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A ROLE FOR PARLIAMENT IN INDEPENDENT JUDICIAL APPOINTMENTS: INSIGHTS FROM THE COMPTROLLER AND AUDITOR GENERAL

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ABSTRACT

In the UK, there is a debate as to whether Parliament should have a role in judicial appointments similar to the that of the US Senate. The minority in favour of this position argues that it would enhance the democratic legitimacy of the judiciary – who are currently selected by various independent commissions – and refers to the proposed reform's coherence with the general practice of pre-appointment hearings in the UK (such as for the Chair of the Equality and Human Rights Commission) and other parliamentary systems. However, the majority against this position argues that meaningful input into judicial appointments, by parliamentarians, would necessarily undermine the impartiality of the judiciary and outweigh the benefits of judicial democratisation. This paper seeks to add to the debate by establishing a detailed proposal for a parliamentary confirmation model for nominations to the UKSC and arguing that it would be both consistent with and enhancing to judicial independence. The research compares the constitutional foundations and historical origins of the Comptroller and Auditor General – an independent office co-nominated by the Government and Opposition, but confirmed by Parliament – and the UKSC, plus the American and Canadian Supreme Courts. This paper fundamentally argues three points: that there is a democratic deficit in the UKSC judicial appointment model; that the Comptroller and Auditor General is sufficiently equivalent to the UKSC so that its appointment model could be translated onto judicial appointments; and that said translation would remedy said democratic deficit, without compromising the non-partisanship of the UKSC.

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In British politics, a recurring debate (arising in the wake[1] of the *Miller II* judgment,[2] for example) arises as to whether Parliament should have a role in judicial appointments. Such a proposal is somewhat analogous to that under the United States Constitution in the role of the Senate.[3] The reasoning for opposition to such a reform was well encapsulated by the House of Lords Select Committee on the Constitution ("Constitution Committee"), when it considered the issue:

> "We are against any proposal to introduce pre-appointment hearings for senior members of the judiciary. However limited the questioning, such hearings could not have any meaningful impact without undermining the independence of those subsequently appointed or appearing to pre-judge their future decisions. In the United Kingdom, judges' legitimacy depends on their independent status and appointment on merit, not on any democratic mandate."[4]

If judicial independence is lost, then equality before the law – Dicey's second limb of the rule of law[5] is undermined to the extent that certain litigants may unjustly receive better or worse treatment from more or less sympathetic judges. Moreover, the Government and/or Parliament may be perversely incentivised to "game" the judicial appointments system in order to reduce their accountability to the judiciary.

With all due respect to the Constitution Committee, I submit that their risk-reward analysis of democratisation versus politicisation is fundamentally flawed. In one regard, it falsely equates competence to exercise judicial office, which

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[1] Edward Malnick, "Boris Johnson interview: 'Surrender Act? More like the Abject Capitulation Act'" (The Sunday Telegraph, 29th Sep 2019) https://www.telegraph.co.uk/politics/2019/09/28/boris-johnson-interview-surrender-act-like-abject-capitulation/ accessed 8 May 2024.

[2] *R (on the application of Miller) v The PM and Cherry and others v Advocate General for Scotland* [2019] UKSC 41.

[3] Constitution of the USA, Art II, s 2.

[4] Constitution Committee, *Judicial Appointments* (HL Paper 272, 2012), p 19, para 46.

[5] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1982) p 114.

depends on independence and merit (inter alia), with legitimacy to exercise judicial office, which – in a representative democracy – does depend on a democratic mandate. As recognised by Professor Ewing of King's College, London,[6] individuals are bound by judges' statutory interpretation – both in disputes with other individuals and in disputes between themselves and the State – and judges have the power to develop the common law through the creation of precedent. Therefore, the people should have some significant say in the appointment of the officials who interpret and develop the law, so that it is and is seen to be interpreted and developed consistently with the reasons for its enactment.

In another regard, such risk-reward analysis presents a false dichotomy between judicial independence and parliamentary involvement in judicial appointments. The Comptroller General of the Receipt and Issue of His Majesty's Exchequer and Auditor General of Public Accounts – or Comptroller and Auditor General ("C&AG") for short – is an example of a public office which reconciles appointment subject to parliamentary involvement with, as Gay puts it, a:

> "… relationship with Parliament [which] is often used as a benchmark of independence and accountability to be applied to the creation of new constitutional watchdogs."[7]

This article compares the C&AG with the Supreme Court of the UK and their respective historical origins. Then, it will argue that there is a democratic deficit in the model used for appointing UKSC Justices ("the UKSC Model") which could be remedied, without compromising the non-partisanship of the bench, by adopting the model used for appointing the C&AG ("the C&AG Model").

BACKGROUND

Scale and Methodology

The UKSC is the focus of my comparison to the C&AG, because it is the apex civil appellate court for the UK's three separate jurisdictions; the apex criminal appellate court for Northern Ireland, England and Wales; and court of first

[6] Professor Keith D Ewing, 'A Theory of Democratic Adjudication: Towards a Representative Accountable and Independent Judiciary' [2000] 38(3) Alberta LR 708–733, pp 711–713.
[7] House of Commons Library: Parliament and Constitution Centre, C&AG (SN/PC/4595, 2008), p 1.

instance for matters concerning devolution from the British Parliament to its Home National counterparts.[8] As such, it would be the most proportionate object of the C&AG Model – in terms of democratic gains for parliamentarians' time spent – since it is the tier of that collective judicial hierarchy with the greatest jurisdiction and the fewest judges.

Noting that judicial accountability is a corollary of representative democracy and that – as Professor Le Sueur of the University of Essex remarks[9] – there are multiple forms thereof, I will focus on the institutional appointment aspect of representative democracy to economise the length of this article. Likewise, I make tangential references to the UKSC's power of judicial review in relation to its democratic legitimacy. For an analysis of parliamentary confirmation of judicial nominations as a remedy to the alleged growth of the senior judiciary's powers, I direct the reader to barrister and University of Durham Visiting Professor Alexander Horne's treatment of the issue.[10]

The C&AG Model

The C&AG is jointly nominated by Prime Minister and the Chair of the Committee of Public Accounts ("PAC"),[11] the latter of whom must be an Opposition Member of Parliament.[12] Therefore, the appointment of a C&AG will typically require a degree of bipartisan support, to the extent that the PAC Chair's views are consistent with those of the Official Opposition.

Since the passage of the Budget Responsibility and National Audit Act 2011, recruitment has been conducted by a panel of four, consisting of the PAC Chair (who acts as its chair), the Permanent Secretary to HM Treasury, the Chair of the

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[8] Sched 6, paras 33–35, to Scotland Act 1998; Sched 10, paras 33–35, to Northern Ireland Act 1998; and Sched 9, paras 29–30, to Government of Wales Act 2006.

[9] Professor Alexander Horne, 'Is there a case for greater legislative involvement in the judicial appointments process?' (2014) The Study of Parliament Group Paper No 3, p 8, fn 30 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412034 accessed 8th May 2024.

[10] Professor Alexander Horne, 'The Changing Constitution: A Case for Judicial Confirmation Hearings?' (2010) The Study of Parliament Group Paper No 1 https://studyofparliamentgroup.org/wp-content/uploads/2020/12/spg-paper-1.pdf accessed 8th May 2024.

[11] BRNAA 2011, s 11(5).

[12] 'Holding Government to Account: 150 years of the PAC: 1857–2007' (*PAC*, 2007) https://www.parliament.uk/globalassets/documents/commons-committees/public-accounts/pac-history-booklet-pdf-version-p1.pdf, p 31, accessed 8th May 2024; and House of Commons, *Standing Orders: Public Business 2023* (HC 1932, 2023), p 126, no 122B(8)(f).

National Audit Office and an observer[13] (the interim C&AG, in 2008, and the Chair of the National Grid, in 2019).[14] When a vacancy is anticipated, recruitment consultants[15] assist with its open advertising and the shortlisting of candidates. Shortlisted candidates are invited for assessments and interviews.[16] The preferred C&AG-designate is then recommended to the PM for approval.

Afterwards, the PAC convenes for a pre-appointment hearing chaired by the Deputy PAC Chair instead of the PAC Chair, who recuses itself therefrom. The C&AG-designate is typically questioned about their motivation[17] and competence[18] for the role; their impartiality[19] and any potential conflicts of interest;[20] and their proposed strategy as Chief Executive of the NAO.[21] These questions are robust but professional,[22] per the Liaison Committee's Guidelines,[23] but PAC members have respected the C&AG-designee's stated inability to answer questions.[24] Their answers are meaningful,[25] because they inform the PAC's views on the

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[13] House of Commons PAC, *Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), p 4, paras 7–8.

[14] House of Commons (n13), p 4, para 8.

[15] House of Commons (n13), p 4, para 9.

