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**The Watchdogs of Washminster – Parliamentary Scrutiny of
Executive Patronage in the United Kingdom**

Article prepared for submission to *Commonwealth and Comparative Politics*

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The Watchdogs of Washminster – Parliamentary Scrutiny of Executive Patronage in the United Kingdom

Abstract

The role of legislatures in scrutinising executive patronage has received scant attention in the context of parliamentary democracy. This article addresses this lacuna by focusing on the parliamentary scrutiny of public appointments in the United Kingdom. Presenting the results of an extensive programme of research, it reveals how select committees have accrued increasing powers to challenge ministerial appointments, and how this has resulted in a series of unintended consequences that raise critical concerns regarding the overall added-value of pre-appointment scrutiny. The article is therefore of comparative significance for theories of legislative scrutiny in particular and executive-legislature dynamics more broadly.

Key words

patronage, control, scrutiny, delegation, executive, legislature

Word count

9,155

Executive patronage focuses on the capacity of ministers to appoint people to positions in public life, and has traditionally been understood as a means through which government actors can reward party activists, repay political debts and embed partisan players throughout the state infrastructure. It is for this reason that executive patronage is commonly associated with ‘the colonialization of the state’ (Müller, 2006); and until very recently executive patronage was often imbued with the assumption that ‘patronage is evil’ (Bearfield, 2009, p. 66). Yet, within a densely populated and increasingly fragmented governance terrain, the power to appoint individuals to key positions throughout the delegated state can be understood as an ex-ante tool of bureaucratic control: a risk reduction mechanism that enables ministers to appoint those in whom they have confidence due to personal, party or ideological affiliations. As such, the normative assumptions of earlier scholarship have been challenged by an emerging body of ‘revisionist’ scholarship that emphasises

a shift in the political deployment of patronage from a tool of corruption towards a tool of governance in large parts of the world (e.g. Ennser-Jedenastik, 2014; Kopecký, Mair and Spirova, 2012; Kopecký and Scherlis, 2008; Park and Kim, 2013).

It is within this broader intellectual canvas that this article focuses on a topic largely neglected by existing research: the role of parliamentary legislatures in scrutinising and controlling executive patronage. This lack of research reflects that fact that parliaments have (historically and comparatively) rarely enjoyed powers over executive patronage. The OECD's 2002 report into 'Distributed Public Governance' concluded that parliaments generally remained 'the great outsider', and although exceptions exist – the provincial legislatures of Ontario and Nova Scotia in Canada have been granted formal opportunities to scrutinise ministerial appointments – pre-appointment hearings have often been little more than rubber-stamping exercises (Pond, 2008a, 2008b). Against this comparative backdrop, the United Kingdom (UK) now stands in a unique position in relation to its parliament's relative strength over executive patronage. Since 2007, the House of Commons – via its select committees – has been granted formal powers to scrutinise a growing portfolio of ministerial appointments, and even to veto appointments a number of high-profile positions; and since 2007, select committees have been keen to exercise their newly-granted powers, holding a total of 75 pre-appointment hearings with 81 candidates. Moreover, select committees members from all parties have become increasingly willing to challenge ministers' decisions, resulting in a burgeoning number of rejections and divisions since October 2009.

In is in this context that this article highlights a series of critical, and comparatively relevant, empirical findings. Since 2007, select committees have emerged as influential actors – even gatekeepers – in the public appointments process, resulting in a recalibration of the balance of power between government and Parliament. Yet, rather than axiomatically enhancing transparency and accountability, the engagement of select committees has led to a range of unintended consequences. This article reveals the emergence of 'scrutiny creep' as select committees have sought the expansion of their competencies, which has added an additional layer of complexity to an already congested regulatory landscape. Moreover, as select committees become increasingly active in challenging the decisions of ministers, there have been incidences of aggression as select committees have neglected a focus on the

professional competency of a candidate in favour of crude political point-scoring. In effectively re-politicising an otherwise independently regulated appointments process, there is also evidence that the introduction of pre-appointment hearings has had a deterrent effect, discouraging participation in public life. Together, such issues raise fundamental questions regarding the capacity of select committees to discharge these functions responsibly and the overall added-value offered by pre-appointment scrutiny.

Yet, despite such implications, the unfolding of the UK's experiment with pre-appointment scrutiny has been largely neglected by commentators and scholars. The only other study is a short evaluation report commissioned by the House of Commons that examined the first 20 hearings held between 2007-2010 (HC 1230, 2011; later summarised in Hazell et al, 2012), which tentatively concluded that 'despite lacking formal powers of veto, Westminster select committees do now have the capacity to influence actors involved in the public appointments process' (Hazell et al, 2012, p. 237). However, this research neglects the critical, more assertive phase of select committee activism that has emerged since October 2009, gathering pace under the Coalition Government since 2010. As a result, the extensive research presented here, which covers 1997-2014, builds on these nascent conclusions and provides clear, unequivocal evidence of the (re-)politicisation of executive patronage. This article presents the results of a three-year research programme entailing the analysis of select committee reports and minutes of evidence for all 75 pre-appointment hearings (plus an additional 27 sets of reports relating to all post-appointment hearings held by the Treasury Select Committee), along with all government responses. The results of this analysis were interrogated in more detail through a programme of 56 interviews with ministers, senior officials, parliamentarians, appointees and recruitment specialists. These findings were then subjected to further reflection and review through engagement with two select committee inquiries.

