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Judging the JAC: How Much Judicial Influence Over Judicial Appointments Is Too Much?

Graham Gee[*]

Introduction

Judicial involvement in judicial appointments is valuable. Judges possess unique perspectives on the qualities required for judicial office as well as the needs of the judicial system. Such perspectives should help to shape individual selections as well as the aims, priorities and structures of the selection regime as a whole. Hence, the pertinent question is not whether judges should exercise influence, but how much, what sorts and at which stages of the appointment process. To my mind, these are amongst the most challenging questions with which those responsible for designing, operating or scrutinizing a judicial selection regime must grapple. Questions such as these will give rise to rival and opposing views, not only at the time at which a new appointment regime is introduced, but also periodically thereafter, as and when experience suggests that judges exercise too little influence or too much. During the Judicial Appointments Commission's (JAC) first decade, however, there has been only relatively muted discussion of these questions. A handful of academics have argued that judges today exercise too much influence.[1] However, their concerns are not widely shared by

[*] This chapter draws on confidential interviews conducted between 2011-14 with many of those involved in the judicial selection process in England and Wales. These interviews were part of a project funded by the Arts and Humanities Research Council (AH/H039554/1). These were augmented by a further round of interviews conducted between 2015-17 with senior judges, officials at the Ministry of Justice and officials and commissioners at the JAC. The Society of Legal Scholars' Research Activities Fund supported this second round of interviews. I am very grateful to the interviewees and for comments on this paper from participants at the following conferences: *The Paradox of Judicial Independence* at the Institute of Government (July 2015); *Judicial Appointments in an Age of Diversity* at the University of Birmingham (November 2015); and the *International Legal Ethics Conference VII* at Fordham Law School (July 2016).

[1] See e.g.: G. Gee, R. Hazell, K. Malleson and P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, Cambridge: Cambridge University Press, 2015; and A. Paterson and C. Paterson, *Guarding the Guardians: Towards an Independent, Accountable and Diverse Senior Judiciary*, London: CentreForum, 2012. Concerns were also hinted at in S. Shetreet and S. Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary,* Cambridge: Cambridge University Press, 2013, p. 116.

judges, politicians, officials or lawyers.[2] Or more bluntly put: several stakeholders—and the JAC and the senior judiciary in particular—seem wholly unconvinced by academic critiques that judges now possess too much sway over appointments.[3]

Reactions to a book that Robert Hazell, Kate Malleson, Patrick O'Brien and I published in 2015 are emblematic. Drawing on interviews with over two dozen individuals closely involved in JAC-run processes, our book identified the basic dynamic at the heart of the selection regime instituted under the Constitutional Reform Act 2005: the Lord Chancellor's relative retreat from both individual appointment decisions and the day-to-day running of the appointment regime as a whole has been offset by the growing influence of judges, and senior judges in particular.[4] We explained how, in addition to seven judicial commissioners who serve on the fifteen-member JAC, judges perform vital roles from the very beginning to the very end of the selection process. They shape job descriptions, design qualifying tests and role-playing tasks, supply references, sit on selection panels, provide views as statutory consultees on shortlisted candidates, and—for 95 per cent of vacancies—make the ultimate decision whether to appoint the person recommended by the JAC. We argued that the high levels of judicial influence that are engineered by statute throughout the appointments regime are reinforced in practice by the fact that judges, as repeat players, are adept at using additional selection criteria[5] and statutory consultation[6] to ensure that considerable weight is

[2] There have been at least eight formal reviews of judicial appointments over the last ten years, but not one contained a sustained discussion of the possibility that judges now exercise too much influence. The eight reviews are: (i) the Nooney Review (2007), an internal review of the JAC processes with the stated intention of increasing efficiency (ii) the LEAN Review (2008), a further internal review of JAC's processes with the stated goal of increasing efficiency; (iii) the Constitutional Renewal Bill (20008), later the Constitutional Reform and Governance Bill, where draft clauses sought to give the Lord Chancellor further controls over the JAC but were later dropped; (iv) the Advisory Panel on Judicial Diversity established by Jack Straw and led by Baroness Neuberger; (v) an End-to-End Review of the Appointments Process (2010) established by the Ministry of Justice; (vi) the House of Lords Constitution Committee's Inquiry into Judicial Appointments (2011-2012); (vii) the Ministry of Justice's consultation on judicial appointments (2011), culminating in the Crime and Courts Act 2013; and (viii) the Ministry of Justice's Triennial Review of the JAC (2014-2015).

[3] It is not only the JAC and senior judges who have given these academic critiques short shrift, but civil servants as well. See e.g. Ministry of Justice, *Triennial Review: Judicial Appointments Commission* (2015) paras 119-120. Practitioners are generally unmoved by the critique as well, but for a rary contrary perspective see the essay in this collection by Karon Monaghan QC.

[4] Gee et al, *The Politics of Judicial Independence,* p. 159-193.

[5] That is to say, additional criteria not stipulated in statute relating to the experience or qualifications that applicants for a given post should possess. Typical is a requirement that candidates for a salaried

attached to their preferences. Our critique was that progress on diversifying the judiciary risks remaining fairly slow in a system with high levels of judicial influence given that judges might favour—whether consciously or not—candidates from conventional professional backgrounds (e.g. the bar and commercial practice). One reason for this is that judges might attach more weight to the professional experience that a candidate has accrued and less weight on his or her potential to develop into an excellent judge. My co-authors and I were in little doubt that most judges today accept that the lack of diversity is a problem and are genuine in their concern to remedy it,[7] but we argued that despite this they had resisted or diluted initiatives that might have led to faster transformation of the bench. Following the book's publication, the JAC, several senior judges and a number of officials made it very clear to us that they viewed our critique about judicial influence and its implications for diversity as wrong. Several did not mince their words when conveying just how wrong they considered it.

These reactions have given me considerable pause for thought over the last two years. It would be odd if they had not. I have reflected, in particular, on the difficulties of conducting research in this area.[8] It is tricky for outsiders such as academics to capture accurately and then to make sense of all of the various institutional dynamics at play in the long and formal processes run by the JAC, where a changing cast of characters participate in different types of vacancies. It is true that the post-2005 processes managed by the JAC are now much more transparent than the traditional 'tap on the shoulder' approach associated with the Lord Chancellor's Department,[9] but inevitably all of the most important interactions still occur out

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judicial office should have fee-paid judicial experience (i.e. experience sitting in part-time, fee-paid judicial roles while continuing in their day jobs).

[6] That is to say, a requirement imposed on the JAC to consult with certain officeholders (usually senior judges) before it selects a candidate to recommend to the appointing authority.

[7] The need for a more diverse judiciary has 'become a truth almost universally acknowledged' even whilst progress remains slow: E. Rackley, 'Rethinking Judicial Diversity', in U. Shultz and G. Shaw (eds) *Gender and Judging*, Oxford: Hart Publishing, 2013, pp. 501, 503. For a more sceptical take, see H. Sommerlad, 'Judicial Diversity: Complexity, Continuity and Change' in this collection.

[8] Similar difficulties are discussed in A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court,* Oxford: Hart Publishing, 2013, pp. 5-9.

[9] For a comprehensive account of the pre-2005 approach to judicial appointments, see Lord Mackay, 'Selection of Judges Prior to the Establishment of the Judicial Appointments Commission in 2006' in Judicial Appointments Commission, *Judicial Appointments: Balancing Independence, Accountability and Legitimacy*, London: Judicial Appointments Commission, 2010; D. Woodhouse, *The Office of*

of sight and behind closed doors. Rendering research even more challenging are the very fluid dynamics between judges, ministers, civil servants and lay people,[10] with relationships ebbing and flowing over even fairly short timeframes as pivotal officeholders enter and depart the stage.[11] Any analysis of the influence of this or that actor can therefore quickly become out of date. Complicating matters further is that the ways in which actors exercise influence, as well as the degrees to which they do so, can reveal contradictory patterns. For example, actors whose interests are assumed to conflict might find that their interests coalesce at certain points in a selection process,[12] or actors might have excessive influence over some, but not all, levels of appointments.[13] It follows that critiques about overly high levels of influence might hold true for some vacancies but not others, or might have been true at one point in time, but not now. All of this is to acknowledge the real risk that academic critiques of judicial influence might be outdated, overstated or simply wrong, whether in whole or in part.

This is one possible explanation for why the JAC and some senior judges have rejected academic concerns about judicial influence over judicial appointments. There are others of course, including individual and institutional incentives that might lead some stakeholders to neglect, dismiss or downplay such concerns. In particular, senior judges might not wish to disturb a regime under which they exercise significant say over the composition of the bench, while the JAC might not wish to acknowledge the limits on either the ability or willingness of its lay and legal commissioners to counteract the high levels of judicial influence that statute

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Lord Chancellor, Oxford: Hart Publishing, 2001, pp. 133-163; and P. Darbyshire, *Sitting in Judgment: The Working Lives of Judges*, Oxford: Hart Publishing, 2011, pp. 90-95.

[10] For an overview, see S. Turenne, 'Judicial Independence in England and Wales since the Constitutional Reform Act 2005', in A. Seibert-Fohr (ed) *Judicial Independence in Transition—Strengthening the Rule of Law in the OSCE Region,* Berlin: Springer, 2012, p. 147.

[11] Since the JAC's creation in 2005 there have been six Lord Chancellors (Lord Falconer, Jack Straw, Ken Clarke, Christopher Grayling, Michael Gove and Liz Truss) three Lord Chief Justices (Lords Phillips, Judge and Thomas), three JAC chairs (Baroness Prashar, Christopher Stevens and Lord Kakkar) and two acting chairs (Lords Toulson and Burnett), with the JAC's relations with the judiciary and the government shaped in part by the occupants of these offices.

[12] Tensions have often run high between the Ministry of Justice, the Courts Service and the judiciary on a range of issues relating to the funding of the judicial system as a whole (e.g. court closures), but they each share an interest in ensuring that the people appointed to judicial office are able to 'hit the ground running'. For example successive Lord Chancellors and Lord Chief Justices have shared in stipulating non-statutory eligibility criteria concerning the expertise and experience needed for a given vacancy. See Gee et al, *The Politics of Judicial Independence,* pp. 171-173.