[16] House of Commons (n13), p 4, para 10.

[17] Cf House of Commons PAC, *Selection of the new C&AG: 12th Report of Session 2008–09* (HC 256, 2009), q 1; and House of Commons PAC, *Oral evidence: Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), q 53.

[18] House of Commons PAC, *Oral evidence: Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), q 5.

[19] Cf House of Commons PAC, *Selection of the new C&AG: 12th Report of Session 2008–09* (HC 256, 2009), q 83; and House of Commons PAC, *Oral evidence: Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), q 62.

[20] Cf House of Commons Public Accounts Committee, *Selection of the new C&AG: Twelfth Report of Session 2008–09* (HC 256, 2009), evv 11–12, qq 61 and 65; and House of Commons Committee of Public Accounts, *Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), qq 2 and 63.

[21] Cf House of Commons Public Accounts Committee, *Selection of the new C&AG: Twelfth Report of Session 2008–09* (HC 256, 2009), evv 6, 8, 9 and 12, qq 27, 44, 47 and 68; and House of Commons Committee of Public Accounts, *Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), qq 35, 41, 45, 48, 50, 52, 55, 60 and 61

[22] Eg, House of Commons PAC, *Oral Evidence: Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), qq 7–33.

[23] House of Commons (n13), pp 7–8, para 20.

[24] House of Commons PAC, *Selection of the new C&AG: 12th Report of Session 2008–09* (HC 256, 2009), q 9.

[25] Cf Constitution Committee, *Judicial Appointments* (HL Paper 272, 2012), p 19, para 46.

C&AG-designate and vice-versa before the latter assumes office, whereafter similar opportunities would be unlikely to arise.[26] The result of the pre-appointment hearing is non-binding, but the PAC has endorsed the PM and PAC Chair's nominee on both occasions.[27] Their recommendation is influential, because the PAC is purposively selected by the House of Commons and the House has divided on the appointment of a new C&AG.[28] The C&AG-designate is appointed by the Crown by Letters Patent, following an address of the House of Commons.[29]

The UKSC Model

When a vacancy arises or is due to arise upon the UKSC, the Lord Chancellor convenes a selection commission ("UKSCSC")[30] and the position is openly advertised. Ordinarily, the UKSCSC is chaired by the UKSC President and consists of another judge, from a court other than the UKSC, who is nominated by the UKSC President; a Judicial Appointments Commissioner; a Northern Ireland Judicial Appointments Commissioner; and a member of the Judicial Appointments Board for Scotland.[31] When the UKSC Presidency is vacant, the Deputy UKSC President sits in lieu thereof, nominates the other non-UKSC judge and the UKSCSC is chaired by a lay member of the JAC, NIJAC or JABS.[32]

The UKSCSC shortlists and interviews candidates on merit, in consultation with the LC, the First Ministers of Scotland and Wales, NIJAC and senior judges.[33] The LC may, in consultation with the senior judge of the UKSC and after approval from both Houses of Parliament, issue compulsory guidance to the UKSCSC as to what matters it should take into account.[34] Candidates must have held high judicial office for a period of at least two years;[35] or have been counsel, a solicitor or

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[26] House of Commons Public Accounts Committee, *Selection of the new C&AG: Twelfth Report of Session 2008–09* (HC 256, 2009), q 59.

[27] Cf House of Commons PAC, *Selection of the new C&AG: 12th Report of Session 2008–09* (HC 256, 2009), p 6, para 10; and House of Commons PAC, *Pre-appointment hearing: preferred candidate for C&AG*, p 5, para 14.

[28] HC Deb 16th Dec 1987, vol 124, c 1204.

[29] BRNAA 2011, s 11, subss (2)–(4).

[30] Constitutional Reform Act 2005, s 26, subss (5)–(5A).

[31] The Supreme Court (Judicial Appointments) Regulations 2013, r 11(1).

[32] CRA 2005, s 27; and the Supreme Court (Judicial Appointments) Regulations 2013, Part 2.

[33] The Supreme Court (Judicial Appointments) Regulations 2013, r 18.

[34] CRA 2005, ss 27(9) and 27B.

[35] CRA (n34), s. 25(1)(a).

equivalent[36] for at least 15 years.[37] Once a candidate is preferred, the UKSCSC presents its report to the LC, who may accept, reject or require the reconsideration of the UKSCSC's recommendation.[38] Acceptance of the nominee is communicated to the Crown, via the PM,[39] who formally appoints the Justice.

Democratic Deficit of the UKSC Model

The UKSC Model inadequately confers democratic legitimacy upon the Court, because UKSCSCs have a tenuous link to the people. The LC – who may be a member of the House of Lords – appoints most UKSCSCers and is accountable to Parliament, with the House of Commons being accountable to the electorate. Two UKSCSCers are appointed from among JACers[40] and NIJACers,[41] whom the LC also appoints. Another UKSCSCer is appointed from among JABS[42] members, who are appointed by a Scottish minister who is a member of and accountable to the Scottish Parliament, which is accountable to the Scottish electorate.[43] The remaining two UKSCSCers have an even more tenuous link to voters, because they ordinarily consist of the ex officio UKSC President and another judge, chosen by the UKSC President, from another court. These judges are themselves products of the UKSC Model and its jurisdictional counterparts.

It would be remiss to fail to acknowledge that there is another source of democratic accountability for UKSC Justices, insofar as both Houses of Parliament may petition the Crown for their removal from office for misbehaviour.[44] However, this is dependent upon the approval of the unelected House of Lords. The last and only time that this procedure has been invoked in respect of a judge within the UK was in 1830: Sir Jonah Barrington was removed from the Irish High Court of Admiralty, for corruption.[45] So, this is a weak form of democratic accountability.

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[36] CRA (n34), s 25(1)(c).
[37] CRA (n34), s 25(1)(b).
[38] The Supreme Court (Judicial Appointments) Regulations 2013, r 20.
[39] CRA (n34), s 26(3).
[40] Sched 12 to CRA 2005; and the Judicial Appointments Regulations 2013, r 4.
[41] Justice (Northern Ireland) Act 2002, s 3.
[42] Sched 1 to Judiciary and Courts (Scotland) Act 2008.
[43] Scotland Act 1998, s 2(2) and s 47, subss (2) and (3)(c).
[44] CRA (n34), s 33.
[45] 'Judges and Parliament' (*Courts and Tribunals Judiciary*) https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/judges-and-parliament/ accessed 24 Apr 2024.

As argued by others,[46] UKSCSCs are also undemocratic for what are effectively electoral colleges. The LC has neither rejected nor required the reconsideration of a candidate for the UKSC, nor has it issued guidance to a UKSCSC. The LC also rarely exercises its discretion to reject or require the reconsideration of recommendees[47] from the analogous JAC[48] and NIJAC.[49] Furthermore, as written by Professors Ekins and Gee (of the University of Oxford and University of Sheffield respectively), the consultation between the many judicial appointments commissions and the LC on the former's shortlist of candidates "…has little real effect on how a selection process is run or the candidates that are ultimately shortlisted",[50] excepting Sir Brian Leveson's removal from the shortlisting for Lord Chief Justice of England and Wales.[51] If the fundamental objective of a judicial appointments commission is to make recommendations free from political interference, then it is difficult for an LC to

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[46] Cf Professor Robert Hazell and Timothy Foot, *Executive Power: The Prerogative, Past, Present and Future* (1st edn, Bloomsbury 2022) p 153; Professors Robert Hazell and Kate Malleson, 'Increasing democratic accountability in the appointment of senior judges' (*UK Constitutional Law Association Blog*, 15th Jul 2011) https://ukconstitutionallaw.org/2011/07/15/robert-hazell-and-kate-malleson-increasing-democratic-accountability-in-the-appointment-of-senior-judges/ accessed 9th May 2024; and Professors Richard Ekins and Graham Gee, 'Reforming the Lord Chancellor's Role in Senior Judicial Appointments' (*Policy Exchange*, 2021) https://policyexchange.org.uk/wp-content/uploads/2021/02/Reforming-the-Lord-Chancellor%E2%80%99s-Role-in-Senior-Judicial-Appointments.pdf, pp 17–19, accessed 13 May 2024.

[47] Cf Joshua Rozenberg, 'JAC of all trades: should ministers pick judges?' (*The Law Society Gazette*, 6th Jan 2023) https://www.lawgazette.co.uk/commentary-and-opinion/jac-of-all-trades-should-ministers-pick-judges/5114725.article accessed 25th Apr 2024; J Rozenberg, 'Lord chancellor veto raises questions for judicial standards' (*The Guardian*, 8th Dec 2011) https://www.theguardian.com/law/2011/dec/08/lord-chancellor-veto-judicial-standards accessed 24 Apr 2024; and Constitution Committee, 'Inquiry on Judicial Appointments Process: Unrevised transcript of evidence' (*House of Lords*, 6th Jul 2011) https://www.parliament.uk/globalassets/documents/lords-committees/constitution/JAP/corrCNST060711ev1.pdf, pp 33–34, q 38, accessed 9th May 2024.