In order to set out these findings and explore their implications for the exercise of executive patronage, this article is divided into four sections. As this introduction has suggested, in the context of delegation, the capacity to appoint appropriately skilled and politically attuned allies to key roles within public bodies constitutes an important channel of control. The first section therefore unpacks the logic of delegation and accountability within a parliamentary framework, drawing on analytical heuristics

developed within the principal-agent literature to consider the underlying rationale of pre-appointment scrutiny and the appropriateness of the tools adopted. Building on this, the second section provides the historical foundations of pre-appointment scrutiny, delineating the pressures that conspired to encourage successive governments to reform patterns of executive patronage in ways ostensibly at odds with the governing norms of parliamentary politics. The third and most substantive section then charts the impact of the UK's experience of pre-appointment scrutiny, specifically focusing on the five – largely unintended – consequences of activism, aggression, (re-)politicisation, deterrence and added-value. The final section then teases out the key lessons revealed by this research, placing the findings of this article within the contours of wider comparative and theoretical debates.

1. Principals, patronage and parliamentary democracy

A misconception exists that the choice between a merit-based and patronage-based bureaucracy constitutes a 'fundamental dichotomy' (Laupente and Nistotskaya, 2009, p. 436; see also Grindle, 2012, p. 31). In the context of delegation, executive patronage can constitute a risk-reduction mechanism through which low-cost, high-trust relationships can be manufactured and sustained. From this perspective, executive patronage can instead be understood as a critical link in the chain of delegation that extends from voters to those charged with policy implementation (Müller, 2000). Such arguments have been developed in recent scholarship that has focused on the way in which governments throughout the world have maximised their patronage capacities to assert control over the delegated semi-state (e.g. Kopecky, Mair and Spirova, 2012; Ennser-Jedenastik, 2014), which in turn underlines a crucial distinction between 'patronage as corruption' and 'patronage as governance' (Flinders and Matthews, 2010). However, whilst such studies have focused on the potential for executive control offered by patronage, none have focused on what might be termed 'parliamentary regulation.'

Whilst unexplored in the context of parliamentary democracy, a number of scholars have analysed legislative oversight of executive patronage in the context of presidentialism. In the US, the findings of the independent review of the appointments process (Twentieth Century Fund, 1996) were reiterated by several scholars, including Aberbach and Rockman (2009), who found that the complexity of the appointments process, the activism of Congress, and the political polarisation

that often occurs across the separate branches of government had served to congest the system and encourage executive gaming. Moreover, this literature suggests that the potential of patronage as a tool of governance is threatened by excessive regulation and acerbic scrutiny. Congressional committees have a longstanding reputation for questioning that can be intrusive, embarrassing and sometimes irrelevant to the appointee's suitability for a specific post; and whilst over 97 percent of presidential appointments receive Senate approval (Bell, 2002, p. 590), research indicates that many candidates simply drop out of the process before being formally rejected (Aberbach and Rockman, 2009, p. 45). The way in which legislative scrutiny risks politicising key public appointments by drawing executives and legislatures into bitter – and highly public – conflict was vividly illustrated by the withdrawal of former US Treasury Secretary Larry Summers from the race to become the next head of the US Federal Reserve. In his explanatory letter to President Obama, the favourite to succeed Ben Bernanke explained, 'I have reluctantly concluded that any possible confirmation process for me would be acrimonious and would not serve the interests of the Federal Reserve, the administration or ultimately the interests of the nation's ongoing economic recovery.' As such, a decisive reaction against the congested and politicised appointments process has begun to emerge, reflected in Obama's 'government of many czars', which has been interpreted as an attempt by the President to recapture control by circumventing the machinery of congressional scrutiny in order to place trusted allies in key administrative positions (Saiger, 2011).

It is therefore clear that the appropriate trade-off between legislative scrutiny and executive patronage is highly contested in the context of presidential systems such as the US; and to explain the dilemmas in which this results, several scholars have sought to derive insights from principal-agent theory (PAT). In essence, PAT focuses on the challenges of agency performance, control and accountability that arise from the delegation of functions from an elected political principal to an unelected bureaucratic agent. Such problems include – *inter alia* – 'omission' (an agent simply fails to act in its principal's best interests) or even 'commission' (an agent follows a course of action contrary to the principal's best interests); problems likely to be exacerbated by 'hidden information' (a principal does not have full knowledge of the task or the agent) or 'hidden action' (a principal cannot fully observe the agent's actions). In turn, hidden information can give rise to problems of 'adverse selection', whereby principals select agents without appropriate skills or preferences; and hidden action can result in 'moral hazard', whereby agents that are selected have incentives

and opportunities to take unobservable action that runs counter to their principal's interests (Strøm, 2000, pp. 270-1).

Accordingly, scholars have applied the lens of PAT to shed light on the ways in which elected political principals exert control over their unelected bureaucratic agents in order to address the agency problems outlined above. As Lupia and McCubbins observe, 'in order to avoid the pitfalls of delegation, the principal must either pick a good agent, or learn enough to protect her interests' (Lupia and McCubbins, 1994, p. 364). A range of measures are available to principals, including *ex ante* mechanisms to contain agency losses before entering into an agreement (e.g. contract design, screening and selection); and *ex post* tools to minimise agency losses after an agreement has been made (e.g. monitoring, reporting and institutional checks). Whilst such tools are not mutually exclusive, as '[r]epresentative democracy clearly entails problems of adverse selection as well as moral hazard', their selection should be informed by the nature of agency problem that requires redress (Strøm, 2000, p. 272). Reflecting on such distinctions, it is apparent that executive patronage constitutes a critical *ex-ante* mechanism to minimise the agency losses associated with delegation, as the appointment of appropriately skilled and politically attuned 'allies' (Epstein and O'Halloran, 1999; Huber and Shipan, 2000) to key roles across the bureaucracy mitigates the risks associated with adverse selection. In turn, the ongoing presence of such allies ameliorates the likelihood of moral hazard. The capacity of executive patronage to address such agency issues would therefore anticipate that governments would remain resistant to reforms intended to fetter or reduce patronage capacities.