[13] Particular concern has been expressed about levels of judicial influence over senior appointments: e.g. Paterson and Paterson, *Guarding the Guardians*.

weaves throughout the appointment process.[14] I will not dwell on these explanations, even if some weight ought to be ascribed to them. I will consider instead another explanation: namely, the lack of shared understandings about what it means to talk of 'judicial influence'. My suspicion is that this contributes to a mismatch between how some academics on the one hand and some judges and the JAC on the other assess judicial involvement in the selection process. A lack of shared understandings about the meaning of judicial influence has made it challenging to foster a constructive debate about whether judges now exercise excessive influence. Part of the problem is that there has been no sustained examination in England and Wales or (so far as I am aware) any other common law jurisdiction of what is meant in this context by judicial influence.[15] We need an account of influence that covers the manifold and sometimes subtle ways in which judges are involved in shaping individual appointment decisions and the overarching appointments regime. We also need a basic framework to help us to evaluate how much and what sorts of influence judges should exercise and at which stages of the selection process. Absent such a framework, we are reduced to making claims about there being too much, too little or just the right amount of influence on the basis of little more than mere intuitions.[16]

This chapter represents the first attempt to identify a broad framework within which to assess judicial influence over appointments in England and Wales. It applies to other jurisdictions in proportion to the degree to which their selection processes and—more significantly—their political and legal cultures resemble those found here. I divide the chapter into three parts. First, to structure debate about such an intricate phenomenon, I suggest that influence is understood to include both *conduct-shaping* (i.e. affecting individual decisions) and *context-shaping* (i.e. affecting the environment in which decisions are made). Conduct-shaping and context-shaping are variable and relational, which in turn can make it very difficult to determine the actual levels of influence that judges exercise. Second, I explain how reflecting

[14] See generally the discussion of the complex motivations and attendant relationships between the stakeholders involved in the new selection processes: E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity*, London: Routledge, 2013, pp. 76-105.

[15] In continental systems there is slightly more (albeit still relatively scant) discussion of how judicial influence over promotions are heightened through Judicial Councils: see e.g. N. Garoupa and T. Ginsburg, 'The Comparative Law and Economics of Judicial Councils', *Berkley Journal of International Law* 27, 2008, p. 52; and C. Guarnieri, 'Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government', *Legal Studies* 24, 2004, p. 169.

[16] See e.g. Sophie Turenne's review of our book which rightly noted the lack of an explicit framework against which to evaluate claims of disproportionate judicial influence: S. Turenne, 'Review', *Cambridge Law Journal* 75, 2016, p. 437.

on the *inputs*, *outputs* and *throughputs* of an appointments regime provides a basic framework for determining when judicial influence becomes too high. Such a framework must recognise the indispensable insights that judges have to share about individual selection decisions and the working of the selection regime as a whole, and which by extension justify some measure of influence over judicial appointments. At the same time, it should also identify appropriate limits on the amount of influence that judges enjoy. In doing all of this, it must help us to assess whether the inputs, outputs and throughputs of the selection regime work to adequately promote core values such as transparency, accountability and inclusiveness. Third, it is against this background that I then offer five presumptions to help to assess whether, all things considered, judges enjoy too much, too little or just the right amount of influence. Informing these presumptions is the belief that judicial involvement in the appointments regime must be, so far as possible, structured, open and subject to effective safeguards. I use these presumptions to assess the JAC regime. Developing, deepening and in some respects departing from the critique that my co-authors and I advanced in 2015, I point to important progress made on structuring several instances of judicial involvement. However, I argue that judicial influence within the regime managed by the JAC nevertheless still far exceeds what is desirable.

What is Judicial Influence?

At one level, judicial influence has an obvious meaning. It denotes the capacity of judges to shape individual appointments, overarching policies or otherwise to ensure favourable treatment of their interests within the appointments regime. At another level, however, careful reflection reveals judicial influence to be an intricate phenomenon not reducible to a snappy and straightforward definition. Part of the reason for this is that judicial influence is likely to manifest in a great variety of different ways. Influence is likely to exhibit many different patterns, with a wide range of judges (tribunal judges and court judges, low-level judges and senior judges) contributing in different capacities (as referees, interviewers, commissioners, the appointing authority) and at various stages of the selection process (short-listing, interview, final decision and so forth). Over and above this, there is good reason to suppose that the professional authority enjoyed by judges, and especially senior judges, transfigures into powerful social forces that significantly shape the actions and decisions of other actors in the appointments regime, such as ministers and civil servants at the Ministry of Justice or the legal and lay commissioners on the JAC.[17] A comprehensive account would address a number

[17] On the important relationship between authority and influence, see R. Cialdini, *Influence: The Psychology of Persuasion,* London: Collins, 2007, (revised edn). First published in 1984. On the social

of related questions such as: which judges, or groups of judges, exercise influence? Over whom or what? Through what means, channels or processes? To the extent that judges exert influence over other actors, do those actors resist or acquiesce? Do those other actors identify themselves as subject to judicial influence? Are judges conscious of the many ways in which they can and perhaps do exercise influence? What factors shape the ways in and degrees to which judges do so? And to what ends do judges exercise influence? In addressing questions such as these, it is helpful to view influence as extending to both conduct-shaping and context-shaping.[18]

Most people when referring to judicial influence likely have in mind the former. Conduct-shaping refers to the capacity of judges to translate their preferences into concrete decisions. On issues where there is broad consensus, judges might have to exert little or no influence to ensure that their preferences are reflected in actual decisions. On other issues, it might involve convincing other actors to decide something at odds with their own interests in order to vindicate strongly held judicial preferences. In its strongest expression, in other words, conduct-shaping influence embraces judges' capacity to affect directly the decisions and behaviour of other actors. Conduct-shaping is an important aspect of influence, but it is far from straightforward to evaluate the ability of judges to convert preferences into real world decisions. There are, after all, multiple decisions to make in any one selection exercise (specifying the job description; designing qualifying tests; short-listing applicants; deciding whether to provide a reference and what to include in it; picking the questions to pose during the interview; and so forth).[19] These decisions will not be of equal significance, with important decisions the responsibility of different decision-makers or, in some instances, different combinations of decisions-makers. As I explain towards the end of this chapter, most (albeit not all) of the key decisions in the JAC's processes involve one or more judges. In addition, preferences are not necessarily uniform. They might vary between judges at different levels of the bench, and even between judges who sit on the same court. Even a

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impact of influence, see generally B. Latane, 'The Psychology of Social Impact', *American Psychologist* 36, 1981, p. 343.

[18] I borrow the distinction between conduct-shaping and context-shaping from Colin Hay's work on power: C. Hay, 'Divided by a Common Language: Political Theory and the Concept of Power', *Politics* 17, 1997, p. 45.

[19] These are examples of only the most obvious *formal* (and the more visible) decisions in a selection process. There is also a range of informal (and the less visible) decisions. An example of the latter is the need for the JAC to decide how much weight to ascribe to the judicial views on shortlisted applicants that have been obtained during statutory consultation.

relatively homogenous group such as the senior judiciary might have multiple preferences that are held with varying strength.

Context-shaping is judges' indirect influence, and covers their capacity to shape the context in which individual selection decisions are made. This includes, but is not limited to, the ability of judges to fashion the general policy environment relating to appointments. It also extends to less concrete influence such as the ability to create the values deemed essential for a well-functioning appointment regime in ways that condition and limit the range of decisions that can be made. Closely related to what elsewhere in this collection Alan Paterson terms the judiciary's 'soft power',[20] context-shaping encompasses the ability to mould the assumptions that inform and underpin the decisions and actions of the main stakeholders in the selection regime. Influence is not only about direct impact on decisions, in other words. It is also about an indirect, systemic impact that shapes the issues that will arise for decision in the first place.[21] Examples of judicial influence as context-shaping include the ability of judges to mould how other actors determine the weight to ascribe to legitimacy, accountability and diversity within the overall selection regime. It might also include the ability to shape the tenor of policy debates about—and, by extension, other stakeholders' views on—issues such as whether to further dilute ministerial involvement in individual selection decisions[22] or how 'merit' relates to the experiences that an applicant should possess prior to appointment to the bench.[23]

Of particular note is that the context-shaping influence that judges enjoy might be a byproduct of forces that neither they nor other stakeholders fully recognize or understand.[24] At the same time, it might be the most important and perhaps even insidious form of influence inasmuch as it prevents significant issues from being seen as appropriate or pressing topics of debate.

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[20] A. Paterson, 'Power and Judicial Appointment: Squaring the Impossible Circle' in this collection.

[21] See generally S. Lukes, *Power: A Radical View,* London: Palgrave Macmillan, 2nd edn, 2005.

[22] It is notable, for example, that concern about curtailing ministerial and legislative involvement seems to loom large in most discussions of judicial appointments in the Commonwealth. See generally J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles*, London: Bingham Centre for the Rule of Law, 2015.

[23] See Morison's discussion of the concern of many stakeholders in Northern Ireland that judges have an 'undue' influence over appointments, arising in part because of their 'indirect' role in validating certain understandings of merit: J. Morison, 'Finding Merit in Judicial Appointments: NIJAC and the Search for a New Judiciary in Northern Ireland', in A-M McAlinden and C. Dwyer (eds) *Criminal Justice in Transition: The Northern Ireland Context*, Oxford: Hart Publishing, 2015, p. 131.

[24] T. Benton, '"Objective" Interests and the Sociology of Power', *Sociology* 14, 1981, p. 161.