[48] Sched 12 to CRA (n34); and The Judicial Appointment Regulations 2013.

[49] Justice (Northern Ireland) Act 2002, s 3.

[50] Professors Richard Ekins and Graham Gee, 'Reforming the Lord Chancellor's Role in Senior Judicial Appointments' (*Policy Exchange*, 2021) https://policyexchange.org.uk/wp-content/uploads/2021/02/Reforming-the-Lord-Chancellor%E2%80%99s-Role-in-Senior-Judicial-Appointments.pdf, p 18, accessed 13 May 2024.

[51] J Rozenberg, 'JAC of all trades: should ministers pick judges?' (*The Law Society Gazette*, 6th Jan 2023) https://www.lawgazette.co.uk/commentary-and-opinion/jac-of-all-trades-should-ministers-pick-judges/5114725.article accessed 13 May 2024.

guide it or refuse their recommendation – as illustrated by one episode. In 2010, the then LC, Jack Straw, required the JAC to reconsider their recommendation for President of the Family Division of the High Court in England, with a view to another candidate.[52] The JAC insisted on its original recommendation and Straw relented, considering that "…if he pushed back a second time, it might create a real rupture between the LC and the judges…".[53] The UKSCSC (inter alia) also recommends a single candidate, so the LC has a Hobson's choice as to the UKSC Justice-nominate and the democratic accountability of the UKSC Model is nominal.

COMPARISON OF THE C&AG AND UKSC

Auditor and Judicial Independence

Both auditors and judges must be able to conduct their work visibly free from prejudice or improper influence,[54] in order to reach fair decisions and for the public to have confidence that those decisions have been fairly reached. Therefore, I disagree with the Constitution Committee's conclusion:

> "…the relationship between Parliament and the judiciary is a unique one… Judges must be independent of both the executive and Parliament…"[55]

The relationship between Parliament and the judiciary is not unique, because the C&AG must be and be seen to be independent of both the Government and Parliament too, in order for Parliament and the public to rely on the objectivity of its audits; for HM Government to confide in the C&AG to objectively report its accounts; and for the C&AG to be publicly perceived to be able to impartially audit both ministerial and parliamentary expenditure (inter alia). Comparably, the

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[52] Rozenberg (n51), accessed 25 Apr 2024.

[53] Prof Thomas Grant KC, "The Politics of Judicial Appointment" (*Gresham College*, 10th May 2021) https://www.gresham.ac.uk/watch-now/judicial-appointment-politics accessed 9 May 2024.

[54] Cf 'Auditor Independence' (*ICAEW*) https://www.icaew.com/technical/trust-and-ethics/ethics/auditor-independence#:~:text=Auditor%20independence%20refers%20to%20the,and%20in%20an%20objective%20manner accessed 9th May 2024; and David S Law, 'Judicial Independence' (*Encyclopaedia Britannica*, 23rd Aug 2023) https://www.britannica.com/topic/judicial-independence accessed 9 May 2024.

[55] Constitution Committee, *Judicial Appointments* (HL Paper 272, 2012), pp 18–19, para 44.

Government and Parliament (inter alia) may appear before the UKSC as litigants,[56] and its Justices must judge and be seen to judge "…without fear or favour, affection or ill-will...".[57] The independence of the C&AG and UKSC is protected by their respective institutional designs, many features of which are identical.

Separation of Powers

The first of these features is the separation of powers, as defined by Montesquieu,[58] which predominantly exists to prevent conflicts of interest arising from an officer having to audit or judge public policies or legislation for which its office is wholly or partially responsible. This includes audits or litigation conducted for ulterior and/or malicious purposes. Neither the C&AG nor UKSC Justices may be sitting members of the House of Lords[59] nor hold ministerial office;[60] the C&AG may not hold judicial office;[61] and UKSC Justices are disqualified from the House of Commons.[62]

The separation of powers also applies to their staff. As noted by Oonagh Gay and BK Winetrobe, NAO staff are public servants – rather than civil servants –[63] in order to "…make their constitutional status, as separate from the executive, more transparent".[64] The C&AG and NAO are also exempt from the control of the House of Commons Commission.[65] The staff of the UKSC are civil servants, but this is a distinction without a difference. They are appointed by the UKSC

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[56] Eg, *Jackson & Ors v HM Attorney General* [2005] UKHL 56; *R v Chaytor & Ors* [2010] UKSC 52; and *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

[57] Cf CRA (n34), s 32; and Promissory Oaths Act 1868, s 4.

[58] Baron de Montesquieu, *The Spirit of the Laws* (first published in 1914, Cosimo Classics 2011) 152.

[59] Cf BRNAA 2011, s 12(3); CRA 2005, s 137(3).

[60] Cf BRNAA 2011, s 12(5); CRA s 137; and House of Commons Disqualification Act 1975, s 1(1)(a); Sched 1 to the 1975 Act; and *The Cabinet Manual* (1st edn, TSO Oct 2011) https://assets.publishing.service.gov.uk/media/5a79d5d7e5274a18ba50f2b6/cabinet-manual.pdf, p 22, para 3.8, accessed 9 May 2024.

[61] BRNAA 2011, s 12(5).

[62] House of Commons Disqualification Act 1975, s 1(1)(a); and Sched 1 to the 1975 Act.

[63] Sched 2, para 2, to BRNAA 2011.

[64] Oonagh Gay and Barry K Winetrobe, 'Officers of Parliament – Transforming the role (*The Constitution Unit*, Apr 2003) https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/100.pdf, p 15, accessed 9 May 2024.

[65] Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (25th edn, TSO 2019), Part 1, ch 6, para 6.44; and BRNAA 2011, s. 12(2).

President[66] and the NAO must endeavour to keep their staff terms of employment broadly aligned with those of civil servants.[67]

As a buttress to the separation of powers, the C&AG may not "…question the merits of the policy objectives…"[68] of any of its auditees. Similarly, judicial review – the most relevant judicial power, because it likewise concerns the UKSC's interactions with the ministerial and parliamentary branches of government – is for determining whether an action or omission of a public functionary is lawful[69] and not whether the underlying policy is meritorious. In these hearings, the Court may also defer to "…the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention",[70] where a statute's compatibility with the European Convention on Human Rights[71] is dubious.

Tenure and Accountability to Parliament

The C&AG and UKSC Justices each enjoy tenure during good behaviour,[72] subject to the former's aforementioned term of ten years,[73] and the latter's mandatory retirement age of 75.[74] These single-term provisions represent two different methods of insulating a decision maker from perverse incentives to compromise its judgment, in order to ameliorate its prospects of reappointment. Both can be removed from office solely by the Crown, following an address by both Houses of Parliament.[75] This procedure is intended to be burdensome, even in response to unpopular audit or judicial verdicts, to safeguard their tenure.

Furthermore, the C&AG can "…report to the House of Commons the results of any examination carried out by him…".[76] Somewhat similarly, "the UKSC President may lay before Parliament written representations on matters that appear to [it] to be matters of importance relating to the UKSC…" or to its jurisdiction.[77]

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66 CRA (n34), ss 48–49.

67 Sched 2, para 17(2), to BRNAA 2011.

68 National Audit Act ("NAA") 1983, s 6, subss (1)-(2) and ss 7(2) and 7ZA(5).

69 Civil Procedure Rules, Part 54, r 54.1(2)(a) (Court Offices).

70 Lord Woolf in *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545; cited in *Oxford Dictionary of Law* (8th edn, OUP 2015) p 346.

71 HRA 1998, s 4.

72 Cf Exchequer and Audit Departments 1866, s 3 (as enacted); and CRA 2005, s 33.

73 BRNAA 2011, s 11, subss (6)-()

74 Judicial Pensions and Retirement Act 1993, s 26.

75 Cf BRNAA 2011, s 14(2); and CRA (n34), s 33.

76 National Audit Act 1983, s 9.

77 CRA (n34), s 5(A1).

The chief executive of the UKSC is also obliged to prepare an annual report on the business of the Court,[78] which is copied to the LC and FMs and laid before each House of Parliament.[79] All these statutory provisions enable limited cooperation between the C&AG or UKSC and Parliament, albeit the former is operating on behalf of the House of Commons.