Moreover, in the context of parliamentary democracy specifically, it is counter-intuitive that ministers would seek to cede powers through the creation of alternative – even competing – lines of accountability to which the introduction of pre-appointment scrutiny give rise. In contrast to the non-linear chains of delegation and multiple institutional checks arising from the separation of powers within presidential systems, parliamentary systems are characterised by a line of delegation that runs from voters through to officials in governments departments and their agencies, which is mirrored by a corresponding chain of accountability running in the reverse direction. In turn, whereas agents in presidential systems may be accountable to multiple principals, agents in parliamentary systems are accountable

to either single or non-competing principals, which further reduces the reliance on the institutional checks (Strøm, 2000, pp. 266-73). Moreover, within majoritarian Westminster systems such as the UK, the legislature is not intended, expected or resourced to play a proactive role in the administration of the state. Reflecting on these constitutional distinctions, scholars have underlined the limited capacity of legislatures in parliamentary systems to scrutinise the actions of bureaucratic agents, and the weaknesses of the tools available to them. Strøm, for example, argues that parliamentary legislatures ‘do not have monitoring capacity necessary to determine when such sanctions might be appropriate’; and that scrutiny mechanisms ‘much less prominent, and have much less teeth.’ Specifically, parliamentary committees ‘have much lower oversight capacity, and in the classical Westminster model, this capacity is almost entirely absent’ (Strøm, 2000, p. 274; see also Huber and Shipan, 2000). Against this broader backdrop, both the abdication by ministers of their patronage capacity and the empowerment of the House of Commons to scrutinise public appointments appears incongruent and demands further analysis.

2. Parliamentary oversight and scrutiny creep

Despite its traditional reputation as a paradigm of power-hoarding majoritarianism, cross-European comparative analysis reveals the patronage capacities of British government ministers to be the lowest within those parliamentary systems studied (Kopecký, Mair and Spirova, 2012). This has been underlined by a handful of recent studies on ministerial appointments in the UK, which have focused on the impact of the rise of independent regulatory appointment commissions in terms of ‘shrinking reach and diluted permeation’ (e.g. McTavish and Pyper, 2007; Flinders and Matthews, 2010). In particular, the establishment of OCPA constituted a critical juncture from the unfettered capacity of ministers to make appointments to an increasingly constrained selectivity focused solely on merit. Moreover, since 1995, the regulation of ministerial patronage has expanded and deepened as OCPA’s Code has gradually extended to encompass a wider range of appointments (and latterly *re-appointments*). The creation of OCPA also paved the way for a plethora of additional independent appointments commissions – such as the NHS Appointments Commission¹ and the Judicial Appointments Commission – whereby the plenipotentiary patronage powers of ministers were fully rescinded away from ministers. Yet at the same time that successive governments were actively seeking to

¹ Abolished by the Coalition Government as part of its public bodies reform programme in October 2012.

depoliticise the public appointments process through the transfer of key competencies to this range of independent regulators, calls for an additional layer of 'parliamentary regulation' mounted. This section therefore sets out the pressures that encouraged reforms ostensibly at odds with the governing norms of parliamentary politics. Specifically, it identifies on two distinct phases of activity. The first phase covers 1997-2009, during which select committees pressed for additional scrutiny capacities, and sought to demonstrate the responsible execution of their duties; and the second phase covers 2009 onwards, a period that has witnessed increased parliamentary activism and heightened tensions between government and Parliament. These two phases provide not simply a chronological account of the evolution of ministerial patronage, but a way of understanding the changing dynamics of executive-legislature relationships. In particular, it underlines the stark shift in the behavior and attitudes of select committees during this second phase, and the range of unintended consequences in which this has resulted.

Phase 1: 'Cracks and Wedges', 1997-2009

The former MP Tony Wright once described the politics of parliamentary reform as being about the insertion of 'cracks and wedges' into established practices that over time could be levered to introduce more significant reforms (2004). With regards to pre-appointment scrutiny, the first significant crack occurred just days after the May 1997 general election when the Labour Government, despite pre-election pledges to give select committees greater powers over appointments, rejected the Treasury Select Committee's request for a formal role in appointments to the new Monetary Policy Committee (MPC) of the Bank of England (HC 282, 1997, paras. 47-9). The Government cited 'substantial difficulties with this proposal' and 'important constitutional issues which go far wider than the Bank of England' (HC 502, 1998, paras. xiii). Undeterred, the Treasury Select Committee announced its intention to its own informal system of 'confirmation hearings' for all appointments and re-appointments to the MPC, with questioning 'restricted to issues of the appointee's personal independence and professional competence' (HC 571, 1998, para. 6); and held its first round of hearings in June 1998.

The Treasury Select Committee's experiment with *post*-appointment scrutiny was generally deemed successful and as evidence that MPs could be trusted to set aside party politics to focus on the professional competency of the minister's appointee.

This success fostered further demands by select committees to engage in the oversight of ministerial appointments; and in March 2000 the Liaison Committee recommended a formalised system of *pre*-appointment hearings (HC 300, 2000, para. 24); proposals which were supported by a number of external commissions, including the Conservative Party's *Commission to Strengthen Parliament* and the Hansard Society's *Commission on Parliamentary Scrutiny*. Yet, the Government rejected such demands on the basis that '[a]ny indication that a Ministerial appointment relied upon the approval of a select committee or was open to a select committee veto would break the clear lines of accountability by which Ministers are answerable to Committees for the actions of the executive.' The Government also highlighted the risk of 'lame duck' appointees, 'appointed by the Minister but without Select Committee endorsement'; and of the scrutiny process serving to 'deter good candidates from putting themselves forward because of the nature of the hearings' (HC 748, 2000, paras. 17-19).

