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JUDGING JUDICIAL APPOINTMENTS

Lord Justice Toulson

Annual Pilgrim Fathers Lecture, 3 December 2009

Introduction

1. It is a pleasure to be here tonight to deliver the sixteenth annual Pilgrim Fathers lecture. In the years since Lord Justice Bingham, as he then was, gave the first of these lectures the series has become well established and it is an honour to be invited to follow a most distinguished line of speakers. The subject matter of tonight's lecture is Judging Judicial Appointments. I have a particular interest in it, because I am a member of the Judicial Appointments Commission (the JAC).
2. The JAC has been in existence since 3 April 2006. Its creation is one of many constitutional changes arising from the Government's decision to truncate the office of Lord Chancellor. In discussing judicial appointments, I want to focus on three things: first, how it used to be done; secondly, how it is done now; and thirdly, why the Judicial Appointments Commission is an essential element of our constitutional settlement.

How Judges used to be Appointed

3. Before the First World War judicial appointments were highly political and frequently made with scant regard for whether the person showed any sign of having judicial qualities. One of the worst offenders was Lord Halsbury, who held office as Lord Chancellor for three periods from 1885–1905. Heuston in his *Lives of the Lord Chancellors* put it in measured terms:

Halsbury's judicial appointments have been the subject of consideration, comment and speculation, mostly of a critical character...The criticisms are known in outline to most lawyers; they are in effect that Halsbury appointed to the High Court, and to a lesser extent to the county court, men of little or no legal

training whose previous career in public life had been largely in the service of the Conservative party or else were relations of his own.¹

Heuston noted that one solicitor Member of Parliament had said in the House of Commons that Lord Halsbury had the 'well-known habit of appointing to the Bench unsuccessful Tory M.P.s with large majorities and no incomes [and that that had] added to the judicial ignorance which is sometimes expressed on social matters.'² The story was reported that on one occasion when a vacancy on the Bench had arisen. Halsbury was asked 'whether, *ceteris paribus*, the best man would be appointed to the job....' His reply is said to have been, '*Ceteris paribus* be damned, I'm going to appoint my nephew.'

4. Whether the story was true or not, it was regarded as believable and matched his conduct. When it came to making judicial appointments, merit was far less important than political, family and social connections. Two illustrations are his appointments of Mr Justice Lawrance and Mr Justice Ridley.
5. John Lawrance was Conservative MP for South Lincolnshire for ten years, from 1880 to 1890, until his appointment as a High Court judge. Stevens says in his book *The English Judges: Their Role in the Changing Constitution* that the appointment was 'greeted with hoots of derision.'³ *The Law Times* had this to say about it:

This is a bad appointment, for although a popular man and a thorough English gentleman, Mr. Lawrance has no reputation as a lawyer, and has been rarely seen of recent years in the Royal Courts of Justice.⁴

His reputation did not improve with time, or with the greater familiarity with the Royal Courts of Justice that his High Court appointment brought.⁵ On the contrary, it seems if anything to have got worse. So bad that after he failed to give a reasoned judgment in a particularly difficult and important case – he simply entered judgment for the plaintiff after many months of post-hearing silence and gentle reminders from the parties that his judgment was long overdue – the legal profession let its unhappiness

¹ Heuston, *Lives of the Lord Chancellors (1885 – 1940)*, (1964, Clarendon Press) at p.36.

² L. Hale in 638 H.C. Deb. 5s. Col. 78 (11 April 1961) cited in Heuston, *ibid* at 36.

³ Stevens, *The English Judges: Their Role in the Changing Constitution*, (2002, Hart) at p.95.

⁴ (1890) L.T. News 305, cited in Heuston at p.45.

⁵ Heuston, *ibid*,

be known. While it was not necessarily wrong at that time to give a judgment without reasons, a reasoned judgment had been expected in the case of *Rose v Bank of Australasia*⁶, since it involved difficult legal points in the context of the construction of a charter party on which he had reserved his judgment. His failure to give reasons frustrated the expectation that those points would be settled.