The judiciary's context-shaping influence might be presumed to be especially powerful given that, more so than other stakeholders, judges (and especially senior judges responsible for the deployment and performance of the judicial workforce) are likely to have a clear sense of how the selection regime should work and the outcomes that they want it to generate.[25] On top of this senior judges are often in office for longer than their counterparts at the Ministry and JAC, with this continuity enabling them to become very effective 'repeat players' who are adept at ensuring that their preferences are secured through the working of the selection processes. As accomplished advocates, judges are also likely to be effective in communicating their concerns to other stakeholders—and, indeed, might succeed in convincing other actors of the supposed soundness of otherwise ill-founded concerns. In its strongest expression, context-shaping influence might involve co-opting other stakeholders to further the judiciary's self-interest to the detriment of the public interest. An example would be if judicial commissioners on the JAC succeed in persuading its lay and legal commissioners to accept uncritically the judiciary's stance on contentious questions of policy.[26] Another example would be where judges succeed in 'cultivat[ing] sympathy or support'[27] among political elites.[28] Arguably, the fact that there has been such little debate during the JAC's first ten years about judicial influence over appointments could itself be an example of the judges' context-shaping influence.[29]

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[25] See Paterson, 'Power and Judicial Appointment: Squaring the Impossible Circle' in this collection.

[26] As discussed later in this chapter, judicial influence has been cited as a possible reason for why the JAC adopted a very narrow 'equal merit' policy after the Crime and Courts Act 2013 clarified that, where there are two candidates of equal merit, there is nothing preventing the JAC from recommending a person for appointment on the basis of improving diversity on the bench. See also G. Gee and K. Malleson, 'Judicial Appointments, Diversity and the Equal Merit Provision', *UK Constitutional Law Blog,* 6 May 2014.

[27] Paterson, 'Power and Judicial Appointment: Squaring the Impossible Circle', in this collection.

[28] Examples might include the way in which judicial leaders persuaded parliamentarians that the 2003 reform proposals would imperil judicial independence unless augmented with greater judicial involvement. See Lord Windlesham, 'The Constitutional Reform Act 2005: ministers, judges and constitutional change: Part 1', *Public Law*, 2005, p. 806; and 'The Constitutional Reform Act 2005: The Politics of Constitutional Reform: Part 2' *Public Law*, 2006, p. 35. Arguably, senior judges were also effective in co-opting the House of Lords Constitution Committee during its 2013 review of the appointments process, with its final report barely acknowledging the risk of excessive judicial influence over the new selection processes. See House of Lords Select Committee on the Constitution, *Judicial Appointments*, HL 272, 2012.

[29] It is worth emphasizing the limited claim that I make in this respect. After all, the fact that few stakeholders seem perturbed by the new arrangements might be a sign that judges do not have excessive influence. My point is simply that if there are high levels of context-shaping influence one

Conduct-shaping and context-shaping are related, and indeed often mutually-reinforcing. Judges' capacity to shape policies can reinforce their influence over discrete decisions, whilst the ability to shape concrete decisions can mould how other actors evaluate the policy context in which those decisions are made. The best example is, perhaps, the potential for judges to ensure—both at the level of discrete decisions and the level of general attitudes amongst key stakeholders—the dominance of traditional understandings of merit that emphasize advocacy, seniority, private practice at the bar and appearances before the higher courts. Merit, constructed in this way, not only unfairly advantages certain privileged groups;[30] it also ensures considerable influence for senior judges inasmuch as it ascribes weight to experiences and skills visible primarily to judges in the higher courts, rather than other actors who participate in the selection process. Judges' ability to insist via concrete decisions on traditional understandings of merit (i.e. conduct-shaping) reinforces the dominance of that understanding within the selection regime (i.e. context-shaping), which in turn will make it easier for the senior judiciary to serve as de facto 'gatekeepers' of merit, and therefore of the selection regime and entry into the judiciary more generally.

Judicial Influence: Variable and Relational

Judicial influence is likely to be both variable and relational. It is variable to the extent that both conduct-shaping and context-shaping will fluctuate depending on factors such as: the vacancy in question; the prevailing statutory framework; the personalities of officeholders; and the institutional relationships between the JAC, the Ministry of Justice and senior judiciary. That patterns ebb and flow over time and from vacancy to vacancy makes it challenging to reach a settled view on whether judges enjoy too much, too little or just the right amount of influence. This might lead to fairly fine-grained assessments. Several academics have expressed particular concern, for instance, about the high levels of judicial influence over senior judicial appointments (i.e. to the UK Supreme Court and leadership roles such as the Lord Chief Justice, Senior President of Tribunals and the heads of division).[31] Even in respect of senior appointments, however, levels of influence have varied

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consequence could be to render it much less likely that there is any debate about the levels of judicial influence.

[30] K. Malleson, 'Rethinking the Merit Principle in Judicial Selection', *Journal of Law & Society* 44, 2006, pp. 126, 135-136.

[31] See e.g. A. Paterson, *Lawyers and the Public Good: Democracy in Action?,* Cambridge: Cambridge University Press, 2012, pp. 148-152.

over time. An example is the dilution of judicial involvement following changes in 2013 to appointments to the Supreme Court. The Court's Deputy President was removed from the commissions specifically constituted for appointments to the Court, whilst the President and Deputy were removed from the process of selecting their successors.[32] Another example is how the influence of senior judges over recruitment to lower level courts grew between 2010 and 2012 during Kenneth Clarke's tenure as Lord Chancellor after he indicated that he would only appoint candidates recommended by the JAC who had been first approved by the Lord Chief Justice during statutory consultation.[33]

In addition to being variable, judicial influence is also relational; that is to say, the influence of any one actor is related to and partly shaped by the influence exerted by other actors. This is especially important given that a striking feature of the post-2005 selection regime is its inclusiveness.[34] The pre-2005 regime—although mixing political, judicial and practitioner influences, and while judges enjoyed significant sway through secret soundings—was dominated by the Lord Chancellor and a handful of officials.[35] In a stark departure, the JAC oversees an open and inclusive regime that involves a variety of other actors. The Lord Chancellor and the Lord Chief Justice, assisted by officials from the Ministry of Justice and H.M. Courts and Tribunals Service, determine the job description for each vacancy. The panel that interviews and ranks candidates comprises a mix of judges and lay people, with the panel's precise composition depending on the office. For certain appointments, senior judges

[32] See Schedule 13 of the Crime and Courts Act 2013 and the Supreme Court (Judicial Appointments) Regulations 2013. For a discussion of these reforms see: P. O'Brien, 'Changes to Judicial Appointments in the Crime and Courts Act 2013' *Public Law*, 2014, p. 179 and E. Delaney, 'Searching for Constitutional Meaning in Institutional Design: The Debate Over Judicial Appointments in the United Kingdom', *International Journal of Constitutional Law* 14, 2016, p. 752.

[33] See Gee et al, *The Politics of Judicial Independence*, p. 175.

[34] 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,* Cheltenham: Edward Elgar Publishing, 2016, p. 145.

[35] Admittedly, by the mid-1990s, the appointment process was becoming increasingly formal and somewhat more inclusive, with for example candidates being interviewed by a panel comprising a senior civil servant, a sitting judge and—for the first time—a lay person. See generally Lord Mackay, 'Selection of Judges Prior to the Establishment of the Judicial Appointments Commission in 2006', in Judicial Appointments Commission, *Judicial Appointments: Balancing Independence, Accountability and Legitimacy*, 2010. By 2001, a Commissioner for Judicial Appointments had also been created to audit the appointment procedures and to investigate complaints. See generally Sir Leonard Peach, *Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel*, London: HMSO, 1999.

must also be consulted, as required by statute.[36] On the JAC a mix of lay, legal and judicial commissioners determine which candidates to recommend to one of the three decision-makers who have the final say whether or not to appoint (i.e. the Lord Chancellor for all appointments to the High Court and above; the Lord Chief Justice for all lower level courts; and the Senior President of Tribunals for most tribunal posts).[37] The fashioning of policy is also a much more collaborative enterprise, with roles for judicial associations, practitioner associations and Parliament. That the appointments landscape is so densely populated, with contributions from multiple stakeholders, reflects the fact that no one actor has a monopoly on all of the skills, information, resources or expertise necessary to reach well-rounded assessments of an applicant's suitability for a judicial career or, more generally, the effective pursuit of policy. The type and degree of influence that judges enjoy in an inclusive regime such as this necessarily depends on and is conditioned by the type and degree of influence enjoyed by other stakeholders.

The suggestion, then, is that influence is a variable and relational phenomenon that encompasses conduct-shaping and context-shaping. The complexity of this phenomenon is one factor that renders it challenging to cultivate constructive debate about judicial influence over judicial appointments. It should already be plain that it can be difficult to reliably calibrate actual levels of conduct-shaping and context-shaping. To determine how effectively judges translate preferences into decisions (conduct-shaping influence) requires identifying those preferences and tracing them through each of the various decision points in the selection process. Both parts to this assessment might be hazardous. There are, as noted earlier, multiple decision points, with some more important than others, whilst preferences might vary between different judges, with some more effective in translating their most strongly held preferences into actual decisions. Difficulties with gauging judges' levels of influence are compounded in respect of context-shaping, where the extent to which judges moulds the general environment in which individual decisions are made, as well as the ways in which other actors regard that broad environment, is essentially unobservable, at least to outsiders. Furthermore, evaluating the conduct-shaping and context-shaping influence of judges in an inclusive selection regime involves evaluating the extent to which other actors contribute, with those contributions also likely to embrace context-shaping and conduct-shaping, with all of the same evidential difficulties. In an inclusive regime that involves contributions from multiple actors it can be tricky to filet out the influence of any given one of them. In line with

[36] See e.g. regs. 6, 12, 18 and 30 of the Judicial Appointments Regulations 2013.

[37] See the changes made to the Constitutional Reform Act 2005 by paras 30-40 of Schedule 13 to the Crime and Courts Act 2013.

this, since it is difficult to isolate influence over individual selection decisions (conduct-shaping) from their influence over the regime (context-shaping), it is necessary to arrive at an all-things-considered assessment that almost inevitably is no more than a rough approximation of the actual levels of judicial influence. All of this could be read as a counsel of despair, with any assessment of the influence exercised by judges so complicated that debate is not profitable. But it should not be read in this way. It should be read instead as underlining the importance of fostering informed, reflective and structured debate that is sensitive to this complexity.