The scrutiny of ministerial patronage thus became one strand of a broader debate concerning executive-legislature relationships. Many parliamentarians deemed the dominance of the executive as unsustainable, arguing that there was a need to move select committees from their traditionally reactive and under-resourced form of oversight towards a more proactive and 'systematic' model (Hansard Society, 2003). A set of reforms were passed by a resolution of the House intended to shift the balance of power back towards the legislature, and included in the set of 'Core Tasks' for select committees was the requirement to 'scrutinise major appointments made by the department' (HC 558, 2002). In July 2003 the Public Administration Select Committee (PASC) again recommended a formalised system of *pre*-appointment scrutiny (HC 165-I), but the Government remained resolute regarding its incompatibility with parliamentary democracy (e.g. Cm. 6056, 2003). This situation therefore evolved in a typically British muddled manner as select committees held *ad hoc* informal *pre*-appointment hearings under the new 'Core Tasks', whilst the Government refused to sanction their formal introduction.

In July 2007, without any prior consultation or announcement, the situation changed when Gordon Brown used his first speech as Prime Minister to announce a package of constitutional reforms, including allowing Parliament 'a bigger role in the selection of key public officials' (*Hansard*, 3 July 2007, c. 816); and at the same time, the

Chancellor announced that in future all members of the MPC would be subject to formalised *pre-commencement* hearings in front of the Treasury Select Committee (*Hansard*, 3 July 2007, c43W). Setting out the underpinning rationale of these measures, the *Governance of Britain* green paper explained that hearings ‘would be non-binding, but in light of the report of the committee, Ministers would decide whether to proceed’ (Cm. 7170, 2007, para. 76). Moreover, the Government also announced that the appointment of the Chair of the newly-established Statistics Authority would be subject to a full confirmatory vote in the House of Commons. Responding to these announcements, the PASC stressed the need for committees to mirror the behavior of the Treasury Select Committee by focusing on the ‘professional competence’ and ‘personal independence’ of candidate, otherwise ‘the reputations of committees are likely to suffer and the Government is likely to reconsider whether pre-appointment hearings are appropriate’ (HC 152, 2008, para. 34). These principles were subsequently enshrined in the guidance produced by the Liaison Committee and the Cabinet Office (Cabinet Office, 2009; HC 152, 2008), and following a period of negotiation with the Liaison Committee, the Cabinet Office published in August 2009 an agreed list of 53 posts subject to pre-appointment hearings (Cabinet Office, 2009).

Phase 2: Emboldened Activism, 2009-2013

As this overview illustrates, 1997-2009 marked the beginning of a transition towards a more formalised system of pre-appointment scrutiny, underpinned by a commitment to ‘good behavior’ by select committees. By 2009, however, the initial cracks that had reshaped executive patronage had been prised open, and this period can be understood as one of ‘emboldened activism’, as parliamentarians sought to accrue further powers and demonstrate their independence from the executive. This was reflected in the burgeoning number of rejections and divisions which occurred from October 2009 onwards (see table 2, below), several of which resulting in ministers being challenged by committee members from within their own parties. Nonetheless, despite this increased activism, from 2010 onwards the Coalition Government pursued its commitment to ‘strengthen the powers of select committees to scrutinise major public appointments’ (HM Government, 2010, p. 21), which had the concomitant effect of further constraining the patronage capacities of ministers.

In September 2010 the Chancellor of the Exchequer, George Osborne, announced the statutory ‘double-locking’ for appointments to the Office for Budget Responsibility whereby the appointment *and* dismissal of senior staff could only proceed with the joint approval of government *and* parliament. The provision within the *Budget Responsibility and National Audit Act 2011* for statutory veto over ministerial appointments thus instituted a significant shift in the balance of power between government and Parliament. The Coalition also allowed the non-statutory ‘double-locking’ of appointments in February 2011, when the Justice Minister announced that Government would accept the Justice Select Committee’s final recommendation regarding the minister’s preferred candidate to the post of Information Commissioner in order to strengthen the Office’s independence (*Hansard*, 16 February 2011, cc. 87-88WS). The Government also sanctioned hearings for positions not covered by Cabinet Office Guidance, for example in March 2011 acquiescing to demands for the Chair of the BBC Trust to be subject to a pre-appointment hearing. In June 2011, the withdrawal of the preferred candidate for the Chair of the UK Statistics Authority (discussed below) prompted a further innovation, and for the first time the Cabinet Office granting the PASC a role in the earlier stages of the selection process. Accordingly, in July 2011, the appointment proceeded as a ‘joint appointment’, whereby the PASC was consulted on the job specification, its Chair sat on the selection panel; and, following a pre-appointment hearing, the appointment was subject to confirmatory vote by the House. Together, these changes were consolidated in updated Cabinet Office guidance, published in 2013, which provided an updated list of 52 positions subject to pre-appointment hearings. As well as reflecting changes to the wider delegated state resulting from the Coalition Government’s public bodies reform programme, the revised list also included several pre-existing positions, including the Chair of the BBC Trust and Chair of SC4, both of which had already been subject to pre-appointment hearings following demands by the relevant select committees.

Stimulated by this disparate raft of changes, this period has also witnessed select committees demanding extended and additional powers. The Liaison Committee has been particularly proactive in ensuring that the views of committees are ‘given due weight’ in the appointments process (HC 426, 2010, para. 72), producing a list of demands that would embed select committees at all stages. Its recommendations have included: consultation between departments and committees on the job specification prior to advertisement (HC 426, 2010, para. 71); information about

short-listed candidates not selected (HC 1230, 2011, 3); private meetings between ministers and committees in cases where a committee is inclined to make a negative report (HC 426, 2010, para. 72); and, a confirmatory vote in the House in relation to key appointments (HC 1230, 2011, p. 3). The Committee also recommended enhanced scrutiny for a small number of top-tier posts, and sought to stratify between different types of appointments. For the very top-tier appointments, it recommended that Parliament was afforded a veto over appointment *and* dismissal; for the second tier, that a minister would appear before a committee if they decided to proceed against its recommendation; and, for a third tier, the continuation of the right to choose to hold pre-appointment hearings (HC 1230, 2011, para. 40). The proposed tripartite system was therefore an attempt to clarify and streamline the *ad hoc* system that had emerged, whilst simultaneously increasing the House's powers over a broader range of appointments. Such demands have been echoed elsewhere. In June 2012, the Home Affairs Committee demanded information about unsuccessful candidates and interview performances so that they did not have to assess the suitability of the nominated candidate in 'a vacuum' (HC 183-I, 2012, para. 8); and in July 2013, the PASC published a 'call for evidence' to solicit questions from the public that could be addressed to the candidate for the Chair of the Committee on Standards in Public Life at their pre-appointment hearing.