6. The consequences of his failure to grapple with the issues were recounted by Lord Justice MacKinnon in 1944. He said:

When I was the pupil of T. E. Scrutton⁷ from 1896 to 1897, he told me that the Only Begetter of the Commercial Court was 'Long' Lawrance. Mr Justice J. C. Lawrance was a stupid man, a very ill-equipped lawyer, and a bad judge....⁸

A delegation of magnates told the Prime Minister that the shameful way in which commercial disputes were being dealt with – or not dealt with – by hopelessly bad judges, especially Lawrance, was causing serious damage to the City of London and its commercial reputation. The Commercial Court, one of the great successes of our court structure, was created in order to limit and repair the damage.

7. As for Ridley, Lord Justice MacKinnon had this to say,

...Lawrance... was not the worst judge I have appeared before: that distinction I would assign to Mr. Justice Ridley. Ridley had much better brains than Lawrance, but he had a perverse instinct for unfairness that Lawrance could never approach.⁹

What credentials did Edward Ridley have for his appointment? Few except that he was the brother of the then Home Secretary, Sir Matthew White Ridley, the grandson of a famous Victorian judge, Baron Parke, and a former conservative MP. As a barrister his practice had been modest. From 1886 until his appointment as a High Court Judge in 1897 he was an Official Referee.

8. Although he seems to have performed satisfactorily as an Official Referee, his appointment to the High Court bench, according to Stevens, was 'greeted with

⁶ [1894] AC 687.

⁷ Later Lord Justice Scrutton.

⁸ MacKinnon, 'The Origin of the Commercial Court,' (1944) *LQR* (60), 324–325.

⁹ *Ibid.*

horror.¹⁰ Heuston noted that it 'aroused an exceptional storm of public and professional criticism.'¹¹ *The Law Times* was scathing. It said that:

... no-one will believe that he would have been appointed to the High Court Bench but for his connections... Such an innovation, we repeat, was only possible where the hard-working official, the bearer of so many heavy burdens of the High Court judges, was highly connected. This is Ridleyism. Let it be known hereafter as Ridleyism...¹²

The *Solicitors' Journal* described the appointment as 'a grave mistake'.¹³ The *Law Journal* said that it could 'be defended on no ground whatsoever.'¹⁴ A contemporary political pamphlet observed sarcastically that: 'in his perplexity, Lord Halsbury finding apparently no relative of his own unprovided for, did a turn for the Home Secretary by making his brother, Mr. Edward Ridley, a judge.'¹⁵

9. On Ridley's death Sir Frederick Pollock wrote to the great Oliver Wendell Holmes, Judicial obituary today: Sir E. Ridley, good scholar, Fellow of All Souls, successful, *sicut dicunt* [so they say], as an Official Referee, and by general opinion of the Bar the worst High Court judge of our time, ill-tempered and grossly unfair: which is rather a mystery.¹⁶
10. The operation of the party system in those days is confirmed by statistics. Of the 139 judges appointed between 1832 – the year of the Great Reform Act that started Britain on the path to universal suffrage – and 1906, a total of 80 were MPs at the date of their appointment. Sixty three of those were appointed whilst their party was in power. Thirty three of them had been Law Officers. And, they were on average eight years younger on appointment than those judges appointed from practice at the Bar.¹⁷
11. Lord Salisbury, who became leader of the Conservative Party after Disraeli and held office as Prime Minister three times between 1885 and 1902, had no doubt about it. Stevens cites him as saying:

¹⁰ Stevens, at p.15.

¹¹ Heuston, at p.50.

¹² (1897) 102 LT News 572, cited in Heuston at p.51; cf, Stevens, at p.15.