Parliamentary Privilege and Judicial Immunity

Both the C&AG and UKSC are absolutely exempt from civil liability for damages, such as for defamation, in order to safeguard the fulfilment of each of their official duties without external interference. Parliamentary privilege attaches to the C&AG in several respects, which stem from its being an officer of the House of Commons.[80] One such freedom is from civil arrest and molestation.[81] Another is general autonomy in conducting its audit duties. The Bill of Rights 1688, Art IX, ensures: "that the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament" (sic). Erskine May confirms that "Officers of the House take part in its proceedings principally by carrying out its orders, general or particular",[82] for instance the presentation of the C&AG's Annual Reports and Accounts[83] to the House of Commons.[84] Publication of these reports is additionally protected by the Parliamentary Papers Act 1840, s 1, which grants to reports, papers, votes and proceedings ordered to be published by either House of Parliament an absolute privilege from criminal and/or civil liability. Additionally, this is relevant to the publication of reports by the President and chief executive of the UKSC.[85]

Judicial immunity is an historic common law principle,[86] namely that judges are privileged from personal actions for damages arising from all acts undertaken and all statements made in the course of their judicial duties. It also extends to acts

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78 The Supreme Court and Judicial Committee of the Privy Council, *Annual Report and Accounts* (HC 11, 2023).
79 CRA (n34), s 54.
80 BRNAA 2011, s 12(2).
81 May (n65), Part 2, ch 14, paras 14.1 and 14.14.
82 May (n65), Part 2, ch 13, para 13.12.
83 Eg, NAO, *Annual Report and Accounts 2022–23* (HC 1515, 2023).
84 Sched 2, para 25(8); and sched 3, para 9(3), to the BRNAA 2011.
85 CRA (n34), ss 5(A1) and 54(2).
86 Eg, *Mazhar v the Lord Chancellor* [2017] EWHC 2536 [43] (Ryder LJ), citing *Sirros v Moore* [1975] QB 118 [132D] (Lord Denning MR).

performed and words uttered without their jurisdiction, provided this occurred in good faith.[87]

Remuneration

Both remuneration schemes for the C&AG and UKSC Justices are designed to shield the officeholders from improper influence. These are "charged on and paid out of the Consolidated Fund"[88] which, as Gay writes:

> "…bypass[es] the annual supply procedure, whereby Parliament approves Government estimates [and] emphasises the constitutional separation from other Government expenditure".[89]

The delivery methods of these schemes somewhat diverge. The C&AG's salary is jointly decided by the PM and PAC, but must be untied to performance.[90] HM Treasury may vary pre-agreed pension arrangements by statutory instrument, subject to their annulment by the House of Commons. Conversely, UKSC judicial salaries are determined by the LC (who is under a statutory duty to defend judicial independence),[91] with the agreement of HM Treasury, but these may be increased, not reduced.[92] Pensions of UKSC Justices are governed by statute,[93] so are less variable than that of the C&AG.

Control, Audit and Judicial Review

The role of the C&AG is similarly challenging to that of the UKSC, because both require complex data analysis. Moreover, both the C&AG and UKSC are the final decision makers within each of their spheres – notwithstanding parliamentary sovereignty and exceptional appeals to international courts – so they are equally important therein.

Both judicial review and the control of the receipt and issue of public money can directly affect ministerial action. The UKSC may quash ultra vires acts – if

[87] *Oxford Dictionary of Law* (8th edn, OUP 2015) p 347.
[88] Cf BRNAA 2011, s 13(5); and CRA 2005, s 34(5).
[89] House of Commons Library: Parliament and Constitution Centre, *C&AG* (SN/PC/4595, 2008), p 4.
[90] BRNAA 2011, s 13(3).
[91] CRA (n34), s 3.
[92] CRA (n34), s 34, subss (2)–(4).
[93] CRA (n34), s 37.

they are illegal, irrational, or procedurally improper[94] and the C&AG may withhold monies from HM Treasury, where not legally granted by Parliament from HM Exchequer.[95] Furthermore, judicial review and audits of public accounts can indirectly affect public policy. Under the Human Rights Act 1998, the UKSC has the power to declare Acts of Parliament incompatible with the ECHR.[96] Nonetheless, the legislation remains intact[97] unless HM Government decides to amend the breach via a Remedial Order,[98] which must be approved by both Houses of Parliament.[99] Similarly, as Dicey put it, the C&AG:

> "…inquires into the legality of the purposes for which public money has been spent, and in [its] report to Parliament calls attention to any expenditure of doubtful legality."[100]

These reports are annually laid before the House of Commons, for detailed examination by the PAC, and may render value-for-money judgments. As shown by Gay and Winetrobe, reports from the C&AG/NAO can be a cause for sensitivity from auditees, for example, when the NAO criticised the House of Commons Commission's project management of the construction of Portcullis House.[101] Aside from embarrassment and loss of political capital, consequences thereafter include a minister having to answer, and possibly resign,[102] for departmental profligacy; the House of Commons withholding supply from HM Government; and/or MPs' accounting to their constituents at surgeries and elections.

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[94] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), cited in *Oxford Dictionary of Law* (8th edn, OUP 2015) p 347.
[95] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund 1982) p 205.
[96] HRA 1998, s 4.
[97] HRA (n96), s 6.
[98] HRA (n96), s 10.
[99] Sched 2, paras 2 and 4, to the HRA 1998.
[100] Dicey (n95), p 207, fn 17.
[101] House of Commons Commission, *First Report of Session 2001–02: Construction of Portcullis House, the new Parliamentary building: Response to the 63rd Report from the PAC (HC 861 2002) and to the Report of the C&AG* (HC 750, 2002), cited in: O Gay and BK Winetrobe, 'Officers of Parliament – Transforming the role (*The Constitution Unit*, Apr 2003) https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/100.pdf, p 15, accessed 9 May 2024.
[102] Although resignation of ministers appears to be an extraordinarily remote happenstance nowadays.

Differences

Their differences notwithstanding, the C&AG and UKSC Models are each intended to foster institutional independence. The C&AG and UKSC also differ in their spheres of operation. The C&AG's role tends towards quantitative analysis, because it examines the financial position of public bodies, whereas the UKSC's role tends towards qualitative analysis, because it decides how the law applies in unclear scenarios.

The most important difference is that the C&AG is a proactive office whereas the UKSC is a reactive one. Generally, the C&AG possesses the initiative to audit Government departments, public bodies and bodies mostly supported by public funds,[103] as it sees fit.[104] This is subject to "…[having] regard to any proposals made by the [PAC]"[105] and acting both economically and professionally.[106] Conversely, as stated by Webley and Samuels, UKSC Justices cannot exercise their jurisdiction "…in the absence of a claim being brought before them".[107] Furthermore, a claim may reach the UKSC only if leave to appeal has been obtained from the relevant appellate court of one of the three jurisdictions or, if first refused, from the Court itself.[108] Another important difference is that the C&AG is a corporation sole,[109] whereas the UKSC is a collegiate institution – notwithstanding its President and Deputy President[110] so the former's powers are more concentrated than the latter. A third important difference is that the C&AG lacks the enumerated qualifications of its counterparts on the UKSC.[111] However, all these important institutional differences argue in favour of the C&AG Model's effective translatability onto the UKSC Model, because the former maintains its impartiality despite it having more discretion and there being more discretion in its choice than the latter.

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[103] NAA 1983, Part II.

[104] BRNAA 2011, s 17(1).

[105] NAA 1983, s 7A.

[106] BRNAA 2011, s 17, subs (3)–(4).

[107] Lisa Webley and Harriet Samuels, *Public Law: Text, Cases and Materials* (3rd edn, Oxford University Press 2015), ch 14, p 425.

[108] 'A guide to bringing a case to The Supreme Court' (*Registry of the UKSC*, 2016) https://www.supremecourt.uk/docs/bringing-case-to-UKSC.pdf, pp 2–3, paras 1.5, 1.6 and 1.9, accessed 9th May 2024.

[109] BRNAA 2011, s 12(1).

[110] CRA (n34), s 23.

[111] CRA (n34), s 25, subss (1)(a)–(1)(c).