In June 2012 the Government rejected the Liaison Committee's recommendations outright. It stated that '[t]hese are ministerial appointments and it would not be appropriate for parliament to be an equal partner in appointment decisions' (HC 394, 2012, 17); whilst reminding the Committee that '[i]n the majority of cases, we would expect that the select committee will agree with the appointment of the Government's preferred candidate where an *open and transparent process* has been followed, the candidate has been *selected on merit*, and the relevant committee has been engaged' (HC 912, 2012, p. 3, emphasis added). The Government's response was met with frustration, as the Liaison Committee stated that '[w]hile we deplored the delay, we hoped that at least it would mean that the Government's response would have real substance, and take us forward to a new stage in the accountability of ministerial appointments. [T]he response fails to engage with our recommendations, and is somewhat dismissive in tone' (HC 394, 2012, paras. 6-7). Yet by November 2013, it appeared that the Government was prepared to concede further ground to select committees, and revised Cabinet Office guidance (2013) included provisions for the sharing of information at all stages of the appointments process, including the job

specification and a summary of the overall field of applications. Moreover, in the event of disagreement between a minister and select committee, whereas previous guidance simply required the minister to ‘consider any relevant considerations contained in the report’ and ‘formally notify the Committee Chair of the decision’ (Cabinet Office, 2009, pp. 6-7), the revised guidance also required ministers to ‘respond to the Committee explaining the reason(s) why’ the report ‘is not accepted’. Crucially, however, the guidance reiterated the principle that ‘it is for Ministers to decide whether or not to accept a committee’s recommendations’ (Cabinet Office, 2013, p. 4-5). Nonetheless, as the research presented in the next section illustrates, select committees have been engaged in a process of ‘scrutiny creep’, exceeding their stated competencies; and that this in turn has resulted in unintended consequences.

3. Disordered drift and unintended consequences

In setting out the evolution of pre-appointment scrutiny, the previous section captured the twin dynamics of legislative recalcitrance and executive acquiescence. It also revealed the way in which these competing tensions resulted in a somewhat piecemeal and disordered creation of competencies, as reforms were often the product of bilateral *ad hoc* agreements between specific departmental ministers and their respective select committees, and imposed upon an already congested institutional landscape. Nonetheless, when the reforms are taken together, it is possible to identify the emergence of a ‘ladder of pre-appointment scrutiny’, whereby a wider range of appointments have been subject to further forms of oversight (table 1, below). All rungs of this ladder rest the principle that pre-appointment scrutiny should test an appointee’s competence and expertise, rather than challenge a minister’s decision; and that any negative report or veto should be based on such considerations. However, as this section will demonstrate, since 2009 pre-appointment scrutiny has deviated from this narrow remit as select committees have become increasingly willing to publicly challenge the appointment of the Government’s preferred candidate (*activism*). This has resulted in further unintended consequences, as select committees have failed to focus solely on independence and professional competence and have instead engaged in political point-scoring (*aggression*). In turn, the highly public and increasingly partisan nature of pre-appointment scrutiny (*re-politicisation*) has served to discourage involvement in public life, and risks negatively impacting on attempts to improve the diversity of public appointments (*deterrence*). This has therefore promoted critical

questions regarding the desirability of an extra layer of inherently political scrutiny within an otherwise independently regulated process (*added-value*).

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Table 1: The ladder of pre-appointment scrutiny

Activism

At the time of writing, a total of 75 pre-appointment hearings with 81 candidates (including two re-appointments to the Office of Budgetary Responsibility) have been held. Until 2009, select committees endorsed governments' preferred candidates without exception. Yet in October 2009, the Children, Schools and Families Committee unanimously rejected the Secretary of State's preferred nomination for the position of Children's Commissioner; and since October 2009, a total of 13 candidates have divided committees or been rejected outright, which represents 22 percent of the 59 hearings held. As discussed in more detail below, many of these divisions and rejections have witnessed committees split along party lines. The rejection of Dominic Dodd as Chair of Monitor was a vivid illustration of this, and the formal minutes of evidence reveal that the four Labour MPs who ultimately thwarted Mr Dodd's appointment (the candidate subsequently withdrew following the publication of a negative report) actively pursued a line of questioning that challenged the ideological foundations of the Coalition Government's healthcare reforms. Yet, as table 2 also illustrates, three out of the four rejections have witnessed governments' own backbench MPs attempt to block their ministers' appointments. Regarding the rejection of Dr Maggie Atkinson as Children's Commissioner, for example, interviewees from a range of political parties and professional backgrounds concurred that she had become an unfortunate pawn in a much broader intra-party conflict. The Committee's Chair, Barry Sheerman (Labour), was a long-time critic of the Prime Minister, Gordon Brown (the Secretary of State for Education's political patron) and was therefore accused of co-opting the pre-appointment hearing to attack the Labour leadership. Similarly, the unanimous decision of the Justice Committee to reject Diana Fulbrook as the Chief Inspector of Probation in May 2011 saw three Conservative MPs challenge the decision of then Secretary of State for Justice Ken Clarke, the most experienced Conservative minister of the Government's frontbench.