¹³ (1897) 41 SJ 433, cited in Heuston *op. cit.*

¹⁴ (1897) LJ News 215, cited in Heuston *op. cit.*

¹⁵ Bristol Selected Pamphlets, (1897), *The Tory way of facing the music*, (<http://www.jstor.org/pss/60231048>)

¹⁶ De Wolfe (ed.), *Pollock-Holmes letters*, (1941), Vol. II at 232, cited in Heuston at p.51

¹⁷ Heuston, at p.38.

It is...the unwritten law of our party system; and there is no clearer statute in that unwritten law than the rule that party claims should always weigh heavily in the disposal of the highest legal appointments.¹⁸

12. Lord Salisbury would have regarded it as an important aspect of our constitution that the judges were well-versed in its operation. In other words an intimate practical knowledge of the political branch of the state was seen as highly desirable. As Halsbury put it,

for a judge who is to sit in the Supreme Tribunals of the Empire, a House of Commons' training is a real advantage. One learns there the nuances of the Constitution, and phases of individual and social political life which are invaluable in checking the danger of abstractedness in mental outlook.¹⁹

A more critical observer might well say that the invaluable check was rather on judicial independence, by ensuring that the judiciary remained firmly part of the established order of the day. The other side of the coin was that the field of possible candidates was improperly narrowed by looking first at MPs and those who had well served a political party. Could a Lawrance have been appointed on merit if the field of candidates was equally open to all regardless of political affiliations? *The Economist* certainly did not think so. In 1859 it had this to say about it,

No doubt it is a sad thing to have fought elections, to have been loyal to one's party, and to have chosen it wisely at the outset, and yet to be quietly passed over, silently left on the way. But the sooner Parliamentary services are altogether ignored in the appointment of judicial officers, except perhaps those which are the rewards of the highest legal offices of the Government, the better.²⁰

I will return to the final qualification about the "rewards of the highest legal offices of the Government" because that involves an interesting legal history in itself.

13. The system of appointments which I have been describing not only narrowed the field and gave rise to appointments based on patronage rather than legal merit. It also led to that suspicion even where the appointment was merited, as it was in a good number of cases.

¹⁸ Cited in Stevens, at p.14.

¹⁹ Halsbury, *Autobiography*, (1929) at 69, cited in Heuston, at p.39.

²⁰ (1859) 17 *The Economist* 758, cited in Heuston, *ibid*.

14. Between the First and Second World Wars there was a marked improvement. The influence of politics and patronage on judicial appointments declined, but less so at the very top level. To return to the *Economist's* reference to 'the rewards of the highest legal offices of the Government,' the highest legal office of all was that of Lord Chief Justice. There was a convention that when that office fell vacant it would be offered to the Attorney-General of the day. Indeed, it was something which the Attorney-General regarded himself as entitled to expect. This convention led to the appointment of Lord Hewart, who was Lord Chief Justice from 1922 to 1940. He was widely regarded as the worst Lord Chief Justice of the twentieth century. Paradoxically his best remembered utterance is that justice must not only be done but must manifestly be seen to be done – a maxim which stood in contrast with the way in which he presided over the Court of Criminal Appeal. The other law officer, the Solicitor-General, was by a similar convention customarily offered the office of President of the Probate, Divorce and Admiralty Division of the High Court (the forerunner of the Family Division) if a vacancy occurred during his term as Solicitor-General, regardless of whether he had any experience or knowledge of the subject or any sign of judicial aptitude.
15. As Lawrance's lamentable performance led to the creation of the Commercial Court, so Hewart's performance led to the end of the convention by which the office of Lord Chief Justice would be offered to the Attorney-General.
16. By the second half of the twentieth century there were few instances where political factors were suspected of influencing the judicial appointment process and certainly none in the last 30 years. In recent decades all Lord Chancellors were scrupulous in seeing that the judicial appointment process was strictly apolitical.
17. In this respect we have been very fortunate, but I am not sure how confident we could have been that this state of affairs would have continued in the changed political landscape of the twenty-first century without the introduction of an independent appointment system. First, the Human Rights Act 1998 has meant that judges now have to decide many more cases than in the past which are liable to bring them into conflict with the government on matters which the government regards as important. Secondly, the Constitutional Reform Act 2005 has brought

about a major change in the office of Lord Chancellor. The Lord Chancellor may now be in the House of Commons. A future Lord Chancellor may not be a lawyer and may have further political aspirations.