COMPARATIVE HISTORIES OF THE C&AG AND UKSC

Origins

The C&AG was created by the Exchequer and Audit Departments Act 1866, through the merger of the offices of Comptroller General of the Exchequer and the Commissioners of Audit.[112] The C&AG was appointed by the Crown-in-Council, by Letters Patent, and enjoyed office during good behaviour. It could be removed therefrom, by the Crown, pursuant to an address by both Houses of Parliament.[113] The office could not be occupied in conjunction with any ministerial or executive office nor membership of either House of Parliament. It was described as "… an Officer of the House [of Commons], and independent of the Treasury…".[114] However, HM Treasury had direction over which departments submitted accounts to the C&AG[115] and how;[116] recruitment and remuneration of the staff of the Exchequer and Audit Department;[117] and "the C&AG was nominated by the Treasury, usually from its own ranks".[118]

The UKSC was immediately preceded by the Appellate Committee of the House of Lords, whose judges consisted of the LC;[119] Law Lords;[120] and Peers of Parliament, who were current or former high judicial officeholders.[121] Law Lords were appointed by the Crown on prime ministerial advice, and held office during good behaviour, subject to mandatory retirement at 70. They could be removed therefrom, by the Crown, pursuant only to an address of both Houses of Parliament.[122] The appointment qualifications were mostly akin to the UKSC,[123] but the LC had a free hand in recommending nominees to the PM – notwithstanding secret soundings being taken from senior judges and counsel as to candidates'

[112] E&ADA 1866, ss 3 and 5 (as enacted).
[113] E&ADA (n112), s 3 (as enacted).
[114] HC Deb 16th Dec 1987, vol 124, c 1191.
[115] Cf E&ADA (n112), s 22 (as enacted); and E&ADA 1921, s. 3(1) (as enacted).
[116] Cf E&ADA (n112), s 23 (as enacted); and E&ADA 1921, s 9(1) (as enacted).
[117] E&ADA 1921, s 8, subss (1)-(2) (as enacted).
[118] HC Deb 16th Dec 1987, vol 124, c 1191.
[119] Appellate Jurisdiction Act 1876, s 5(1) (as enacted).
[120] Appellate Jurisdiction Act (n119), ss 5(2) and 6 (both as enacted).
[121] Appellate Jurisdiction Act (n119), s 5(3) (as enacted).
[122] Cf Appellate Jurisdiction Act 1876, s 6 (as enacted); and CRA 2005, s 33.
[123] Cf Appellate Jurisdiction Act (n119), s 6 (as enacted); and CRA 2005, s 25 subss (1)(a)–(1)(b).

competence.[124] Law Lords were created nonhereditary peers[125] and actively participated in the business of that House, except when doing so would later mean that they would have to recuse themselves from judicial proceedings.[126]

Independence from the Government

The National Audit Act 1983 was devised as an antidote to ministerial encroachment on the C&AG. Crucially, the 1983 Act made the Crown's power of appointment exercisable on an address presented by the House of Commons, which could be moved only by the PM acting in agreement with the PAC Chair.[127] It made the C&AG an explicitly ex officio member of the House of Commons[128] as well, and permitted the appointment as C&AG of anyone "…elected or sitting as a member [thereof]…".[129] It also replaced the E&AD with the NAO, which would have greater symbolic and substantial independence from HM Government. Its staff would have the status of public servants[130] and HM Treasury lost its unfettered discretion concerning which departments were audited[131] and by which staff.[132] The prime ministerial veto over the C&AG-designate was simply retained due to "...a need for the Government to have confidence in the person appointed because that person has unlimited access to all private papers and persons of the Government."[133]

The appellate jurisdiction of the House of Lords was abolished and replaced with the UKSC, in order to enhance judicial independence. Consistent with this, UKSC Justices are explicitly disqualified from membership of either House of Parliament.[134] Now, UKSC Justices-nominate are also recommended by a UKSCSC, whose recommendations the LC may now only accept, reject or require

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[124] House of Commons Constitutional Affairs Select Committee, *Judicial appointments and a Supreme Court (court of final appeal): First Report of Session 2003–04* (HC 48-I, 2004), vol 1, p 18, paras 48–49.
[125] Appellate Jurisdiction Act 1876, s 6 (as enacted).
[126] Eg, Royal Commission on the reform of the House of Lords, *A House for the Future* (CM 4534, 2000), p 93, para 9.6.
[127] NAA 1983, s 1(1) (as enacted).
[128] NAA (n127), s 1(2) (as enacted).
[129] E&ADA 1866, s 3 (as enacted).
[130] Ibid, s 3(5) (as enacted).
[131] NAA (n127), s 12(2) (as enacted).
[132] Sched 5 to NAA (n127).
[133] HC Deb 23rd Jan 2008, vol 470, c 1527.
[134] Cf Appellate Jurisdiction Act 1876, s 6 (as enacted); and CRA (n34), s 137.

reconsideration thereof. Lastly, the PM was relegated to being a conduit of this recommendation to the Crown, who formally appoints the Justices.

Both the C&AG and UKSC were reformed to be made more independent from the executive. Admittedly, the growing divergence between their appointment models is attributable to the intention for the former to become more dependent upon Parliament, as an officer thereof, and the latter to become more independent therefrom. However, the trajectorial differences of these reforms are immaterial because the result has been that both institutions are independent from the Government and Parliament. As noted by Professor Drewry of Royal Holloway London University, the mandatory ministerial and parliamentary concordance in the appointment of the C&AG "…[left] [it] in an independent position between the [Treasury and House of Commons]".[135]

Recruitment and Remuneration

The C&AG's recruitment procedure is a constitutional convention, per Jennings' tripartite test.[136] Its precedent was inaugurated in 2008; adhered to in 2019;[137] and the Tiner Report[138] recommended it, including public advertising of and competition for vacancies conducted by a recruitment panel.[139] With these modernisations, the C&AG Model became more greatly aligned with the UKSC Model. The BRNAA 2011 enabled remuneration arrangements to be agreed by the PM and PAC, as long as they were untied to performance,[140] so as to better attract candidates of sufficient calibre.[141]

The Crime and Courts Act 2013[142] amended the Constitutional Reform Act 2005, ss 28–31, so that UKSCSCs became governable by delegated legislation.[143] Consequently, the UKSC Model mirrored the C&AG Model's containment of fundamental appointment rules in statute and derivative ones in more alterable

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135 Professor Gavin Dewry, *Unpublished research for the NAO* (1983); cited in House of Commons Library: Parliament and Constitution Centre, *C&AG* (SN/PC/4595, 2008), p 4

136 Sir Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) p 134.

137 House of Commons PAC, *Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), pp 3–4, paras 4 and 8.

138 House of Commons: The Public Accounts Commission, *Review of the NAO's Corporate Governance: 14th Report* (HC 328, 2008.

139 House of Commons (n138), p 14, para 64.

140 BRNAA 2011, s 13(3).

141 House of Commons (n138), p14, para 66.

142 Sched 13, paras 5, 6 and 7(1)(b), to the 2013 Act.

143 The Supreme Court (Judicial Appointments) Regulations 2013.

sources. Delegated legislation is certainly more embedded and formal than constitutional convention. However, this greater formality is commensurate with the greater volume and frequency of appointments of UKSC Justices than C&AGs (twelvefold[144] within the same decade),[145] insofar as formal rules are easier to fairly and clearly replicate at scale. After prior consultation with the FMs of Scotland and Wales, NIJAC and senior judges,[146] said delegated legislation was to be issued by the LC – with the agreement of the senior UKSC Justice–[147] subject to the affirmative procedure.[148] UKSC Justices inherited the Law Lords' salary and pension arrangements.[149]

Pre-Appointment Hearings

The changes under the Budget Responsibility and National Audit Act (BRNAA) 2011 were accompanied by the Brown Government's publication of the Governance of Britain Green Paper,[150] which heralded the introduction of pre-appointment parliamentary hearings for:

> "…a number of positions in which Parliament has a particularly strong interest because the officeholder exercises statutory or other powers in relation to protecting the public's rights and interests."[151]

The C&AG was included on the list of offices to which these hearings would apply,[152] subject to the Liaison Committee's reservation that C&AG-designate would appear before the PAC after the PM and PAC Chair had agreed thereupon, but before the debate on the motion for its appointment.[153] This was agreed in

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[144] CRA (n34), s 23(2).

[145] 'Biographies of the Justices' (*UKSC*) https://www.supremecourt.uk/about/biographies-of-the-justices.html accessed 14 May 2024; and 'Former Justices' (*UKSC*) https://www.supremecourt.uk/about/former-justices.html accessed 14 May 2024.

[146] CRA (n34), s 27A(3).

[147] CRA (n34), s 27A(1).

[148] CRA (n34), s 144.

[149] CRA (n34), ss 34 and 37.

[150] Ministry of Justice ("MoJ"), *The Governance of Britain* (CM 7170, 2007).

[151] Ministry of Justice (n150), pp 28–29, paras 75–76.

[152] House of Commons Liaison Committee, *Pre–appointment hearings by select committees: First Report of Session 2007–08* (HC 384, 2008), p 12.