Whilst the rate of rejection constitutes a small proportion of all select committee recommendations, it is clear that 2009 onwards constitutes a significantly more assertive phase of select committee activity, who – as successive governments have reiterated – are not expected to challenge a minister’s decision. Moreover, it is also clear that this activity has at various points been both partisan *and* institutional in nature, with select committee members from all parties attempting to block appointments. The stark contrast between the expectations of government and the subsequent actions of select committees has also created a disjuncture between applicants’ understanding of the rationale and format of pre-appointment hearings and the way in which hearings subsequently proceeded. Cabinet Office guidance simply states that the purpose of hearings is to enable committees to take evidence from the Government’s preferred candidate, and that applicants for posts suitable for hearings must be made aware prior to applying. One candidate stated that ‘from the head-hunters right the way through... it was made clear to candidates that the select committee did not have a right to veto. It was a confirmatory hearing for the secretary of state’s preferred candidate’ (interview, 29 August 2013); and another described how the hearings had been portrayed as a ‘bit of a rubber-stamping because [in] the main interview [they] had said that they were recommending me’ (interview, 9 September 2013). This misunderstanding has also engendered indignation on the part of parliamentarians. Reflecting on Professor Malcolm Grant’s appearance before the Health Committee, for example, those members of the select committee who refused to endorse his appointment complained that the candidate ‘demonstrated an assumption that his appointment was already confirmed’ (Calkin and Golding, 2011).

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Table 2: Pre-appointment rejections and divisions

Aggression

Focusing on the rate of rejection alone therefore fails to adequately capture the political dynamics at play, and the broader ramifications of introducing a new form of legislative oversight within a highly adversarial polity. As one MP noted, ‘[t]here’s no doubt that pre-appointment hearings seem to have changed. It seems to reflect a sense of frustration on the part of select committees that they feel they should have

more power but that is just coming across as... well, rudeness really' (interview, 28 June 2013). Whilst Cabinet Office guidance stated that questioning should remain focused on 'the professional competence and personal independence of the candidate' (Cabinet Office, 2009, p. 12); a detailed analysis of minutes of evidence indicates a qualitative shift in the tone and nature of hearings, which are replete with examples of committees engaging in inappropriate, even aggressive, cross-examination. The PASC, for example, subjected Sir William Shawcross to questions that bore little relevance to the public appointment in question, including his views on the war in Iraq (HC 351-II, 2012, Q. 189). Moreover, this hearing degenerated into an embarrassing and highly political exchange, with members of the committee arguing with the Chair: 'I am sorry we did not have a pre-appointment hearing for you', one member told the Chair. 'We would not have chosen you' (HC 351-II, 2012, Q. 189). Similarly, the Treasury Select Committee, widely regarded as an exemplar of best practice, has become more personal and aggressive in its post-appointment hearings. The comment by one MP, for example, that he found Dame Clara Furse's performance in front of the Committee 'amazingly unimpressive' (HC 224-I, 2013, Q. 34) was covered in both the national and international media.

(Re-)politicisation

Reflecting on this increased assertiveness, many interviewees expressed serious concerns about the politicised nature of hearings. One appointee described hearings as little more than 'an opportunity for them to gallop their political steeds around the room' (interview, 29 August 2013); and a committee clerk noted, 'several committees seem to have forgotten the unwritten rule about good manners and a narrow focus' (interview, 27 June 2013). The rejection of Dr Maggie Atkinson as Children's Commissioner in 2009 was cited by many interviewees as a critical example of the way in which good manners have been set aside in favour of political game-playing: 'Maggie Atkinson got caught up in a battle... that had very little to do with her CV or performance', one MP noted (interview, 18 October 2012). Indeed, as table 2 above suggests, appointments in the fields of health and education have attracted the greatest degree of political controversy, prompting parliamentarians to divide along traditional party lines. The Secretary of State for Health's preferred candidate as Chair of the NHS Commissioning Board, Sir Malcolm Grant, was asked by one Labour member 'other than being married to a GP and having a medical school, what have you done that involves you in any way that demonstrates your passion about the NHS?', before the member intimated that his nomination a result

of favour by health ministers (HC 1562-ii, 2011). Similarly, Dominic Dodd, the Secretary of State's preferred candidate as Chair of Monitor (the regulator for health services in England) was subject to sustained questioning (again, by a Labour member of the Committee) regarding his views on private healthcare and criticised for holding a senior position in Marakon Associates – a private sector consultancy firm with interests in private healthcare – despite the fact Mr Dodd left the company over a decade prior (HC 744, 2013, Qs 10-17).

Deterrence

Immediately after their introduction on a pilot basis, then Commissioner for Public Appointments, Janet Gaymer, counselled against the formal adoption of pre-appointment hearings on the basis that they would politicise the appointments process, and render well-qualified individuals reluctant to apply (HC 152, 2008). Such warnings were reiterated by interviewees. One appointee stated that 'if [hearings are] used as a political battleground then good people will not come forward to take these jobs' (interview, 6 September 2013); and another declared that 'I do know of people who have withdrawn from such roles because they didn't enjoy being used as a political football' (interview, 13 September 2013). Similar concerns were publicly expressed when the Secretary of State for Justice, Ken Clarke, quietly withdrew his support for Diana Fulbrook after a negative report from the Justice Committee; a move that was considered by *The Times* (30/08/11) as almost guaranteed to 'deter potential applicants from within the [probation] service applying for the job.' Reflecting on the increasingly partisan and adversarial nature of hearings, one senior civil servant suggested that they would be 'incredibly daunting' to someone 'who is not part of that world' (interview, 10 April 2013); and one MP noted that:

What we seem to be doing is creating a new form of patronage that is even more exclusive than the old forms because you have to be able and willing to survive a select committee hearing that is increasingly adversarial. That might be fine if you are schooled in Westminster survival strategies and have the skin of a rhino but this serves to narrow the pool of candidates (interview, 23 October 2012).

