoc selection panel (for the Court of Appeal and leadership jobs) should be required to present the Lord Chancellor with a shortlist of between three and five names per vacancy. The Lord Chancellor would be free to select from that shortlist. In deciding whom to choose, the Lord Chancellor would be required to base their choice on the explicitly stated selection criteria, which should include

scope to select a candidate that would contribute to the diversification of the senior judiciary.

This represents a sensible expansion of the minister's input by introducing an element of choice, but while ensuring that the JAC or selection panel (as appropriate) can first vet all of the candidates that are ultimately included on the shortlist. The workload associated with selecting from a shortlist for the relatively small number of senior vacancies that arise each year should not be overly burdensome for the Lord Chancellor, recognising that the officeholder has to manage a large ministerial portfolio. Using shortlists is also consistent with the approach in several other common law countries.[64] Contrary to what some have suggested,[65] it is also broadly in line with the current selection regime, insofar as no one can be appointed without first having first received the endorsement of the JAC or an ad hoc selection panel. The fact that the JAC or selection panel will ensure that all of the names on the shortlist satisfy the merit threshold all but eliminates the scope for partisan considerations to enter the Lord Chancellor's choice. In this, shortlists are consistent with the principle of appointment on merit. Empowering the Lord Chancellor to select from a shortlist augments the ministerial role, but it is still a bounded discretion if statute stipulates both the minimum and maximum names to be included on the shortlist, with the Lord Chancellor required to exercise his or her discretion on the basis of merit. (Shortlists of a specified number of names is preferable to the JAC or ad hoc selection panel being required to forward the names of all of the candidates who meet the selection criteria). Using shortlists is consistent with judicial independence insofar as it introduces a limited discretion that recognises the executive's legitimate interest in appointments. Over time, using shortlists should help to cultivate Lord Chancellors as informed and engaged partners in the judicial selection regime. One possibility to further structure the Lord Chancellor's discretion would be to require the JAC or selection panel to rank the candidates on the shortlist. The Lord Chancellor would be free to depart from the panel's ranking, but would be required to supply reasons for doing so. The risk with a ranked shortlist, however, is that it would in practice undercut the element of choice for the minister that shortlists introduce. More attractive would be to include a diversity component on the shortlist. The JAC or selection panel would be required to include at least one candidate from an under-represented group on the

[64] The processes differ of course, but shortlists prepared by a nominating commission feature in some appointment processes in Canada, Ireland and South Africa as well as in some states in the United States. See J. van Zyl Smith, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (BICCL 2015) Appendix 2.
[65] House of Lords Select Committee on the Constitution, *Judicial Appointments Process: Oral and Written Evidence*, p450 (Lord Mance).

shortlist, with a duty to offer an explanation where this was not possible (because, for example, of the size and composition of the eligible pool).[66]

Some might suggest that presenting the Lord Chancellor with a shortlist is appropriate for the Court of Appeal and leadership posts, but not for the High Court. I disagree: to my mind, recruitment to the High Court and the Court of Appeal should be treated in essentially the same manner, with the Lord Chancellor having a legitimate interest in appointments to each of the two courts. There are a number of good reasons to treat recruitment to the High Court and the Court of Appeal in the same way. For a start, there are several similarities between the two courts: both are superior courts of record. Their judges enjoy the same constitutional protection under the Act of Settlement against removal. Both courts are also a site of judicial review claims against the government and public authorities, and therefore serve important constitutional functions. Most importantly for these purposes is the fact that recruitment to the Court of Appeal has been exclusively from among existing members of the judiciary in recent years. Appointment to the High Court is thus a critical gateway to the top ranks of the judiciary. Opening up recruitment to the High Court bench to candidates from non-traditional social and professional backgrounds is necessary as a way of promoting judicial diversity in the Court of Appeal and the UK Supreme Court. For this reason, shortlists should apply to the High Court as well as to the Court of Appeal and leadership positions.

Conclusion

The judicial appointments regime in England and Wales is unbalanced. If the pre-2005 regime conferred excessive discretion on the Lord Chancellor, the new regime has gone much too far in the opposite direction. Today, the Lord Chancellor is almost entirely excluded from the process of selecting lower level judges, save for a limited role at the outset of a selection round. The Lord Chancellor has the final say whether or not to appoint those who the JAC or ad hoc selection panel recommends for senior vacancies. But, in truth, the Lord Chancellor's options are so limited as to be almost illusory. The current arrangements place far too little weight on the sound reasons for involving Lord Chancellors in individual selection decisions, including the scope for ministerial input to enhance judicial independence, to supply political leadership on judicial diversity and to render more effective the Lord Chancellor in the discharge of the office's systemic responsibility for

[66] A diversity component is not unfamiliar to ECtHR of Human Rights, the UK Government must submit to the Parliamentary Assembly of the Council of Europe a three-person shortlist that includes at least one woman. See Article 22 of the European Convention on Human Rights. For a discussion of the use of short-lists in several ECHR contracting parties, including the UK, see K. Lemmens, '(S)electing Judges for Strasbourg: A (Dis)appointing Process?' in M. Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP 2015) 94.

the justice system as a whole. In this article, I have argued that presenting the Lord Chancellor with a shortlist of candidates from which to choose for senior vacancies could enhance judicial independence and diversity, but whilst preserving the principle of appointment on merit. The changes for which I argue in this article would require statutory change. But, above all, they require a cultural change within the legal community. Judges and lawyers need to acknowledge not only the valuable contribution that the Lord Chancellor can make in individual selection decisions, but also the vital importance of effective political engagement with the justice system as the foundation of judicial independence. To endure despite occasional but inevitable tensions that arise between the executive and the judiciary, judicial independence requires constant constructive engagement between ministers, judges and civil servants on a wide range of issues relating to the administration of justice, including appointments. Or differently put: the appointments regime can help to bridge the gulf between the political and legal realms, but only if the Lord Chancellor has a meaningful input into senior selection decisions.