18. With the change of political landscape it was an important part of the Constitutional Reform Act that the Government should be largely taken out of the judicial appointment process, and so a new system had to be devised.
19. Two other aspects of the old appointment process had caused mounting concern. One was the narrowness of the pool of candidates. The other was the unseen nature of the process by which appointments were made. The senior judiciary was drawn almost entirely from the practising bar. The method by which they were chosen involved consultation described by critics as 'secret soundings.'
20. I do not believe that the process of consultation was pernicious, but that is an insider's view. As a presiding judge of the Western Circuit, I was among many consulted about judicial appointments on the circuit and tried, like others to the best of my knowledge, to ensure that the comments made were well informed and fair. But I well understand why those not involved in the process saw it as the establishment at work reproducing itself.
21. So there was a double complaint: that the selections were made in the image of the selectors, resulting in an over-narrow judiciary, and that the process was hidden from public view. If justice must not only be done, but be seen to be done, the same ought to apply to the selection of those appointed to be judges. Without a proper degree of openness, the good are apt to be damned by false suspicions as 'rumour outruns fact'²¹, and nowhere in the legal system do rumours run faster than over appointments.
22. The process of attempting to make the appointment system more open goes back 10 years. In March 1999 the Lord Chancellor, Lord Irvine, published an information brochure on judicial appointments. Among other things, it set out three fundamental considerations which informed the appointments process. Those were that

²¹Caesar, *The Civil War*, (Carter ed.) (2008, Oxford) at p.95.

appointments were made strictly on merit; that experience as a part-time judge would normally be a prerequisite for a full-time appointment; and that in carrying out the appointment process the Lord Chancellor would place significant weight on the independent views of the serving judiciary and the wider legal community.²²

23. Shortly after the publication of that information brochure Lord Irvine appointed Sir Leonard Peach to report, among other things, on 'the operation of the appointments and procedures in relation to all judicial appointments...' He was specifically asked to consider the 'appropriateness and effectiveness of a) the criteria and b) the procedures for selecting the best candidates...' He was also asked to consider the extent to which the candidates for appointment were 'assessed objectively' and what safeguards there were against discrimination on grounds of race or gender.²³ He was not, however, to examine the issue of by whom appointments were to be made. The Lord Chancellor's role and how he carried it out was outwith the scope of Peach's terms of reference.

24. The Peach Report contained many recommendations, but its central recommendation, recommendation 16, was that a Judicial Appointments Commission should be established.²⁴ This Commission was not, despite its title, to be an Appointments Commission in the sense of running the appointments process itself. It was to be an oversight Commission, scrutinising the appointments process which was to remain in the Lord Chancellor's hands. It was also to consider and recommend improvements to the appointments process, and to perform the role of a complaints body, with the power to handle grievances and appeals arising out of appointments processes. While the process was itself to remain with the Lord Chancellor, external scrutiny and accountability was to be introduced into the system. When Peach was appointed he invited people to contact him with their views. I took the opportunity of doing so and we had a meeting at which we discussed his ideas for an appointments commission. I argued that it should be directly involved in recommending appointments. Peach did not believe that he could

²² Criteria as summarised in, Peach, *An Independent Scrutiny of the Appointment Process of Judges and Queen's Counsel in England and Wales*, (London, 1999) (the Peach Report), part 5 (<http://www.dca.gov.uk/judicial/peach/reportfr.htm#part5>)

²³ The Peach Report, Terms of Reference (<http://www.dca.gov.uk/judicial/peach/indexfr.htm>).