[153] House of Commons (n152), p 23; and House of Commons Liaison Committee, *Pre-appointment hearings by select committees: Government Response to the Committee's First Report of Session 2007–08* (HC 594, 2008), p 3, para 4.

order to maintain both the "…balance between the executive and this House and between the Government and Opposition" in the appointment of the C&AG, and "…perceptions of the C&AG's independence from the Government…".[154] Conversely, judicial pre-appointment hearings were earlier considered, but dismissed, by the Blair Government:[155]

> "The Government sees difficulty in such a procedure. MPs and lay peers would not necessarily be competent to assess the appointees' legal or judicial skills. If the intention was to assess their more general approach to issues of public importance, this would be inconsistent with the move to take the Supreme Court out of the potential political arena. One of the main intentions of the reform is to emphasise and enhance the independence of the Judiciary from both the executive and Parliament. Giving Parliament the right to decide or have a direct influence on who should be the members of the Court would cut right across that objective."[156]

Tenure

Sir John Bourn was C&AG from 1988–2008.[157] In recognition that his "…tenure [was] not matched in modern times",[158] the BRNAA 2011 limited the C&AG's indefinite tenure to a non-renewable term of ten years to:

> "…give the incumbent time to settle into the role and to become a strong and effective leader of the [NAO], while on the other hand mitigating the risk that the [NAO] becomes too closely associated with the personality of the Chief Executive over the longer term…refreshing the leadership of an organisation such as the NAO from time to time enables it to continually improve its performance and contribution."[159]

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[154] House of Commons (n153), p 22, para 16.
[155] MoJ, *The Governance of Britain*, p 28, para 71.
[156] House of Commons Constitutional Affairs Committee, *Judicial appointments and a Supreme Court (court of final appeal): First Report of Session 2003–04: Volume I* (HC 48–I, 2004), pp 26–27, para 83, fn 108.
[157] House of Commons Library: Parliament and Constitution Centre, *C&AG* (SN/PC/4595, 2008), pp 6 and 16.
[158] House of Commons Library (n157), p 4.
[159] House of Commons Library (n157), p 13, para 62.

Likewise, "…the principle of judicial independence necessarily makes it very difficult to force a judge to retire on the grounds of declining capacity to act…".[160] Avowedly, the mandatory judicial retirement age is a "blunt tool"[161] for reconciling these interests. UKSC Justices initially retained the Law Lords' mandatory retirement age,[162] but this was eventually relaxed to 75[163] in recognition that increasing lifespans suggest that judges can competently work into older age.[164]

TRANSLATION OF THE C&AG MODEL TO THE UKSC

Joint Committee on Judicial Appointments ("JCJA")

There should be a select committee concerned with appointments to the UKSC. Like Sir Thomas Legg, KC and Professors Hazell and Malleson (University College London and Queen Mary University of London respectively) –[165] I believe that it should be a joint committee,[166] because legislation is enacted by both Houses of Parliament (notwithstanding the Salisbury Addison convention[167] and the rare use of the House of Commons' overriding power).[168] The jurisprudence of the judges who interpret the law is pertinent to all parliamentarians for assessing the efficacy of legislation and the fidelity of its interpretation. This is the same rationale for the PAC being a select committee of the House of Commons, which has an exclusive competence in fiscal policy.[169] Fiscal decisions are the subject of the

[160] Constitution Committee: 25th Report of Session 2010–12, *Judicial Appointments* (HL Paper 272, 2012), p 59, para 191.
[161] Constitution Committee (n160), p 59, para 191.
[162] CRA (n34), s 35(3).
[163] Sched 1, para 25(2)(a), to Public Service Pensions and Judicial Offices Act 2022.
[164] Robert Buckland KC, MP et al, 'Judicial retirement age to rise to 75' (*MoJ*, 9th Mar 2021) https://www.gov.uk/government/news/judicial-retirement-age-to-rise-to-75 accessed 26 Apr 2024.
[165] Sir Thomas Legg KC, "Brave New World – The new Supreme Court and judicial appointments" (2004) Legal Studies vol 42, 45–54, p 46; and Hazell and Malleson (n46).
[166] Cf House of Commons and House of Lords Joint Committee on Human Rights, *Appointment of the Chair of the Equality and Human Rights Commission: 12th Report of Session 2019–21* (HC 1022 and HL Paper 180, 2020), p 3, para 1.
[167] May (n65), Part 2, ch 11, para 11.7.
[168] Parliament Act 1911, s 2.
[169] Parliament Act (n168), s 1.

C&AG, so (as observed by Gay and Winetrobe)[170] the House of Commons has exclusive responsibility for appointing it.

The JCJA should be distinct from the sponsoring departmental select committee, as is the PAC from the Treasury Select Committee, because it must be chaired by an Opposition MP.[171] While it is this article's thesis that mandatory bipartisanship is conducive for appointing non-partisans, this is an exceptional requirement for auditor and judicial independence. Government MPs should ordinarily be allowed to chair select committees of the House of Commons, because HM Government is usually the major party therein and – potential discrepancies between shares of votes and seats notwithstanding – therefore has the greatest democratic mandate.

The JCJA ought to be created by statute, instead of by the standing orders of Parliament, because it would be simpler if the various amendments and repeals to be made to CRA 2005, Part 3, were consolidated thereinto. The JCJA should possess the PAC's powers:

> "…to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to report from time to time, to appoint specialist advisers …and to adjourn from place to place".[172]

The JCJA should have 20 members, which would make it a quarter larger than the PAC, so that its quorum would be the same size as a UKSCSC (five).[173] Its membership should be nominated at the commencement of each Parliament,[174] and serve for the duration thereof, to balance public accountability with minimal interruption of office. Both the JCJA Chair and its Deputy should be elected by their respective Houses of Parliament by secret ballot,[175] in instant run-offs,[176] to consistently ensure that they would be independently chosen by majorities of parliamentarians. I would reinforce the C&AG Model by requiring that the Deputy JCJA Chair be a Crossbench peer, to ensure neutrality between the Government

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[170] O Gay and BK Winetrobe, 'Officers of Parliament – Transforming the role (*The Constitution Unit*, Apr 2003) https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/100.pdf, p 13, accessed 9 May 2024.

[171] Cf House of Commons, *Standing Orders: Public Business 2023* (HC 1932, 2023), p. 126, no 122B(8)(f).

[172] Cf House of Commons (n171), pp 152–153, no 148(1).

[173] Cf House of Commons (n171), p 130, no 124(1).

[174] Cf House of Commons (n171), pp 124 and 153, nos 122B(2) and 148(2).

[175] Cf House of Commons (n171), pp 124 and 126, no 122B, paras (1)(e) and (9).

[176] Cf House of Commons (n171), p 127, no 122B(11)(d).

and Opposition – during the pre-appointment hearing – and balance the roles of both Houses of Parliament. The remaining delegations to the JCJA (nine each) would be nominated by the respective Committees of Selection of both Houses of Parliament, in proportion to parties' numerical strength in each,[177] and approved by the whole House from which they are delegated.[178] The Financial Secretary to HM Treasury is an ex officio (but conventionally non-attending) member of the PAC,[179] but I propose the further step of disqualifying Ministers of the Crown from the JCJA.[180] Inasmuch as the JCJA Chair would recuse itself from the pre-appointment hearing, in order to facilitate an independent verdict on the UKSC Justice-nominate, it would be incoherent for HM Government to be capable of controlling said hearing through collective ministerial responsibility.[181]

The JCJA Chair and LC would co-nominate UKSC Justices and the rest of the JCJA would vet the nominees, in a pre-appointment hearing chaired by the Deputy JCJA Chair. The JCJA should copy the PAC's pre-appointment hearing procedure and incorporate Prof Hazell's recommendation[182] that the UKSC Justice-nominate should answer a written questionnaire, in advance, to economise the length of said hearing. Similar questionnaires are generally published "…at the time of the oral evidence session with the Committee",[183] so it would give the public a standard against which to measure the JCJA's behaviour. Consequently, the prospect of a UKSC Justice-nominate being ambushed during the hearing would be mitigated by making that unprofessionalism obvious to the populace. After the pre-appointment hearing, the JCJA would publish a positive, qualified or negative report[184] on the UKSC Justice-nominate.

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[177] Cf House of Commons (n171), p 82, no 86(2).

[178] Cf House of Commons (n171), p 123, no 121(2); and *House of Lords, Standing Orders: Public Business* (HL Paper 232, 2021), p 26, no 62(2).

[179] 'Holding Government to Account: 150 years of the PAC: 1857–2007' (*PAC*, 2007) https://www.parliament.uk/globalassets/documents/commons-committees/public-accounts/pac-history-booklet-pdf-version-p1.pdf, p 31, accessed 9 May 2024.

[180] Cf Justice and Security Act 2013, s 1(4)(b).

[181] *Oxford Dictionary of Law* (8th edn, OUP 2015) p 399.

[182] Professor R Hazell, 'Improving Parliamentary Scrutiny of Public Appointments' (*draft article for Parliamentary Affairs*, Jan 2018) https://discovery.ucl.ac.uk/id/eprint/10064625/3/Hazell_Parliamentary%20Scrutiny%20of%20Public%20Appointments%20v10%20for%20Liaison%20Cttee%2019%20Jan%2018.pdf, p 12, para 5, accessed 9 May 2024.

[183] House of Commons Treasury Committee, *The Treasury Committee's scrutiny of appointments: Eighth Report of Session 2015–16* (HC 811, 2016), p 13, para 34.