A Framework for Debating Judicial Influence

One way to structure the debate about judicial influence is in terms of inputs, outputs and throughputs.[38] Each provides a focus for reflecting on some of the core components of a normatively attractive appointments process. Inputs, in this context, direct us to reflect on the relationship between judicial influence and the decision-making processes that lead to individual selection decisions or the policies and structures of the selection regime.[39] It encourages us to explore judicial involvement in light of who else contributes to decision-making and the quality, degree and weight of their various contributions. Outputs encourage us to explore the relationships between judicial influence and the outcomes of the appointments regime. These include whether talented individuals from diverse backgrounds are appointed to judicial office and, more generally, whether the regime fosters confidence in the courts and tribunals. Throughputs overlap with and build on inputs and outputs as well as shining a light on what occurs 'in the space between' the two.[40] This directs us towards the governance of the regime and, more particularly, the interaction amongst stakeholders when assessed in terms of accountability, openness, checks and balances and the independence of the JAC. This encompasses both the participation-orientation of inputs and the results-orientation of outputs in order to help us to evaluate the degree to which a set of institutional

[38] This distinction is elucidated by Vivien Schmidt in the context of the legitimacy of the European Union. See e.g. V.A. Schmidt, 'Democracy and Legitimacy in the European Union', in E. Jones, A. Menon and S. Weatherill (eds) *The Oxford Handbook of the European Union,* Oxford: Oxford University Press, 2012, p. 661. See also M. Zürn, 'Democratic Governance the Nationa-State', *European Journal of International Relations* 6, 2000, p. 183; and K. Dingwerth, *The New Transnationalism: Transational Governance and Democratic Legitimacy*, London: Palgrave, 2007, p. 15.

[39] See the seminal work by Scharpf on the distinction between input and output legitimacy: F. Scharpf, *Governing in Europe: Effective and Democratic,* Oxford: Oxford University Press, 1999.

[40] V.A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output *and* "Throughput"' *Political Studies* 61, 2013, pp. 2, 5.

arrangements—and, more particularly, the roles of judges within them—can be justified. In brief: the question of how much and what sort of influence judges should exercise can be structured by referring to those inputs, outputs and throughputs that ought to shape a well-designed and well-functioning selection regime. In this section, I reflect on some of the ways that judicial influence can translate into inputs, outputs and throughputs, taking care to identify the many valuable contributions that judges make as well as the concerns that flow from those contributions. As will become clear, the inputs, outputs and throughputs of a selection regime (as well as the relationship of judicial influence to each) are interconnected.

Inputs

The starting point is to acknowledge the sound reasons that justify a measure—and perhaps even a large measure—of judicial input into the selection regime. Judges have a legitimate interest in the composition of the judiciary that justifies their involvement in individual appointments and the crafting of policies on the selection regime. They are well positioned to assess the potential judge-craft of applicants for judicial office. They bring first-hand knowledge of day-to-day life in courts and tribunals, and in this way can help to ensure that the changing demands of litigation are reflected in the blend of professional, administrative and personal qualities necessary for particular vacancies. Equally vital is judicial input into the policies on and the governance of the selection regime. Involving judges can help to foster their confidence (and that of the legal community) in the integrity of the selection regime. Importantly, it helps to ensure that judges have a stake in that regime, including shared responsibility for recruiting from underrepresented groups.[41] Their involvement also minimizes the danger that other actors—and most obviously: ministers—enjoy too much influence.

For all of these reasons, it is unsurprising that judges are 'anxious'[42] to exercise influence. However, it is no reflection on the judiciary if the rest of the polity is equally anxious to ensure that the judiciary has an adequate influence, but not a 'predominating influence'.[43] Judicial influence is something to be optimized, not maximized, given the risks associated

[41] See s. 139A of the Constitutional Reform Act 2005, which provides that each of the Lord Chancellor and the Lord Chief Justice 'must take such steps as that offer-holder considers appropriate for the purpose of encouraging judicial diversity'.

[42] G. Palmer, 'Judicial Selection and Accountability: Can the New Zealand System Survive?' in B.D. Gray and R.B. McClintock (eds), *Courts and Policy—Checking the Balance* Wellington: Brookers, 1995.

[43] T. Legg, 'Judges for the New Century', *Public Law*, 2001, 62, 73.

with judges being too involved in the selection regime. These include the risk that a largely self-selecting judiciary will be self-replicating, which irrespective of the quality of the individuals appointed might undermine public confidence in the appointments regime as well as the judiciary as a whole. Judges might, in particular, seek to promote and police an understanding of 'merit' that over-emphasizes experiences and skills which are found chiefly in candidates who resemble themselves. It is not inevitable that self-replication will follow from high levels of judicial influence, but the burden should rest on the judiciary to satisfy the rest of the polity that no connection exists given that it is generally assumed in merit-based selection processes that involving current officeholders risks a cloning effect.[44] Of particular concern is that judges might seek to influence the selection regime in ways that lead to differential weight being placed on diversity for different sorts of vacancies, with more permissive approaches towards diversifying focused on the lower courts and tribunals.[45] A related risk is that high levels of influence might result in appointments on the basis of seniority rather than merit,[46] with an emphasis on attributes unrelated to judicial office, such as whether a person seems a 'good chap'.

There are, then, sound reasons to involve judges in the selection regime, but there are difficult questions about just how much involvement judges should have and at which stages of a selection exercise. It is necessary to discern proper boundaries on judicial involvement not merely to reduce the risks associated with disproportionate influence, but also because there exists broad consensus across the UK that judicial selection regimes should be inclusive and draw on the perspectives of the many other actors with a crucial stake in the work of the courts and tribunals. As noted earlier, well-informed assessments of candidates' suitability for a judicial career should draw on the expertise, experiences and perspectives of a range of stakeholders. The same holds for policy decisions as well. Especially important is to involve ministers, lay people and lawyers.

The limits on judicial inputs should be considered in light of and by reference to ministerial inputs, amongst other things. It is not fashionable to say as much but there are good reasons

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[44] See L. Peach, *Report on the Scrutiny of Judicial Appointments and Queen's Counsel Selection Procedures* (1999).

[45] R. Hunter, 'Judicial Diversity and the "New Judge"' in H. Sommerlad, S. Harris-Short, S. Vaughan and R. Young (eds), *The Futures of Legal Education and the Legal Profession*, Oxford: Hart Publishing, 2015, p. 79; See also Sommerlad, 'Judicial Diversity: Complexity, Continuity and Change' in this collection.

[46] See generally the evidence from other legal systems in J. Bell, *Judiciaries Within Europe,* Cambridge: Cambridge University Press, 2006.

for ministers to have a meaningful role in individual selections. This is especially so in respect of leadership roles (where judges work closely with ministers and civil servants on the management and funding of the judicial system) and the top courts (where judges often enjoy significant powers over public policy). Such reasons include that ministers can inject an important degree of democratic legitimacy and accountability into the selection regime—and, by extension, into the judiciary as an institution of government. Ministerial involvement can also help to foster the executive's trust and confidence in the courts as well as buttressing ministerial understanding of the constitutional roles performed by judges. Ministerial involvement can also furnish the political will necessary to advance the diversity agenda. Insofar as they tend to view courts in a wide political and social context, ministers are very well placed to understand the importance of diversity and the need to make rapid and visible progress on appointing a judiciary more reflective of society at large.[47] As Andrew Lynch notes elsewhere in this collection, popular concern about diversity might not be evenly distributed throughout the electorate, and hence ministers might have an inconsistent focus on it, but there is nevertheless good reason to believe that diversity can be 'a pressure point' for politicians.[48] It is also true that ministers can be held to account for the failure to make such progress in ways much less true of judges. This is not to deny that risks flow from ministerial involvement. These include, above all else, the risk that ministers might seek appointments on the basis of partisan factors. Ministers may also place too much weight on the need for selection processes to represent value for money, with the persons appointed able to begin judicial work immediately without long and expensive training.

Questions about the appropriate levels of judicial input should also be weighed alongside lay and legal involvement in the selection process. With backgrounds in commerce, industry, academia and recruitment, lay people can bring fresh perspectives to judicial appointments. This has the potential to limit the scope for judges to exert disproportionate influence. Lay people might, for example, insist on initiatives that strengthen and further formalize selection processes in the face of judicial opposition.[49] They could also challenge tacit understandings of merit by encouraging judges to acknowledge that judge-craft requires competences beyond

[47] For a contrasting view made by Justice Ronald Sackville in light of the Australian experience, see R. Sackville, 'The Judicial Appointments Process in Australia: Towards Independence and Accountability', *Journal of Judicial Administration* 16, 2007, p. 125.

[48] A. Lynch, 'Diversity without a Judicial Appointments Commission – The Australian Experience', in this collection.

[49] An example is the important role lay people on the JAC played in successfully arguing for interviews to form part of the process for appointments to the Court of Appeal: see Gee et al, *The Politics of Judicial Independence,* p. 184.

the technical legal and advocacy skills associated with excellence at the bar, but also includes the communication and management skills that are especially relevant for a successful career as a solicitor.[50] Involving lawyers also ensures that the concerns of the legal professions are embedded in the selection regime; for example, the solicitor commissioner on the JAC is able to remind the other commissioners of the importance of recruiting judges from diverse professional backgrounds. However, just as involving other actors can counter the influence that judges exert, so too can their involvement actually intensify high levels of judicial influence. Most obviously, the involvement of lawyers on the JAC could encourage a cosy consensus, where lawyers' interests align with judges' interests leading to a 'self-selecting lawyerly caste of judges'[51] characterized by 'too little heterogeneity of outlook'.[52] Barristers, solicitors and legal executives will often have different interests and perspectives, but they might share broadly similar impulses on some issues that are a partial product of their similar socialization by legal education and practice. For example, they might share similar views on the question of whether ministers should have any real involvement in selection decisions. The involvement of lay people could similarly sharpen rather than shrink judicial influence where judges succeed in persuading lay people to advance judicial interests that are at odds with the public interest. For example, judges might succeed in persuading the JAC's lay commissioners of the need to select candidates with extensive experience in a fee-paid judicial role who require little on-the-job training from the resource-strapped Judicial College, even although one consequence of this might be to disadvantage candidates from non-traditional backgrounds who tend to be less well placed to take on fee-paid judicial work alongside their day job.[53]

Outputs

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[50] K. Malleson 'Introduction', in K. Malleson and P.H. Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World,* Toronto: University of Toronto Press, 2006, pp. 3, 9.