Evidence suggests that such a deterrent effect has begun to emerge. One select committee member confided that the withdrawal of Dame Janet Finch as preferred candidate for the Chair of the Statistics Authority was a direct result of the hostile

line of questioning that she endured regarding her personal credibility, wherein the Chair of PASC went so far as to ask: ‘I have to ask you the absolute shocker of the question, which is that, if this Committee were to recommend against your appointment, it is in fact still the Government’s prerogative to appoint you anyway. Would you accept the appointment on that basis?’ (HC 1261-i, 2011, Q. 129). Similarly, a Freedom of Information request submitted to the Department of Health confirmed that Dominic Dodd ‘formally withdrew his interest in the post [Chair of Monitor] following the decision of the Select Committee not to endorse his appointment.’ It is clear, therefore, that pre-appointment scrutiny has resulted in an anticipatory effect, as in both instances each candidate withdrew before the sponsoring minister publicly responded to the committee’s recommendation.

Reflecting on such risks, a former select committee chair wondered if ‘we weren’t in danger of creating another old boys network’, which also reveals the effect pre-appointment scrutiny on the diversity of public life. One private recruitment specialist revealed that:

Finding good people to apply for these posts was hard enough already, particularly when trying to find candidates from under-represented social groups... Now we have this new stage and its high-risk, high-politics and hard to predict and people don’t like that (interview, 20 May 2013).

Indeed, several interviewees suggested that increasingly aggressive hearings had led to a gender bias: ‘can it be a coincidence that women make up the minority of senior public appointments but three of the four rejections by select committees?’ (interview with MP, 11 September 2013). Evidence paints a mixed picture. Under the Coalition, the proportion of women being newly appointed to public bodies has risen from 36.4% in 2010 to 41.1% in 2014 (OCPA, 2014, p. 8). Yet previous research (Flinders, Matthews and Eason, 2012) has underlined a range of constraints on, and barriers to, greater diversity in public life, specifically the way in which the at times tribal culture of Westminster politics can be daunting to those not imbued with such norms. Indeed, OCPA’s latest statistics reveals that in relation to the most senior chair appointments (i.e. those exact appointments liable to pre-appointment scrutiny), only 20% of applications received are from women; and only 24% of appointees are women (OCPA, 2013, p. 21; OCPA, 2014, p. 8). Such incidents therefore carry the potential to undermine the fragile progress made in recent years in terms of improving the diversity of life; and the loss of so many high-profile

female appointees will affect progress against the Coalition's own aspiration of opening-up public life to previously under-represented groups.

Added-value

Taken together, the four pressures set out above flow into a wider issue regarding the 'added-value' of pre-appointment scrutiny. The independent system of regulation, overseen by OCPA, had already generated complaints about inflexibility and complexity, which led to its fundamental review in 2012. Yet the relationship *between* the systems of regulation and scrutiny – one independent, one legislative – has drifted without explicit consideration of the inter-relationships or interface between these two systems. This might reflect the fact, as one senior Cabinet Office official put it, that '[t]he Prime Ministers' [Gordon Brown's] announcement in the House was the first we'd heard of the plan... it all came as a complete shock!' (interview, 20 February 2012). The addition of a highly politicised final stage of pre-appointment scrutiny to an otherwise independently regulated public appointment process is therefore anomalous. Moreover, several interviewees expressed important concerns regarding the lack of expertise on the part of parliamentarians to assess the professional competence of candidates. One appointee asked '[t]hey are not trained in employment process, they do not have the right to hire you or fire you and therefore why would they have the right of veto?' (29 August 2013); and another stated that:

What worries me is that it was so amateurishly done... One of the things that really stood out was how ill-prepared they were, how little they knew about me, how little they knew about the appointments process. One wondered if they had been briefed at all (interview, 13 September 2013).

Indeed, one appointee highlighted the 'mismatch' between a transparent and merit-based public appointments process and the existence of a final layer of pre-appointment scrutiny, asking 'At that point you have to say just what is the role?' (interview, 17 September 2013). This sense of 'mismatch' undoubtedly stems from tensions between government and Parliament, and the competing dynamics that have shaped the scrutiny of executive patronage; and again underlines the challenge of inculcating a merit-focused model of pre-appointment scrutiny within a power-hoarding majoritarian democracy.

4. Concluding remarks and comparative relevance

At first glance, the incentives for members of the House to engage in the scrutiny of public appointments may appear unclear, not least because the vast majority of hearings supported the government's candidate, and only once, in the case of Diana Fulbrook, has the minister publicly withdrawn support following a negative committee report. Indeed, in relation to the overwhelming majority of appointments, select committees have not been granted formal veto powers and pre-appointment hearings are not intended to replicate US-style confirmation hearings. However, this simplistic interpretation neglects the deeper but less visible impact of these reforms. As one former senior civil servant noted, 'I know they're not formally confirmatory hearings, but in fact if a committee says they're not in favour of a person, then that would be the end.' This argument was widespread amongst interviewees who generally felt that select committees had become *de facto* veto players due to the impact a negative report would have on the credibility of the appointee and the appointing minister, which was played out in relation to the appointments of Dame Janet Finch and Dominic Dodd. 'It would be ridiculous', as one former Minister noted, 'for anyone to want to try and get someone through who was not head and shoulders above the bar.' The introduction of pre-appointment hearings has therefore brought with it a strong anticipatory effect or preventative influence that permeates the whole appointments process. Pre-appointment scrutiny therefore constitutes a silent revolution, as the 'efficient secret' of executive-legislature relations (i.e. the convention of individual ministerial responsibility) has been broken, whilst attracting little academic or public comment. Yet it is clear that the House of Commons is being drawn into the business of governing, rather than just scrutiny, evolving rapidly from a reactive to proactive legislature in relation to executive patronage. Such developments are therefore difficult to reconcile with the British political tradition, and the UK can be characterised as 'Washminster' hybrid, existing somewhere between presidentialism and parliamentarianism.