[184] Cf House of Commons Library, *Parliamentary Involvement in Public Appointments* (RP 08/39, 2008), pp 9–15.

UKSC Recruitment Panels ("UKSCRPs")

Secondary legislation regulating the composition and selection procedure of UKSCRPs should be delegated by the statute creating the JCJA,[185] so that these fine details would be more alterable than the broad principles contained in the latter source. The delegated legislation should continue to be made by the affirmative procedure,[186] but the senior UKSC Justice should be relegated to a consultee.[187] The purpose of adopting the C&AG Model is to reassert parliamentary control over appointments to the UKSC; therefore someone who is not a parliamentarian should not be able to veto compositional and/or procedural changes to UKSCRPs.

When a vacancy arises, or would be due to arise, the LC – who would be the minister responsible for the sponsoring department – should convene a UKSCRP chaired by the JCJA Chair and consist of the following UKSCRPlists, who would be non-voting but advisory. The second panellist would be the Permanent Secretary to the Ministry of Justice acting as agent for the LC. The third panellist should be the UKSC President (or its Deputy, when the Presidency is vacant),[188] because – like the NAO Chair[189] – it could expertly assess the candidate's credentials. The LC would appoint a counsel or solicitor as observer, because it would possess a supplemental qualification with which to verify the propriety of the nomination process. The observer should also be qualified in the same jurisdiction[190] as the nominee, in order to certify that a UKSCRP can "…ensure that between them [UKSC] judges will have knowledge of, and experience of practice in, the law of each part of the UK".[191] Empanelling laypeople would be superfluous, since the public would be represented through the JCJA Chair.

Vacancies on the UKSC would continue to be openly advertised and shortlisted with the assistance of recruitment consultants. The UKSCRP would consult stakeholders – such as the LC, FMs and senior judges –[192] on the drafting of the

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[185] Cf CRA (n34), Part 3.

[186] Cf CRA (n34), s 144, subss (4)-(5)(za).

[187] Cf CRA (n34), s 27A subss (1) and (3).

[188] Cf the Supreme Court (Judicial Appointments) Regulations 2013, r 5(1)(a).

[189] Sched 2 to BRNAA 2011.

[190] Cf the JAC Regulations 2013, r 4(1)(c); Sched 1, para 2(b), to Judiciary and Courts (Scotland) Act 2008; and Justice (Northern Ireland) Act 2002, s 3(5)(b).

[191] CRA (n34), s 27(8).

[192] Cf the Supreme Court (Judicial Appointments) Regulations 2013, r 18; and House of Commons PAC, *Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), p 4, para 10.

shortlist. Shortlisted candidates would then be interviewed by the UKSCRP, who would select its preferred candidate on merit.[193] The JCJA Chair should then write to the LC –[194] rather than PM – for its approval,[195] due to the volume and frequency of nominations to the UKSC. However, the PM should be notified when the LC approves of the UKSC Justice-nominate, to maintain Cabinet coherence. Were the LC to disapprove the UKSRP's preference, the latter should recommend another candidate and the previous steps should be repeated until a UKSC Justice-nominate has been agreed. Upon agreement, the JCJA should be convened for a pre-appointment hearing.

Appointment via an Address to the Crown

UKSC Justices would continue to be appointed by the Crown, by Letters Patent,[196] but this would be triggered by an address from the House of Commons. Motions for such addresses should be tabled after the JCJA's pre-appointment hearing report and be movable by a Minister of the Crown,[197] if seconded by the JCJA Chair,[198] in order to give the PM leeway to undertake or delegate[199] this duty. I would expect that the LC would conventionally move these motions, due to its involvement in the initial selection and the PM's time constraints. Once the debate on the motion is concluded, the Speaker puts the question to the House to be agreed or disagreed by relative majority.[200]

There is a mechanism for a joint address to the Crown[201], but its inclusion would undermine the democratisation goal of adopting the C&AG Model. Were the appointment of a UKSC Justice-nominate to be disputed by the House of

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[193] Cf. CRA (n34), s. 27(5); and Profs R Hazell and K Malleson, 'Increasing democratic accountability in the appointment of senior judges' (*UK Constitutional Law Association Blog*, 15th Jul 2011) https://ukconstitutionallaw.org/2011/07/15/robert-hazell-and-kate-malleson-increasing-democratic-accountability-in-the-appointment-of-senior-judges/ accessed 9 May 2024.

[194] Cf House of Commons PAC, *Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), p 4, para 11.

[195] Cf House of Commons PAC, *Selection of the new C&AG: 12th Report of Session 2008–09* (HC 256, 2009), p 5, para 7.

[196] Cf BRNAA 2011, s 11(2); and CRA 2005, s 23, subss (2) and (5).

[197] Cf BRNAA 2011, s 1, subss (3)–(4).

[198] Cf BRNAA 2011, s 11(5).

[199] Cf May (n65), Part 1, ch 6, para 6.44, fn 1.

[200] May (n65), Part 3, ch 20, para 20.60.

[201] E May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, (21st edn, TSO 1989), pp 565–66.

Lords, the Salisbury Addison convention would be unlikely to apply. This is because HM Government would have to have been able to time a manifesto pledge for a specific nomination to the UKSC, who would have to be agreeable with the yet to be elected Opposition JCJA Chair, with a vacancy emerging thereupon. The House of Lords' degree of influence over pre-appointment hearings would be appropriate, because it would be commensurate with its influence over the legislative process – that is, not ordinarily amounting to an outright veto thereover.

EFFICACY OF C&AG MODEL FOR UKSC APPOINTMENTS

Democratisation of the UKSC Model

Firstly, the people would elect the House of Commons. As argued by Bagehot,[202] this would be the electoral college for both HM Government, in which the Minister of the Crown would be holding a portfolio, and the JCJA Chair.[203] The Minister of the Crown would serve at HM pleasure and the JCJA Chair would serve throughout the Parliament, subject to their resignation or removal from office. Both would have to be MPs, in order to move and second the motion to address the Crown[204] from the House of Commons (inter alia),[205] so their mandates would be refreshed at most every fifth year.[206] Consequently, the corresponding constituents of the Minister of the Crown and the JCJA Chair would have direct access to one of the judicial co-nominators. The electorate would have the greatest input into the latter of this pair, because its election by majority in a secret ballot would insulate MPs from having to weigh direct pressure from party leaders against the wishes of their constituents. The other unelected UKSCRP lists are reconcilable with the primacy of the House of Commons, because their role is merely advisory.

Secondly, the House of Commons would have a veto over both its delegation to the JCJA, as nominated by its Committee of Selection, and the motion for the Crown to appoint the UKSC Justice-nominate. Therefore, constituents would have, via their MPs, an influence over which MPs would scrutinise a UKSC Justice-nominate and whether that nominee would be appointed to office. A division on such a motion could embarrass both the Government and Opposition,

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[202] Walter Bagehot, *The English Constitution* (Oxford University Press 2009), ch 6, p 99.
[203] Cf House of Commons, *Standing Orders: Public Business 2023* (HC 1932, 2023), p. 124, no 122B(1)(e).
[204] Cf BRNAA 2011, s 11, subss (3)–(5).
[205] Cf House of Commons, *Standing Orders: Public Business 2023* (HC 1932, 2023), p. 127, no 122C(1)(a).
[206] Dissolution and Calling of Parliament Act 2022, s 4.

by impugning their judgment, so both factions would be encouraged to solicit the support of a spectrum of MPs.

Thirdly, the Minister of the Crown and the JCJA Chair would be bilaterally responsible for their UKSC nominations, because these motions would be possible only with their agreement. Consequently, the PM would be responsible if it moved the motion to render the appointment after the LC had approved the UKSCRP's preference. In line with the convention of individual ministerial responsibility,[207] the Minister of the Crown and JCJA Chair would be expected to answer for questionable judicial nominations and, if necessary, resign.[208] The distinction would be that the latter would be appearing as a witness before the JCJA, rather than the House of Commons during question time. Likewise, the sanction for failing to adhere to this standard would be the JCJA resolving that it lacks confidence in its Chair[209] and the House of Commons resolving that it lacks confidence in HM Government.

By way of addendum, Professor Horne has noted "…the use of unelected Peers would detract from the democratic nature of the [judicial appointments] process".[210] This is a nonfatal objection, however, because the involvement of the House of Lords is reconcilable with the primacy of the House of Commons. The JCJA Chair could be removed from office only if the MPs thereon consented[211] to a resolution of no confidence therein. Additionally, the JCJA's verdict against recommending their nominee to the UKSC would be advisory only; the final decision to confirm the appointment would be for the House of Commons.

Politicisation of Judicial Appointments

There are multiple reasons to believe that the C&AG Model would translate its impartial process to appointments to the UKSC rather than turn it into a bench perceived to be coloured by party politics, like the Supreme Court of the US.[212]

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207 *Oxford Dictionary of Law* (8th edn, OUP 2015) p 399.