[51] J. Allan, *Democracy in Decline: Steps in the Wrong Direction,* London: McGill-Queen's University Press, 2014, p. 81.

[52] J. Allan, 'Judicial Appointments in New Zealand: If It Were Done When 'Tis Done, Then 'Twere Well It Were Done Openly and Directly', in K. Malleson and P.H. Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World,* Toronto: University of Toronto Press, 2006, p. 117. See also G. Gee, 'The Politics of Judicial Appointments in Canada', in Judicial Appointments Commission *Judicial Appointments: Balancing Independence, Accountability and Legitimacy*, 2010, pp. 99, 114.

[53] See generally Gee et al, *The Politics of Judicial Independence,* pp. 171-173.

The inputs into a selection regime should be determined (at least in part) by the outputs sought from it. The primary outputs of a selection regime are of course the appointments made under it. Underlying the inclusive approach to judicial appointments now found across the UK lies emerging recognition of the fact that the objective is not merely to appoint well-qualified judges. For sure, the regime must ensure that high quality individuals with the array of attributes necessary to excel in judicial office are appointed, with the appointment process sufficiently rigorous to test the professional competence of applicants, but it must do so by drawing on a wide range of perspectives to render it more likely that judges are recruited from a diverse pool, including from underrepresented groups. In other words, the people appointed to the bench should be very well qualified and also reflective of society at large, with the inputs into the selection process designed with this aim in mind. A well-functioning regime should also generate a number of secondary outputs. It should promote the independence of judges and the rule of law, in part by fostering confidence in the judicial system among key stakeholders. It is important to note that there might be a disjuncture between the inputs into the selection regime and the outputs to be secured from it. Limits on the capacity of actors who contribute to the selection process to achieve a more diverse bench might result from, for example, the statutory framework or the structure of the legal professions.[54] It is notable that though valued as an output,[55] diversity does not feature anywhere in the initial assessment of a candidate's 'merit' in the JAC-managed regime.[56] It is also of course very difficult to determine the quality of those ultimately appointed, especially where, as in England and Wales, there is no comprehensive appraisal system for reviewing the performance of serving judges.[57]

When thinking about how levels of judicial influence might relate to the desired outputs of the selection regime, it is important to acknowledge, once again, that judicial input is essential for ensuring the selection of high calibre individuals who will be able to handle the demands of a judicial career. At the same time, it is necessary to examine how judicial interests correlate with the public interest. One concern is that if they make multiple, important inputs into the selection process, judges may repeatedly succeed in prioritizing judicial self-interest

[54] See L. Barmes and K. Malleson, 'The Legal Profession as Gatekeepers to the Judiciary: Design Faults in Measures to Enhance Diversity', Modern Law Review 74, 2011, p. 245.

[55] Part of the Government's justification for introducing the JAC was that it would help 'to make our judiciary more reflective of the society it serves': Department for Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges,* CP 10/03, 2003, para 21.

[56] G. Bindman and K. Monaghan, *Judicial Diversity: Accelerating Change,* London: Labour Party, 2014, para 3.13.

[57] See generally Gee et al, *The Politics of Judicial Independence,* pp. 149-155.

over the public interest. It might be that most of the time judicial interests and the public interest are aligned, but there might also be occasions where judges resist initiatives that promote the common good. For example, some judges might resist initiatives that reflect best recruitment practices and which are designed to ensure a fairer, more transparent and inclusive process. Or to take another example: even although at some level committed to promoting diversity, judges might obstruct initiatives that potentially lead to faster progress on diversifying the bench where those initiatives imperil traditional understandings of merit.[58] While 'it cannot be in the public interest to marginalize or ignore'[59] the views of judges, it is equally important that the regime ferrets out spurious arguments advanced by judges that are more about entrenching vested judicial interests than furthering the public interest.

Throughputs

Today, the health of a selection regime will be assessed by reference to not only inputs and outputs, but also the quality of governance that results from the way that various key stakeholders interact—or what might be called the throughputs of the selection regime. A central concern, in other words, is that the inputs into that regime, together with the outputs that flow from it, should foster a way of regulating judicial appointments that is transparent, accountable and inclusive, with effective checks and balances to structure the contributions made by the various stakeholders and to ensure that no one actor has excessive influence. The key is to grasp how judicial involvement contributes to the governance of the selection regime; that is to say, to what extent do the multiple judicial inputs foster or frustrate transparency, accountability, inclusiveness, the independence of the JAC and, more generally, an appropriate balance of influence across the various stakeholders?

Particular concerns will focus on the relationship between judicial influence and accountability. Even were it desirable to do so, it is difficult in practice to hold a decision-maker accountable for individual appointments given that judges have security of tenure, and hence are normally in office for much longer than other public officials.[60] There should always remain, however, important measures of both democratic accountability and

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[58] See G. Gee and K. Malleson, 'Judicial Appointments, Diversity'.

[59] J. Sumption, 'The Constitutional Reform Act 2005', in Judicial Appointments Commission, *Judicial Appointments: Balancing Independence, Accountability and Legitimacy,* London: Judicial Appointments Commission, 2010, pp. 31, 39.

[60] See generally J. Resnik, 'Judicial Selection and Democratic Theory: Demand, Supply and Life Tenure', *Cardozo Law Review* 26, 2005, p. 579.

explanatory accountability for the working of the regime as a whole. Insofar as high levels of judicial influence might come at the cost of ministerial involvement, there is likely be a serious deficit in terms of democratic accountability (in the sense of important decisions being made by someone who is accountable to the electorate, even if only indirectly). At the same time, high levels of judicial influence may or may not be accompanied by an appropriate level of explanatory accountability (in the sense of furnishing an account of their collective contributions to the stewardship of the appointments regime). This depends on the extent to which the judges take steps to explain in what ways and to what ends they exert influence during a selection exercise and, more generally, on policy questions relating to the structure and operation of the selection regime.

Another concern is whether the patterns of judicial influence might work, over time, to undermine the independence of the JAC. Most obviously, the views of the judicial commissioners on the JAC might come to dominate over those of the lay and legal members, with the possibility that the former co-opt the latter. More subtly, the need for the JAC's leadership to nurture the confidence of and maintain constructive relations with the judiciary (and especially senior judges with whom the JAC's Chair works closely) might render it difficult at times for the JAC to distinguish between the public interest on the one hand and judicial interests on the other. It might become difficult for the JAC's leaders to realize the full scope for the JAC's interests and the judiciary's interests to conflict on issues such as how to frame job descriptions, the design of the qualifying tests and role-playing tasks, the use of interviews for senior leadership roles and the application of the equal merit provision.[61] There might also be a lack of clarity about the responsibilities of the JAC's judicial commissioners, and whether they owe their loyalty when discharging their role as commissioners to the JAC, the judiciary or the wider public.[62] For this reason, it is important that, so far as possible, each judicial input into the selection regime is structured by a set of understandings shared by all of the stakeholders as to the purpose and limits of involving judges at specific stages of the selection process. Without such a set of understandings, there

[61] See generally Gee et al, *The Politics of Judicial Independence*, pp.163-186.

[62] The JAC's Commissioners must uphold the Seven Principles of Public Life, which include taking decisions 'solely in terms of the public interest'. As Jan van Zyl Smit notes, it can be inferred from this that individual Commissioners 'must make their own decisions and not prefer the wishes of the constituency whose "seat" they occupy on [the JAC]'. This is not to say, of course, that all will adhere to this requirement. See 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,* Cape Town: Siber Ink, forthcoming.

is substantial scope for the judiciary to convert their multiple inputs to the selection process into influence that compromises the JAC's independence.

Is there too much Judicial Influence over the JAC-run Selection Regime?

As noted as this chapter's outset, the question is not whether judges should have a high level of involvement in judicial appointments, but rather when does such involvement become excessively high? To answer this question, I want to draw on five presumptions that, to my mind, can be extracted from this discussion of inputs, outputs and throughputs. Before turning to those presumptions, I begin by stipulating that judicial involvement in the JAC-run regime is, by design, fairly substantial. This stipulation should be uncontroversial. Few would deny that high levels of judicial involvement are embedded within the JAC regime. That judges are so closely involved with the selection of their colleagues is not surprising insofar as this acknowledges their legitimate interest in the make-up of the bench. Also relevant is that their heavy participation in the new methods of selecting judges was a way of addressing many judges' profound nervousness in 2003 about the proposed abolition (and eventual reshaping) of the office of Lord Chancellor, and the consequent creation of the JAC.[63] Extensive judicial involvement is a product of statute as well as practices that were adopted by the JAC within the statutory framework.[64]

Statute and institutional practice have endowed the judiciary with considerable conduct-shaping influence throughout the appointments process. As mentioned in the introduction, judges are involved at almost every stage of every JAC-managed selection exercise. For vacancies below the High Court, judges are involved from the very beginning (designing job descriptions) to the very end of the selection process (deciding whether to appoint the applicants recommended by the JAC). For vacancies in the High Court, Court of Appeal and leadership roles, judges are involved at every stage save the final decision whether or not to accept the JAC's recommended candidate (although, even here, the very fact that they are involved at all prior stages suggests that the candidates that the JAC or the ad hoc selection panel responsible for senior appointments ultimately recommends to the Lord Chancellor

[63] See K. Malleson, 'Creating a Judicial Appointments Commission: Which Model Works Best?', *Public Law*, 2004, p. 102; and K. Malleson, 'The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?', in K. Malleson and P.H. Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World,* Toronto: University of Toronto Press, 2006, pp. 39, 51.