²⁴ The Peach Report, (<http://www.dca.gov.uk/judicial/peach/reportfr.htm#part8>) recommendation 16.

go so far within his terms of reference, but he believed that this would be the natural evolution from his proposals. He was prescient, although at that stage nobody anticipated the near abolition of the position of Lord Chancellor.

25. In March 2001 recommendation 16 was implemented and the Commission for Judicial Appointments was established. Sir Colin Campbell was appointed as the First Commissioner for Judicial Appointments with seven Deputy Commissioners.²⁵ The Commission's remit was as Peach had recommended. It was an oversight and appeals body: scrutinising the appointments process, keeping it under review and where necessary making recommendations for reform. The Commissioners were to carry out these activities

...in the manner they consider best calculated to promote economy, efficiency, effectiveness and fairness in appointment procedures, exercise their functions with the object of maintaining the principle of selection on merit in relation to relevant appointments.²⁶

26. In October 2002 it published its first report. It was soon overshadowed in the confused events of the abolition-then-non-abolition of the office of Lord Chancellor. In June 2003 the abolition of that office was announced. There was then a stay of execution followed by a reprieve of sorts. Discussions between the then Lord Chancellor and Lord Chief Justice, Lord Falconer and Lord Woolf, resulted in an agreement or 'concordat' about constitutional matters affecting the judiciary, including the appointment system. The agreement was brought into effect by the Constitutional Reform Act.

How Judges are now Appointed

27. The Constitutional Reform Act sounded the death knell for the Commission for Judicial Appointments. In its place the Judicial Appointments Commission was born. The CJA was replaced by the JAC. The change involved more than simply rearranging letters. The two bodies were fundamentally different. The JAC, unlike its similarly acronymed predecessor, is a true appointments commission. It now takes

²⁵ Department of Constitutional Affairs, *Constitutional Reform: a new way of appointing judges*, (Consultation Paper) (July 2003) (<http://www.dca.gov.uk/consult/jacommission/>), Introduction, para. 13.

²⁶ Cited at *The Commission for Judicial Appointments, Annual Report 2002*, (<http://www.dca.gov.uk/judicial/judcomrep02.pdf>) at 1.6.

the primary role in the selection of judges which historically the Lord Chancellor took, and which he continued to take following the implementation of the Peach Report. Under the Act the CJA's former role as an oversight body, dealing with complaints arising out of the appointments process, is carried out by the Judicial Appointments and Conduct Ombudsman.²⁷

28. The appointments process is now very different from what it was. Anyone who wants to know about the process can do so. The Act sets out the statutory appointments process, the many judicial positions to which it applies and the statutory criterion for appointment, which is merit.²⁸ The JAC's website gives further details²⁹ and shows what appointments are available at any time. The present process is properly overt.

29. Candidates now have to apply for appointment. To some this has come as a novel and unwelcome experience, never having had the experience of making a job application. There was also concern that this might result in a loss of talent to the bench, because some potentially admirable judges might have been willing, if asked, to accept a judicial appointment involving a large reduction in income from a sense of public duty, but would not apply. It is impossible to know for a fact how many such cases there have been, but I can state for a fact that in recent competitions for the High Court and Circuit bench there has been ample talent from which to make selections. It seems that, whether welcome not, people are becoming used to the system of having to apply.

30. The Lord Chancellor is not entirely shorn of a role in the reformed landscape. The JAC runs the appointments process through statutory selection panels and statutory consultation. The Commissioners then decide which candidate (or candidates, in the case of a bulk competition) they consider most suitable for appointment. They make their recommendation to the Lord Chancellor, who can accept it, reject it or ask the JAC to reconsider it, but he cannot substitute a candidate of his own choosing.³⁰ The final decision remains in the Lord Chancellor's hands, subject to some statutory

²⁷ Constitutional Reform Act 2005 s62 and Schedule 1; and <http://www.judicialombudsman.gov.uk/>.