This momentum shows little sign of slowing, and developments in the UK are therefore of comparative significance, as no other parliamentary democracy has evolved so far towards a congressional model of 'advice and consent.' Moreover, its findings chime with longstanding debates about the legislative oversight of political patronage in the context of presidentialism detailed above; and it is therefore clear

that dilemmas regarding the appropriate trade-off between legislative scrutiny and executive patronage are highly contested in parliamentary and presidential systems alike. Indeed, the greatest significance of the UK case is the way in which recent reforms have blurred the traditional distinction between parliamentarianism and presidentialism, or at the very least, between the US ‘veto style’ and UK ‘scrutiny style’ models of legislative oversight. Pre-appointment scrutiny in the UK was never intended to replicate the US ‘veto style’ model, yet, the way in which the system has been allowed to drift runs counter to these intentions. These developments also run counter to the ‘mirroring principle’, which predicts that ‘within a given legislature, the distribution of legislative influence tends to mirror the external checks and balances in the polity as a whole’ (McCubbins, 2005, 123). The introduction of legislative powers such as double-locking have increased the number of veto points and in turn risked the gridlock and inertia more typically associated with presidential systems. Whilst at present no other parliamentary system has introduced such powers (the Procedural Affairs Committee in Ontario, for example, rejected a US-style legislative veto as incompatible with cabinet government), it is crucial that such risks are recognised.

This point brings this article back to the distinction between ‘patronage as corruption’ and ‘patronage as governance’; and to arguments concerning the use of patronage as a critical way of forming low-cost, high-trust relationships between politicians and officials in a context of an increasingly complex and fragmented institutional architecture. Calls to further restrict executive patronage, for example by removing entirely the power of selection from minister’s hands (as advocated in Canada by Aucoin and Goodyear-Grant, 2002) arguably fail to appreciate not only the potential that patronage provides in terms of executive control, but the way in which a direct relationship between minister and appointee prevents blame-shifting. Put slightly differently, removing ministers from the appointments process risks them being accountable for individuals they had no role in appointing – exactly the sort of ‘lame duck’ appointees that the UK government cautioned against in its attempts to resist pre-appointment scrutiny. Yet, as this article has clearly demonstrated, such risks have begun to emerge in the UK as the increasingly partisan and combative nature of pre-appointment hearings has prompted the withdrawal of candidates from the appointments process. This raises fresh questions about how to balance the centripetal thrust of delegation with the centrifugal logic of political accountability.

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Tables

Table 1: The ladder of pre-appointment scrutiny

Stage	Standard of control	Procedure	Examples	Date introduced
6	'Double-locking'	Statutory right of veto	Office for Budget Responsibility	February 2011
5	Very high	Non-statutory right of veto	Information Commissioner	February 2011
4	High	Formalised pre-appointment hearings <i>and</i> affirmative legislative vote	Chairs of Electoral Commission, Statistics Board, Independent Parliamentary Standards Authority	July 2007
3	Medium/high	Formalised pre-appointment hearings	Chairs of Natural England, Office of Rail Regulation, Care Quality Commission	July 2007
2	Medium/low	Formalised post-appointment hearings	Members of the MPC 2007 onwards, Chair of the Financial Services Authority	July 2007
1	Low	Non-statutory confirmation hearings	Members of the MPC, 1998-2007, all ministerial appointments not covered by Cabinet Office guidance	June 1998

Table 2: Pre-appointment rejections and divisions

Date	Post	Appointee	Committee	Outcome	Consensus	Ayes	Noes
12 Oct 2009	Children's Commissioner for England	Dr Maggie Atkinson	Children, Schools and Families	Rejected	8-0	Con - 3 Lab - 3 Lib Dem - 2	
12 Oct 2009	Local Government Ombudsman	Dr Jane Martin	Communities and Local Government	Recommended	2-1	Lab - 2	Con - 1
16 Nov 2010	First Civil Service Commissioner and Commissioner for Public Appointments	Sir David Normington	PASC	Recommended	2-1	Con - 1 Lib Dem - 1	Lab - 1
11 May 2011	HM Chief Inspector of Probation	Diana Fulbrook	Justice	Rejected	7-0	Lab - 4 Con - 3	
28 Jun 2011	Chair of UK Statistics Authority	Dame Janet Finch	PASC	Withdrawn before report published			
18 Oct 2011	Chair of the NHS Commissioning Board	Professor Malcolm Grant	Health	Recommended	4-3	Con - 3 Lib Dem - 1	Lab - 3
2 Feb 2012	Director of the Office of Fair Access	Professor Leslie Ebdon	Business, Innovation and Skills	Rejected	4-2	Con - 4	Lab - 2
23 Jun 2012	Her Majesty's Chief Inspector of Constabulary	Tom Winsor	Home Affairs	Recommended	7-1	Con - 5 Lib Dem - 1	Lab - 1
5 Sep 2012	Chair of the Charity Commission	William Shawcross CVO	PASC	Recommended	4-3	Con - 4	Lab - 2 Lib Dem - 1
9 Sep 2013	Chair of OFGEM	David M. Gray	Energy and Climate Change	Recommended	5-1	Con - 2 Lab - 3	Lab - 1
15 Oct 2013	Chair of Monitor	Dominic Dodd	Health	Rejected	3-2	Lab - 3	Con - 1 Lib Dem - 1
17 Dec 2013	Chair of OFCOM	Dame Patricia Hodgson	Culture, Media and Sport	Recommended	7-1	Con - 3 Lab - 4	Con - 1
15 Sep 2014	Registrar of Consultant Lobbyists	Alison White	Political and Constitutional Reform	Recommended	4-3	Con - 1 Lab - 2 Lib Dem - 1	Con - 1 Lab - 2