[64] See generally Gee et al, *The Politics of Judicial Independence*.

likely reflect the dominant judicial views about who to appoint).[65] As one commissioner put it, 'judicial fingerprints' can be found on almost all decisions in selection exercises run by or under the auspices of the JAC. I also stipulate that statute and institutional practice confer significant context-shaping influence on judges. This is a partial product of the status of, and respect for, the judiciary and the legal professions in England and Wales. It also results from a strong judicial presence on the JAC: there are more judicial than lay commissioners, with the number of judges and lawyers outnumbering their lay members to constitute a majority on the JAC. Once again, this stipulation should be uncontroversial. The question is whether their combined conduct-shaping and context-shaping influence gives judges too much say over appointments. According to one former JAC commissioner, this represents 'significant but not overwhelming influence'. I disagree, and I now want to point to five rebuttable presumptions that can be taken to indicate that high levels of judicial influence over the JAC regime are in fact too high.

1. Judicial influence is too high if judicial involvement contributes to squeezing out the scope for meaningful ministerial involvement.

Today, the Lord Chancellor has only very minimal involvement in individual appointments.[66] Beyond specifying (in consultation with the Lord Chief Justice) the job description, the Lord Chancellor is no longer involved in appointments below the High Court, i.e. 97% of total appointments. For the High Court and above, the Lord Chancellor sets the job description (again in consultation with the Lord Chief Justice) and, for leadership roles, might also give an oral briefing to the selection panel at the outset of a selection exercise. The Lord

[65] Strictly speaking, the panels for the most senior vacancies (Court of Appeal, heads of division and the Lord Chief Justice) operate as a committee of the JAC, and somewhat separate from regular JAC-run selection processes. These panels include very senior judges who are not commissioners of the JAC but who participate ex officio, with other senior judges consulted during the selection process. As a result, the JAC retain an important role in these senior recruitment exercises, but their involvement is less than that for more junior vacancies, with senior judges having more involvement in senior level appointment than on lower level appointments. It is still apt to regard these senior selection rounds as run by or under the auspices of the JAC.

[66] It is also relevant, of course, that occupants of this historic office are no longer required to be lawyers or peers and—by virtue of the twinned responsibilities of the Lord Chancellor and Secretary of State for Justice—now juggle a very heavy and politically salient policy portfolio. Viewed in this light, it would be unsurprising if Lord Chancellors' level of interest in individual selections was relatively low, and certainly much lower than pre-2005 Lord Chancellors. See generally G. Gee, 'What are Lord Chancellors For?', *Public Law*, 2014, p. 11.

Chancellor also has the final say whether to appoint the person recommended by the JAC (or the ad hoc selection panels for the very top appointments), although practice over the last decade suggests that Lord Chancellors almost always accept the names recommended to them. Between 2005 and 2016, Lord Chancellors accepted the candidates that the JAC recommended—literally —99.9 per cent of the time.[67] Under the statute, the Lord Chancellor can depart from a recommendation by the JAC only if he or she is able to provide reasons that raise doubts over the soundness of the JAC's assessment of the candidate's merit.[68] According to one former office-holder, 'the detailed wording [of the statute] and the expectations in practice make it very difficult for the Lord Chancellor to exercise even his limited powers'.[69] This is not to imply that a Lord Chancellor has no influence over individual selections. According to civil servants at the Ministry, Lord Chancellors take an interest in appointments, especially for leadership roles, reviewing substantial evidence compiled during the selection process before deciding whether or not to accept the person that the JAC has recommended. Nevertheless, it is difficult to avoid the conclusion that judicial influence—throughout every stage of the process for lower level appointments and every stage for senior posts except the final decision—has left little if any meaningful scope for the Lord Chancellor to influence individual selections. To put this differently: the conduct-shaping influence of the judiciary within the regime is so pervasive that there remains little room for ministerial involvement, with even the formal powers enjoyed by the Lord Chancellor becoming in practice almost impossible to use, and all of this despite their being several sound reasons (as noted above) for retaining a meaningful ministerial input.

As for policy development, the Lord Chancellor remains an important driver of reform. The reforms introduced in 2013, for example, were initially prompted by Kenneth Clarke's limited interest in lower level appointments.[70] The Lord Chancellor approves the JAC's strategic aims

[67] Between 2006-2014 (i.e. before the substantial portion of the Lord Chancellor's role as the final decision-maker was transferred to the Lord Chief Justice and the Senior President of Tribunals), the JAC had made almost 4,300 recommendations, with Lord chancellors refusing only 5 of them. In other words, Lord Chancellors accepted the JAC's recommendations—literally—99.9% of the time.

[68] See e.g. s. 91 of the Constitutional Reform Act 2005.

[69] J. Straw, *Aspects of Law Reform: An Insider's Perspective,* Cambridge: Cambridge University Press, 2013, p. 58.

[70] As Clarke put it, the Lord Chancellor's role in lower level appointments had become 'largely ceremonial and ritualistic': House of Lords Select Committee on the Constitution, *Judicial Appointment Process: Oral and Written Evidence,* 2013, p. 424, Q.373.

and the performance and policy framework within which it operates.[71] There can be little doubt, however, that policy development is now a collaborative enterprise, with judges possessing a much more significant say than a decade ago. Of note is that the judiciary's considerable conduct-shaping influence arguably intensifies its context-shaping influence, at least insofar as Lord Chancellors appear to accept that the thrust of reforms to the selection regime should be to increase judicial responsibility for selections, rather than decrease it. The overall effect of the 2013 reforms was, for example, to expand the judiciary's influence. Even Clarke's modest proposal that the Lord Chancellor should sit on the panels that recommend candidates for the most senior vacancies was later dropped by his successor, Chris Grayling. Notably, there have been few attempts emanating from Lord Chancellors and the Ministry of Justice to ensure that judicial inputs into the appointments regime are appropriately structured and underpinned by shared understandings as to the purpose of and limits on those inputs.

2. Judicial influence is too high if it seriously exacerbates accountability deficits in the selection regime.

A democratic accountability deficit was almost inevitable once it was decided in 2003 to move from a ministerial model of appointments to one built around an independent appointments commission. Partial redress can perhaps be found in: the statutory duty on the JAC to publish an annual report;[72] 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;[73] and the fact that the JAC's Chair, Chief Executive and commissioners have given evidence before select committees from time to time.[74] Lord Chancellors have also from time to time appeared before select committees to discuss, inter alia, aspects of the selection regime.[75] Augmenting this is a statutory duty on the Lord Chief Justice to 'take such steps …as [the officeholder] considers appropriate for the purposes of encouraging judicial diversity'.[76] All of this might be said to offer a limited, indirect form of democratic

[71] Ministry of Justice, *Framework Document: Ministry of Justice and the Judicial Appointments Commission*, para 3.3.

[72] Constitutional Reform Act 2005, Schedule 12, para 32.

[73] See e.g. House of Commons Justice Committee, *Appointment of the Chair of the Judicial Appointments Commission,* HC 416, 2016.

[74] See e..g House of Commons Constitutional Affairs Committee, *The Operation of the Judicial Appointments Commission,* HC 1665-I, 18 July 2006.

[75] See e.g. House of Lords Select Committee on the Constitution, *Annual Oral Evidence Session with the Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of Justice,* 2014, pp. 2-3, Q.2.

[76] Constitutional Reform Act 2005, s. 137A.

accountability—but it pales in comparison to the substantial, direct democratic accountability inherent in the ministerial model.[77] A relevant question is whether, even taking account of these practices, judicial influence on the JAC-run regime is so high as to render the democratic deficit a serious cause for concern. Views will differ on this of course, and some might argue that any such deficit is more serious for some vacancies (top courts) than others (lower courts). A second question explores the extent to which any such democratic deficit is offset by the judiciary's efforts to provide a public account of their input into the selection regime (explanatory accountability).

On the first question, the Lord Chancellor remains formally accountable for the regime as a whole, but now only has very limited levers to shape individual selections, with ministerial input into policy coloured by the judiciary's context-shaping influence. Inasmuch as providing a nexus with Parliament is one of the reasons why Lord Chancellors should have a genuine role in shaping individual selections (as I argued above), and insofar as judicial input has compressed the scope for such a role, then high levels of judicial influence are contributing to a real democratic deficit. Reasons to believe that this represents a serious concern include the scale of the deficit: beyond a role in deciding the job descriptions, there is now no ministerial involvement in 97% of appointments, which in turn raises questions about the appropriateness of requiring the Lord Chancellor to remain accountable to Parliament for the selection regime. More generally, in the face of what some view as the rising constitutional power of the judiciary, it is reasonable to worry about the erosion of the legitimacy that traditionally flowed to the judiciary from the existence of a democratic nexus in the selection regime that resulted from the meaningful involvement of ministers.

On the second question there is reason to doubt whether there are mechanisms in place to ensure the effective scrutiny of the public narrative that judges offer of the ways in which they exercise influence over appointments. To be sure, there is evidence that senior judges take seriously their responsibility to provide an official account of their stewardship of, and contributions to, the selection regime, for example by publishing regular reports and statistics.[78] At the same time, there are few reliable mechanisms for holding judges to account

[77] There is a danger in overstating this point given that for much of the twentieth century Lord Chancellors were shielded from the full force of democratic accountability in Parliament: see Woodhouse, *The Office of Lord Chancellor,* pp. 165-181.

[78] See, e.g., the Judicial Diversity Committee of the Judges' Council, *Report on Progress 2013-2016,* 2016; the Lord Chief Justice, *The Lord Chief Justice's Report 2016,* 2016, pp. 9-11; and Judicial Office, *Judicial Diversity Statistics 2016,* 2016.

for their considerable influence over the selection regime. For example, the House of Lords Constitution Committee in 2012 made a number of recommendations directed towards the judiciary.[79] It is of course always open for the Constitution Committee, or any other select committee, to invite senior judges to appear before them to discuss actions taken in response to those recommendations,[80] but Parliament's interest in judicial appointments has been sporadic, with select committees not always effective at following up on their recommendations.[81] None of this is the fault of the judges themselves, but rather is in large part an inevitable result of the post-2005 institutional arrangements. What is more, the judiciary's official account of their influence inevitably offers no insight into what goes on behind closed doors. No mention is made in such accounts of, for example, repeated judicial attempts to resist interviews and application forms for appointments in the Court of Appeal and for leadership positions, despite these forming an important and uncontroversial part of most professionalized appointment processes. Similarly, there is little evidence in the official accounts provided by the judiciary of successful judicial lobbying to dilute the JAC's 'equal merit' policy, a matter that I discuss immediately below.