²⁸ Constitutional Reform Act 2005 s63(2).

²⁹ <http://www.judicialappointments.gov.uk/application-process/112.htm>

³⁰ E.g., Constitutional Reform Act 2005 s73(1).

limits. In taking that decision the Lord Chancellor can only consider the recommendation in terms of the candidate's merit. Merit is the sole basis on which the JAC operates in making recommendations and the sole basis on which the Lord Chancellor can consider its recommendations.

31. In summary, the process of merit based appointments for which *The Economist* called in 1859 and which became progressively established during the twentieth century has now been placed on a statutory foundation. It is now an open and publicly known process conducted by an independent Commission rather than in the quiet shadows of the Lord Chancellor's Department.

The Judicial Appointment Commission's Constitutional Importance

32. It hardly needs to be said that appointing good judges, and not appointing bad ones, is of the highest importance. It is very hard to remove a full time judge prior to the statutory retirement age. A High Court judge or above can only be removed by an address of both Houses of Parliament, and that has not happened in living memory. One imagines that long before that point was reached the judge would be told by the Lord Chief Justice that he should resign, but that has not happened for decades. A judge below High Court rank can be removed by the Lord Chancellor, but the Constitutional Reform Act contains a detailed disciplinary process.

33. That judges should be removable only for misconduct (or severe illness) is deliberate and goes back to the Glorious Revolution and Bill of Rights of the late seventeenth century. Parliament did not want the executive to be able to remove judges for political reasons, as Stuart kings had tried to do.

34. The founding fathers of the constitution of the USA adopted the same principle for reasons stated by Alexander Hamilton, writing as Publius, in the Federalist Papers in 1787:

The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best

expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.³¹

35. The Constitutional Reform Act now provides in section 3:

The Lord Chancellor, other ministers of the Crown, and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice, must uphold the continued independence of the judiciary.

36. All this is uncontroversial – or nearly so. I add the qualification because it is sometimes argued that judges are insufficiently accountable to the public. Judges do not merely apply the law but are to some extent lawmakers. This is inescapable and happens to a greater or lesser degree in every country. However detailed a legislative code of law may be, it would be impossible to produce an omnibus code which covered every conceivable human situation in such precise terms as to make it a mechanistic task to apply the code to the facts.

37. So judges are inevitably involved in the shaping of the law. A complaint now commonly made by those who disapprove some aspect of it is that the law is being made by “unelected judges” and that the process lacks democratic legitimacy. It has been made with particular vigour in relation to the development of the law of privacy, because that is an area which particularly affects journalists and broadcasters. It is a serious criticism and merits some consideration.

38. Before the Human Rights Act the possibility of some statutory right of privacy was the subject of numerous reports by committees and unsuccessful parliamentary bills.³² Parliament introduced a more opaque form of privacy protection by its incorporation through the Human Rights Act of the European Convention on Human Rights. Article 8 of the European Convention recognises a right to respect for private life in terms far more general than had been proposed in the various earlier bills and reports and far more general than would be expected in a Westminster statute. In the absence of more specific statutory provisions in this sensitive area, it has fallen

³¹ The Federalist Papers, No. 78.

³² Bills were introduced by Lord Mancroft in 1961, Alexander Lyon in 1967, Brian Walden in 1969, William Cash in 1987 and John Browne in 1989. Reports were made by the Younger Committee on Privacy (1972) Cmnd 5012, the Law Commission on Breach of Confidence (1981) Cmnd 8388, the Calcutt Committee on Privacy and Related Matters (1990) Cmnd 1102 and his later Review of Press Self-Regulation (1993) Cmnd 2135.

to the judges to have to decide how article 8 should be applied, taking into account the relevant case law of the European Court of Human Rights.

39. Because of the way in which the European Convention is framed and has been incorporated into English domestic law by the Human Rights Act, the role of the judge as lawmaker – which has existed for over 1,000 years – has become in some areas more controversial than in the past. In these circumstances, it is sometimes argued that the process of picking judges who have such power in the development of the law should be made more democratic. There are various ways in which it could be argued that this should be done.