3. Judicial influence is too high if judges repeatedly succeed in ensuring that the public interest is subordinated to judicial interests.

During its first decade the JAC has secured some notable policy developments in the face of judicial opposition. Perhaps the best example is the formalization of the process of appointing members of the Court of Appeal. Another success is assuming responsibility in 2013 for appointing Deputy High Court Judges.[82] However there are also suggestions that, at various points during the JAC's first ten years, judicial interests have prevailed over the public interest. Examples include the successful effort by the senior judiciary to resist the JAC assuming responsibility for the selection of the Senior Presiding Judge (a role with a wide

[79] See e.g. recommendations that (a) greater stress should be placed within the judiciary on judicial careers, with it easier to move between courts and tribunals and to seek promotion, and (b) a judicial appraisal system should be introduced: House of Lords Select Committee on the Constitution, *Judicial Appointments,* HL 272, 2012, paras 180 and 186.

[80] On growing numbers of judicial appearances before Parliament, see R Hazell and P. O'Brien, 'Meaningful Dialogue: Judicial Engagement with Parliamentary Committees at Westminster', *Public Law*, 2016 p. 54.

[81] Gee et al, *The Politics of Judicial Independence*, p. 188.

[82] Judicial Appointments Commission Regulations 2013, SI 2013/2191, Part 8.

range of management, leadership and governance responsibilities).[83] The most troubling example is, perhaps, the judicial influence that diluted the content of the JAC's equal merit policy. One of the changes introduced by the Crime and Courts Act 2013 was to clarify the meaning of section 63 of the Constitutional Reform Act 2005, which provides that the JAC must select candidates 'solely on merit'. The 2013 Act clarified that, where there are two or more candidates determined to be of equal merit, section 63 does not prevent the JAC from recommending a candidate on the basis of improving diversity on the bench.[84] As a consequence, the JAC had a free hand to devise a policy how best to implement the 'equal merit' provision.

In devising its equal merit policy, the JAC faced two critical questions. First, should the provision apply to all stages of the selection process, including short-listing, or just once at the final stage where the JAC makes its recommendation? Second, to which groups of under-represented applicants should the provision apply? Alas, the JAC answered both questions very narrowly, adopting what its then chair conceded was 'a fairly minimalist' approach.[85] The JAC decided to apply the provision only at the final selection stage, thus blunting its potential to increase diversity. The premise that there might be candidates demonstrating different strengths and weaknesses who are considered of equal merit is relevant to short-listing and at the point at which the JAC decides whom to recommend to the appointing authority. Indeed, it might be thought that it is at short-listing that it is most difficult to differentiate between the best candidates.[86] Applying the equal merit policy at short-listing could help to remove barriers that might prevent non-conventional candidates being invited for an interview. The JAC further limited the provision's potential by applying it only to race and gender. It did so on the grounds that the equal merit policy should only be invoked where underrepresentation is evidenced by reference to published data. There are practical difficulties related to the availability of reliable data for some of the 'protected characteristics' under the Equality Act. However, the JAC could have been proactive in widening the number of protected groups to whom the equal merit provision can apply. Arguably, a more

[83] The selection of the Senior Presiding Judge is seen by judiciary as a question of judicial deployment, not judicial appointment: Gee et al, *The Politics of Judicial Independence*, p. 186.

[84] Crime and Courts Act 2013, Schedule 13. This is variously known as the 'equal merit', 'tie-break' or 'tipping point' provision and derives from s. 159 of the Equality Act 2010.

[85] House of Commons Justice Committee, *The Work of the Judicial Appointments Commission*, HC 1132, 2014, Q31.

[86] Bindman and Monaghan, *Judicial Diversity: Accelerating Change,* para 4.8.

pioneering and proactive approach would be consistent with the JAC's statutory duty to 'have regard to the need to encourage diversity in the range of persons available for selection'.[87]

What bears emphasis, for these purposes, is that judicial influence accounts for the JAC's narrow equal merit policy. Judges exercised significant sway over the design of the JAC's policy. Over half of the responses to a consultation exercise on the equal merit policy that the JAC ran in 2013 were from judges and their representative bodies. There were also lengthy private discussions between the JAC, senior judges and the Ministry. As the then JAC Chair explained, there was 'serious caution among many [of the JAC's] stakeholders' about the equal merit policy.[88] Confidential interviews with some of those involved in the design of the policy confirm that it primarily was to meet judicial anxiety that the JAC adopted such an anaemic policy. There is also evidence of judicial resistance to the policy in the years following its adoption. According to one interviewee who is closely involved in appointments process, some judicial commissioners on the JAC fiercely resisted an internal report that recommended that the JAC should extend the equal merit policy to the short-listing stage. In all of this it seems that some judges' attachment to a traditional account of merit—and, in particular, to the view that it will always be possible to distinguish between two candidates — is trumping the JAC's concern for faster progress on diversity.[89] To grasp the potential of the equal merit policy requires a certain attitude about the type of assessments made by selection panels when faced with two or more candidates with different but commensurable judicial qualities—and, more significantly, a change of attitude amongst some judges who serve on or seek to influence the JAC. In short: judicial influence inside the JAC and external pressure brought to bear on it by senior judges and judicial associations has led to a weak policy that 'runs the risk of marking merely another positive headline backed by very little positive impact in terms of addressing the glaring diversity deficit'.[90] The evidence, to date, suggests that judicial influence succeeded in minimizing the impact of the equal merit provision: the JAC made 306 recommendations for judicial office in 2015-16, but invoked the provision a mere 14 times.[91]

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[87] Constitutional Reform Act 2005, s. 64.

[88] House of Commons Justice Committee, *The Work of the Judicial Appointments Commission,* HC 1132, 2014, p. 13, Q. 31.

[89] There are, for sure, some judges who take a different view. See House of Lords Select Committee on the Constitution, *Judicial Appointments,* HL 272, 2012, para 99. Notably, Lady Justice Hallett has encouraged the JAC to consider applying the Equal policy at short-listing: Judicial Appointments Commission, *Minutes of Meeting,* June 2016, para 5.2.

[90] Paterson and Paterson *Guarding the Guardians*, pp. 47-48.

[91] Judicial Appointments Commission, *Annual Report and Accounts 2015-16*, July 2016, p. 17.

4. Judicial influence is too high where this has enabled judicial involvement to be essentially unstructured, lacking transparency and not subject to effective checks.

Arguably, academic critiques about judicial influence over the JAC-run regime —including the critique in the book that I co-authored with Hazell, Malleson and O'Brien—have to date understated the importance of ensuring that, so far as possible, judicial inputs into the selection process are structured, transparent and subject to effective checks. From its inception in 2006, the JAC has sought to ensure a structured selection process; emphasising, for example, that interviews should follow a set format that enables evidence to be assessed against explicitly stated criteria for appointment, with this designed in part to counter the risk of judges appealing to implicit criteria that form no part of a merit-based selection process.[92] Academic critiques have always not done enough to acknowledge the important work that undertaken by the JAC on its creation in 2006 to ensure a structured and open appointment process. A related shortcoming of academic critiques has been to overlook the important steps taken by the JAC and others to structure some of the judicial inputs into the selection process since 2006. For example, the JAC in 2015 sought to address the potential for conflicts that can arise where judges undertake multiple roles in a single selection round (as panel member, statutory consultee, referee and so forth).[93] Similarly, in the face of concern that judicial commissioners tended to enjoy longer terms on the JAC than their non-judicial counterparts, the JAC, the Ministry of Justice and senior judges now share 'an expectation'[94] that there should be consistent tenures for both judicial and non-judicial commissioners alike. These are very welcome developments that should be kept in mind when assessing the degree and nature of judicial influence on the JAC and its selection processes.

Despite these important steps, there is still more work to be done to ensure that judicial contributions are structured and subject to effective checks. A particular problem is the risk that judges will enjoy excessive influence through statutory consultation; that is, where the JAC is required by statute to seek the views of senior judges on the shortlisted candidates before making its recommendation. Evidence that Hazell, Malleson, O'Brien and I collated between 2011 and 2014 suggests that the views of senior judges expressed via statutory

[92] Note, however, Monaghan's essay in this collection which argues that the existence of formally stated criteria is unlikely to substantially reduce the risk of judicial influence: see K. Monaghan, 'Reflection', in this collection.

[93] Judicial Appointments Commission, *Minutes of Meeting,* February 2015, para 6.1.

[94] Ministry of Justice, *Triennial Review: Judicial Appointments Commission,* 2015, para 118.

consultation carries substantial weight, with that weight increasing with the seniority of the vacancy in question. Further confidential interviews between 2014 and 2017 confirmed continued concerns amongst some inside the JAC about the quality of and weight attached to the judicial views expressed during statutory consultation. My co-authors and I concluded that statutory consultation sometimes operates as a de facto 'veto' for senior judges on the people that the JAC recommends, which led us to worry that statutory consultation gives judges too much influence.[95] As the JAC see its, however, the weight ascribed to the views expressed in statutory consultation is 'directly proportionate to the quality of those reasons, which is generally high'.[96] What is more, when compared with the typically decisive say that judges possessed via secret soundings under the pre-2005 regime, it could perhaps be suggested that '[t]he relative weight of judicial consultation is bound to be smaller…and its objectivity easier to assess' in the formal and transparent applications-based regime run by the JAC, where 'the range of information available about candidates is much wider, and largely in the hands of the candidate themselves'.[97] Although there might be something in this, as of 2016, there remains very real (if not always explicitly stated) concern among some in both the JAC and the Ministry about the quality, consistency and relevance of the views that senior judges express during statutory consultation.[98] As one civil servant at the Ministry put it, statutory consultation has a role to play because senior judges 'know the job and they know the people', but the key is to ensure that judges 'give better and more consistent evidence in statutory consultation, and follow a consistent approach'.

5. Judicial influence is too high if judges succeed in co-opting other stakeholders, including in ways that undermine the JAC's independence.