40. The most obviously democratic way of selecting judges would be for them to run for office, as in most states of the USA. Some states have appointment commissions, but all except 12 states have some form of election. Federal judges are not elected.

41. The virtue of the election of judges – that they owe their position to the political will of the electorate – is also its vice. We want our judges to have legal ability and other judicial skills, and we want them to be true to their judicial oath that they will do right to all manner of people (including minorities) ‘without fear or favour, affection or ill will’. There is no guarantee that an electoral system would deliver this result and much evidence to the contrary. An electoral process has a natural tendency towards a politicised judiciary. Justice Sandra O’Connor, the most recent US Supreme Court Justice to have held elected political office before appointment to the bench,³³ said in a case in a case concerning judicial appointments:

We...want our judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if the judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help be aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects...Even if judges were able to suppress their awareness of the potential consequences of their decisions and refrain from acting in on it, the public’s confidence in the judiciary

³³ She was a Republican member of the Arizona state senate and became the majority leader in 1972. She left the Arizona state senate in 1974 to run for the office of trial court judge. She was promoted to the intermediate state court of appeals in 1979 and was appointed to the US Supreme Court by President Reagan in 1981.

could be undermined simply by the possibility that judges would be unable to do so.³⁴

42. Justice O'Connor quoted Dean Roscoe Pound, who commented as long ago as 1906 that 'compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench'.

43. Richard Posner, a judge of the US Court of Appeals for the 7th Circuit and senior lecturer at the University of Chicago Law School, recently identified a further objection in his book *How Judges Think*:

'One of the worst effects of an elected judiciary, besides the distorting effect of lawyers' campaign contributions on the evolution of law, is that it greatly curtails the field of judicial selection. Most people are not temperamentally suited for electoral politics and in any event not good at it, though they may have just the suite of abilities required in an excellent judge. The number of people who have both political and judicial talent is small.'³⁵

44. An alternative system would be for the appointment of judges to be made subject to some form of parliamentary confirmation. For practical reasons one would imagine that this would be limited to senior judges. Under the US constitution the President has power 'to nominate, and, by and with the consent of the Senate, to appoint' judges of the Supreme Court (among other offices). Alexander Hamilton explained the purpose of requiring the consent of the Senate as follows:

To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would be a powerful, though in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.³⁶

45. In practice the operation has been far from silent and, since the nomination of Harlan Stone (later Chief Justice Stone) as a justice in 1925,³⁷ it has involved the nominee giving evidence before the Senate Judiciary Committee. That committee has not confined itself to the limited role envisaged by Hamilton but has adopted a partisan, political approach. This is perhaps particularly understandable in a system where the

³⁴ *Republican Party of Minnesota et al v White* 536 US (2002) per O'Connor J at 1 – 2.

³⁵ Harvard University Press (2008) 137.

³⁶ The Federalist Papers, No 76.

³⁷ For an account of the circumstances which led Stone, then Attorney General, to 'take the unprecedented step of offering to appear' before the Senate Judiciary Committee, see Neale, A T., *Harlan Fiske Stone: Pillar of the Law*, (1956, Viking Press), pp 181-200.

court has the final say on the validity of legislation, by its power to nullify it, and where political considerations feature strongly in the nomination of candidates. By contrast, in the United Kingdom the doctrine of parliamentary sovereignty means that Parliament has the final say in determining what the law is to be and political considerations do not feature in the nomination of candidates, which may be considered good reasons for not making judicial appointments subject to parliamentary veto. Conversely, the natural tendency of introducing a system of parliamentary veto would be to introduce political considerations into the appointment process.