The JAC must be independent not only from the Ministry of Justice, but from the judiciary as well. It is true, of course, that judges have a critical role to play in promoting and protecting the JAC's independence. Indeed, the then Lord Chief Justice, Igor Judge, is credited with robustly defending the JAC in 2010 after tensions with the Ministry became so fraught that there were rumours that the JAC might be abolished just a matter of years after its birth.[99]

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[95] Gee et al, *The Politics of Judicial Independence*, pp. 172-175.

[96] Sumption, 'The Constitutional Reform Act 2005', p. 40.

[97] ibid, p. 39.

[98] At a recent JAC meeting, there was a general discussion on statutory consultation and the need for consultees to ensure good quality, evidence-based statutory consultation responses: Judicial Appointments Commission, *Minutes of Meeting,* June 2016, para 3.5.

[99] On the JAC's 'near-death experience', see Gee et al, *The Politics of Judicial Independence*, pp. 167-170.

However, whether by design or otherwise, judges can wield influence that undermines that independence. Judicial influence that undermines the JAC's independence is difficult to detect and calls for constant vigilance. It includes (but is not limited to) co-opting the JAC's leadership, commissioners and staff. In short, the risk of judicial capture of the JAC is real. Over its first decade, this risk has ebbed and flowed, with at least occasional concern inside some parts of the JAC that judicial influence was undermining the JAC's independence. Three issues deserve emphasis.

First, some of those most closely involved in the JAC's work expressed concern in confidential interviews that each of the JAC's first two lay chairs—Baroness Prashar (from 2006 to 2010) and Christopher Stephens (from 2010 to 2016)—sometimes seemed to have been co-opted by the senior judiciary. Ensuring that the JAC's independence is not compromised by judicial capture are among the most important responsibilities of the JAC's leadership (the Chair and the Chief Executive).[100] Of course, the lay Chairs find themselves in an especially delicate position, requiring a range of administrative, diplomatic and political skills to foster and maintain the confidence of multiple stakeholders (ministers, judges, civil servants as well as the various legal professions), each of which might have competing concerns. On his appointment in 2011, Christopher Stephens found confidence in the JAC amongst ministers and senior judges at dangerously low levels. It would be understandable if the Chairs were generally sympathetic to the judiciary's perspectives on contentious questions. After all, the judiciary has an important say in the selection of the Chair,[101] and might be keen to ensure that a suitably sympathetic candidate is selected to lead the JAC. Furthermore, senior judges have ample opportunity to 'lobby' the JAC's Chair and influence his or her mindset. Not only does the JAC's Chair have regular one-to-one meetings with the Lord Chief Justice to discuss the appointments regime, he or she also participates alongside senior judges on panels that select the members of the Court of Appeal, heads of division and judicial leaders such as the Lord Chief Justice.[102] It would be unsurprising if this close and repeated contact with senior judges led some Chairs over time to share the judicial approach on contentious policy questions.

Second, there is some concern that the senior judges who sit as commissioners on the JAC have at times exerted disproportionate influence on both individual selections and the

[100] See G. Gee, 'The Crime and Courts Bill and the JAC', *UK Constitutional Law Blog,* 1 November 2012.

[101] See Judicial Appointments Commission Regulations 2013, reg. 9.

[102] See Judicial Appointments Regulations 2013, regs. 5, 11, 13 and 23.

fashioning of the JAC's policies. According to one official, some of the more junior judges on the JAC have at times seemed to 'take their lead' on contentious policy questions from the senior judicial commissioners. An example cited in support of this by the same official was concerted judicial opposition to the JAC's desire to strengthen its equal merit policy. Concern has also been voiced about significant spikes in judicial influence over the JAC that occurred in 2010 and 2016 when the senior judicial commissioner served as the JAC's acting chair pending the appointment of a new lay chair. A particular concern is that these periods of interregnum provided an opportunity for these judges to entrench high levels of judicial influence over the JAC's processes.

Finally, there is concern about whether the JAC's lay and legal commissioners might be deferential to the judicial commissioners, both on decisions relating to individual appointments and policy questions. Similarly, in respect of selection days for lower level vacancies, there are concerns about that judicial members on the interview panels might have an oversized influence. To be clear, in its early days, one of the JAC's priorities was 'to ensure that [the commissioners] worked as a cohesive group' and 'to ensure parity among the commissioners so that there was no distinction between lay and judicial members'.[103] Emphasis was also placed during Christopher Stevens's tenure as Chair to ensure that all decisions were reached by consensus, reflecting the informed view of all of the Commissioners. In several of the interviews that I have conducted with commissioners over the last five years, it has been repeatedly emphasized that every commissioner enjoys the same say, with no discernible difference between how lay, legal or judicial commissioners contribute to the JAC's decisions.[104] There is, according to many of those involved with the work of the JAC, no evidence of any deference to the judicial commissioners. As Geoffrey Bindman QC and Karon Monaghan QC have noted, however, there is reason to be (at the very least) 'a little sceptical of this': by virtue of 'the authority inherent in their status', together with their 'experience of doing the job itself', the judicial commissioners are 'likely in practice to be very influential'.[105]

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[103] U. Prashar, 'Translating Aspirations into Reality: Establishing the Judicial Appointments Commission', in Judicial Appointments Commission, *Judicial Appointments: Balancing Independence, Accountability and Legitimacy,* 2010, pp. 43, 49.

[104] In their report on judicial diversity for the Labour Party, Geoffrey Bindman QC and Karon Monagahan QC make the same point, noting that they 'have been told that the lay members of the JAC are not in any sense deferential to or swayed by the views of the judicial members'. See Bindman and Monaghan, *Judicial Diversity: Accelerating Change,* para 3.18.

[105] ibid, para 3.18.

And, indeed, some interviewees with very good knowledge of the internal workings of the JAC's processes have conceded in private that it can be exceptionally difficult for the lay commissioners to challenge the views of judicial commissioners and—in particular—senior judges, both on questions of policy and in respect of individual selection decisions. There is usually no suggestion of any outright, explicit deference shown to the judicial commissioners (although at least one interviewee felt browbeaten by some senior judges in one selection round). However, several interviewees have spoken of the role of the lay commissioners in ways that suggests that they perform a limited, secondary role of corroborating the assessments of candidates made by judicial commissioners, with this especially notable in descriptions of selection exercises for senior roles. To be clear, even when performing this corroborating role, lay commissioners can play a vital role in ensuring that fair, open and evidence-based decisions are made. However, a corroborating role is likely to mean that there will be no real difference in the type of appointments made (especially to senior positions), with traditional understandings of merit prevailing.[106] This is significant insofar as the independence of the JAC is undermined, in a very real sense, if the lay commissioners become captured by an interpretation of merit that is advanced by judges in the name of their vested interests rather than the public interest.[107] Even strong and impressive lay commissioners with stellar professional careers can lack a coordinated and coherent approach to policy on appointments. The solution is not to dispense with lay involvement on the JAC, but rather to adopt a realistic approach to their ability to act as an effective counter to high levels of judicial influence.

Conclusion

The purpose of this chapter has been threefold. First, it has sought to promote a more structured debate about judicial influence over judicial appointments by providing some tools for assessing when that influence becomes too high. The starting point, I suggested, is to consider influence in terms of conduct-shaping and context-shaping. I then explained how the judiciary's conduct-shaping and context-shaping influence must be evaluated by reference to the inputs, outputs and throughputs of a well-designed and well-functioning appointment regime. From reflecting on those inputs, outputs and throughputs, it is possible to point to five rebuttable presumptions that suggest that the judiciary exerts too much influence. Second, I have sought to use these presumptions to substantiate and add depth to claims made by a handful of academics over the last decade that judges now exercise too much influence under the JAC regime. Third, in all of this, the overriding objective has been less to persuade the

[106] Gee et al, *The Politics of Judicial Independence*, p. 185.

[107] J. Morison, 'Beyond Merit: The New Challenge for Judicial Appointments', in this collection.

main stakeholders in the selection regime that such academic critiques are necessarily correct, but rather to help bridge a gulf between academics on the one hand and judges, the JAC and officials on the other about why it is important to debate the levels of judicial influence. In short: the goal has been to help stakeholders recognize and remedy the fact that this is a debate that has been largely neglected during the JAC's first decade. Moreover, as debates about the need for an independent judicial appointment body heats up in common law countries such as Australia and Canada, there are lessons to be drawn from the experience in England and Wales, both about the levels of judicial influence and—perhaps as importantly—about the difficulty of furnishing a constructive debate about that influence.

I have deliberately framed the five presumptions as rebuttable. This recognizes that debates about influence in the real world are inevitably highly contextual. Abstract propositions about what may or may not constitute excessive influence can only ever be the starting point for debate. It is vital to attend to the unique circumstances in the judicial system at hand, always recognizing that levels of influence will be a product of multiple factors, not all of which directly relate to judges themselves. It might be, for example, that the levels of judicial influence need to be reconsidered if the institutional dynamics in the selection regime do not operate as envisaged. In the JAC regime, high levels of judicial influence are mandated by statute, and are thus an important expression of Parliament's will. Yet, in practice, judges exercise much more influence than Parliament intended, partly because successive Lord Chancellors have participated much less fully than anticipated, and also partly because checks on judicial influence are arguably less effective than envisaged (e.g. the scale of judicial involvement on the JAC regime is not counterbalanced by the input of the JAC's lay and legal commissioners). It is also important to keep in mind that the cumulative level of judicial influence might be too high even if no one instance of judicial involvement is objectionable when viewed in isolation. There is of course room to debate whether any instance of judicial involvement is desirable on its own terms (e.g. whether it is desirable for the Lord Chief Justice and the Senior President of Tribunals to have the final say over such a large proportion of selections given that this arguably intensifies an acute deficit in democratic accountability). Yet, even if each and every instance of involvement might be justifiable when view in isolation, the combined effect of the involvement that is ingrained throughout the selection regime might lead to the conclusion that judges have excessive influence. Put differently, these presumptions represent a beginning rather than an end to debate about levels of judicial influence. But it is a debate that, in the JAC regime, is overdue.