46. The confirmation process in the USA has had other ill effects. Nominees have been coached to avoid disclosing their true opinions about the development of the law in controversial areas by evasive blandness and stonewalling. The contrast between Chief Justice Roberts' testimony before the Senate Judiciary Committee and his subsequent conduct, and the effect of this on the reputation of the judiciary, has been described by Posner as follows:

He said that a judge, even if he is a Justice of the Supreme Court, is merely an umpire calling balls and strikes. Roberts was updating for a sports-crazed era Alexander Hamilton's description of a judge as the government official who, unlike an official of the legislative or executive branch of government, exercises judgment but not will...

In offering the umpire analogy, Roberts was trying to navigate the treacherous shoals of a Senate confirmation hearing. And having had a very successful career as an advocate – the batter, not the umpire – it was natural for him to exalt the former's role. (When he became Chief Justice, his perspective quickly changed.)...

In the spring of 2007, less than two years after his confirmation, he demonstrated by his judicial votes and opinions that he aspires to re-make significant areas of the constitutional law. The tension between what he said at his confirmation hearing and what he is doing as a Justice is a blow to Roberts' reputation for candor and a further debasement of the already debased currency of the testimony of nominees at judicial confirmation hearings.³⁸

47. The lesson is that one cannot have it both ways. If there is to be a parliamentary process for the confirmation of judicial appointments, the process can be expected to be political. And then it is not surprising if nominees become trained to use the same techniques of blandness and prevarication as politicians do when questioned about areas where they do not want to be tied down.

³⁸ *How Judges Think*, pp 78,81.

48. A further possibility would be for government itself to play a more direct role in the appointment of judges, but that would be a reversal of the process of separating the appointment of judges from political considerations.
49. Although a poll of the general public may well show that a majority would be on the Government's side in some cases where the courts have ruled against the Government (for example, human rights cases involving alleged terrorist sympathisers), I doubt whether a poll of the general public would show that they wanted politics to be brought into the appointment of judges.
50. So we come back to the system which has been chosen of selection by an independent judicial appointments commission. I would reject the argument that the system is deficient in democratic legitimacy. It is a system established by the elected legislature by Act of Parliament. I see nothing anti-democratic in the cornerstone provision of section 27(5) of the Constitutional Reform Act that 'selection must be based on merit.'
51. Such a system cannot guarantee that the most meritorious candidate is always appointed. From my experience I do not believe that it is possible to devise a perfect system for achieving this. It is not just a matter of human fallibility, but every system (whether based on a candidate's *c. v.*, references, written test, role play, interview, or any combination of the above) has its limitations. That said, I do believe that a system of selection by an independent commission striving to appoint the most meritorious candidate is best able to secure the essential conditions which we ought to require of an appointment system embodying our commitment to the rule of law. First, it facilitates applications for appointment from the widest possible pool of talent, as ours is required to do. Secondly, it facilitates a proper evidence-based scrutiny of those applicants by a well-qualified appointments panel. Thirdly, it isolates the appointments process from any improper consideration or influence: political, financial or otherwise. It thereby isolates the process, and those appointed, from any perception of compromise, bias, or partiality. It maintains the independence and impartiality of the judiciary. Fourthly, it is open to scrutiny and is accountable. The JAC is open to such scrutiny both by reference to the Judicial Appointments and

Conduct Ombudsman and through the Lord Chancellor examining its recommendations on grounds of merit.³⁹

52. Finally, a merits-based selection and appointments process operated by an appointments commission is best-placed to secure a properly diverse judiciary. This will take time in England and Wales. We start from a position where the present bench and the legal professions from which it is fed are not properly reflective of society as a whole. But by widening the potential pool of candidates, by advertising positions widely and by working with specialist groups, an appointments body can best secure the application for judicial positions of candidates who properly reflect society at large. There is work to do here, but an appointments commission carrying out merit-based selection is the optimum means by which it can be done.

Roger Toulson

³⁹ To date over 7,000 applications for appointments have been handled by the JAC and there has been one partially successful complaint to the Ombudsman.