208 Cf House of Commons, *Standing Orders: Public Business 2023* (HC 1932, 2023), p. 127, no 122C(1)(b).

209 Cf House of Commons (n208), p 128, no 122C, paras (3)–(4).

210 Professor A Horne, 'Is there a case for greater legislative involvement in the judicial appointments process?' (2014) The Study of Parliament Group Paper No 3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412034, p 66 accessed 8 May 2024.

211 Cf House of Commons (n208), p 128, no 122C, paras (1)(c) and (4).

212 Although that is not always so – an example being the Warren Court – Chief Justice Earl Warren was nominated/appointed by a Republican President. Consisting of conservative and more liberal judges the Court was not generally perceived as being

Firstly, noting (University College London) Professor Thomas' argument,[213] pre-appointment hearings would not alter the fact that the UKSC lack the powers for generating the same political stakes in its composition as the SCOTUS. Parliamentary sovereignty means that judges cannot strike down Acts of the British Parliament, which is unlikely to change unless the UK reaccedes to the European Union.[214] Declarations of incompatibility also take effect only if the Government and Parliament decide to remedy the incompatible legislation. The UKSC, unlike the SCOTUS,[215] is therefore not a backdoor to constitutional amendment. It also lacks the perverse incentive to become one, because the British constitution can be amended by a parliamentary majority[216] in which the House of Commons may trump the House of Lords.[217] Conversely, amendments to the US Constitution must be proposed by two thirds majorities of both Houses of Congress – or a federal Convention, for which two thirds of State legislatures have applied – and ratified by three quarters of State legislatures or conventions.[218] Additionally, noting Professor Thomas' other argument,[219] the typically shorter tenure UKSC

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tainted by which judge was nominated/appointed by which political party. Further, the Burger Court (Chief Justice Burger nominated/appointed by President Nixon and consisting of Republican and Democrat nominees/appointees) decided unanimously against President Nixon's contention that the White House 'Watergate tapes' not be released: United States v. Nixon | 418 U.S. 683 (1974) | Justia U.S. Supreme Court Center accessed 27 September 2024. This unanimity did not follow, however, in the Gore/Bush dispute, the Court splitting along Republican/Democrat lines: Bush v. Gore | 531 U.S. 98 (2000) | Justia U.S. Supreme Court Center accessed 27 September 2024.

[213] Professor C Thomas, 'Giving Judges a Voice in Democracies' (*Inner Temple*, 16th Nov2020)https://www.innertemple.org.uk/education/education-resources/readers-lecture-series/giving-judges-a-voice-in-democracies/ accessed 9 May 2024.

[214] Cf *Factortame (No 2)* [1991] 1 AC 603.

[215] Eg, Roe v Wade, 410 US 113 (1973); and Dobbs v Jackson Women's Health Organization, 597 US (2022).

[216] Nb the legally non-binding referenda on EEC/EU membership, in 1975 and 2016; and adopting the Alternative Vote, in 2011.

[217] Parliament Act 1911, s 2.

[218] The Constitution of the USA, Art V, and see Jocelynne A Scutt, 'CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION, WRONGS RIGHTED OR REACTION & REITERATION' | The Denning Law Journal (ubplj.org) accessed 27 September 2024.

[219] Constitution Committee, 'Inquiry on Judicial Appointments Process: Unrevised transcript of evidence' (*House of Lords*, 6th Jul 2011) https://www.parliament.uk/globalassets/documents/lords-committees/constitution/JAP/corrCNST060711ev1.pdf, p. 14, q 15, accessed 14 May 2024.

Justices – which is compressed between minimum judicial and/or legal experience and a mandatory retirement age – means that they are unlikely to be in the position to shape public policy for years after their appointers have left office. The argument that a shallower[220] and narrower[221] ambit for judicial review – even alongside entrenchment clauses –[222] tends towards less political contention is evidenced by the Supreme of Court Canada. It did not impinge upon the impartiality of Justice Rothstein, when a committee of the Canadian House of Commons subjected him to a pre-appointment hearing. Due to their equivalent powers and tenures, Professor Hogg (formerly Osgoode Hall)'s reasoning as to why pre-appointment hearings were not liable to politicise the Canadian Supreme Court would therefore apply to its British counterpart:

> "…we have a weaker form of judicial review in Canada under the Charter of Rights and Freedoms than the strong form of judicial review in the United States. Judicial decisions striking down laws on Charter grounds usually leave room for…and usually get a legislative response that accomplishes the objective of the law that was struck down. Court packing and court bashing are not as necessary in Canada as American politicians perceive them to be in America."[223]

Secondly, bipartisan support would moderate the jurisprudence of the UKSC Justice-nominate, to the extent that political ideology informs jurisprudence, otherwise nominations would be deadlocked. Similarly, Government and Opposition members of the JCJA would be interested in avoiding public embarrassment to the nominee, in the pre-appointment hearing, because both factions would be ultimately and equally culpable if a candidate were made to be seen as an injudicious choice. I argue that this is why, respecting the appointment of C&AG-designates, the PAC has always produced positive pre-appointment hearing reports and the House of Commons has gone to division (with little opposition) only once.[224]

Thirdly, the procedural restrictions of the C&AG Model would make it difficult for the LC and JCJA Chair to nominate a candidate merely based on party-political considerations. Open advertisement would continue to safeguard

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[220] Canadian Charter of Rights and Freedoms, s 33.
[221] The Supreme Court Act 1985, ss 5, 5.1, 6, 6.1 and 9(2).
[222] Canada Act 1982, Part V.
[223] Professor Peter W Hogg, 'Appointment of Justice Marshall Rothstein to the Supreme Court of Canada' (2006) 44 Osgoode Hall Law Journal 527–538, p 533.
[224] HC Deb 16th Dec 1987, vol 124, c 1204.

against nepotism, to the extent that that would even still be possible with bipartisan nomination, since the most qualified applicants would be publicly invited to compete against more politically favoured ones. The composition of the UKSCRP would also be conducive towards unbiased selection, because both the UKSC President and the Permanent Secretary to the MoJ would be bound by the expectations of them to each maintain judicial and civil service neutrality.[225] The observer would also have the incentive to properly verify procedural propriety, because doing so would be to the benefit of his professional reputation (and vice-versa). The lynchpin for ensuring that all these procedural safeguards operate as intended would be the public pre-appointment hearing, because – as Professor Hazell writes – it "…generally serve[s] multiple purposes, with the main ones being… to probe the openness and fairness of the recruitment process".[226]

Fourthly, the C&AG Model would be unlikely to either deter potential UKSC candidates from applying for nomination or to perversely incentivise said candidates into adopting partisan traits, in order to be appointed to office. UKSC Justices must be able to maintain their independence in the face of the intense parliamentary and public scrutiny to which they are subjected.[227] Accordingly, a firm but fair pre-appointment questioning by the JCJA would be a meaningful and desirable test of a UKSC Justice-nominee's mettle[228] and would only deter someone who was already deterred by said scrutiny.[229] Beyond that, Professor Hazell and others have observed that the Liaison Committee Guidelines for Select Committees Holding Pre-Appointment Hearings – which would oblige the Deputy JCJA Chair "…to intervene if, in [its] opinion…questions [were] irrelevant, unduly personal or partisan, or discriminatory" –[230] have been followed in around 90 percent of hearings, with less than five percent having been "…deemed to be

[225] Constitutional Reform and Governance Act 2010, s 7(4)(b).

[226] Professor R Hazell, 'Improving Parliamentary Scrutiny of Public Appointments' (*draft article for Parliamentary Affairs*, Jan 2018) https://discovery.ucl.ac.uk/id/eprint/10064625/3/Hazell_Parliamentary%20Scrutiny%20of%20Public%20Appointments%20v10%20for%20Liaison%20Cttee%2019%20Jan%2018.pdf, p 12, para. 5, accessed 9th May 2024.

[227] Cf House of Commons PAC, *Oral evidence: Pre-appointment hearing: preferred candidate for C&AG* (HC 1883, 2019), q 62.

[228] Cf Liaison Committee Guidelines for Select Committees Holding Pre-Appointment Hearings, p 4, para 17.

[229] Cf House of Commons Liaison Committee, *The Work of Committees in Session 2008–09: Second Report of Session 2009–10* (HC 426, 2010), Annex 3, pp 109–110, para 5.3.4.

[230] Liaison Committee Guidelines for Select Committees Holding Pre-Appointment Hearings, p 4, para 17.

irrelevant, aggressive or politicised".[231] In the comparable Canadian context, Professor Hogg – when he chaired the pre-appointment hearing –[232] also limited the committee from asking Justice Rothstein why he had ruled on previous cases; how he would rule on hypothetical cases; and his underlying beliefs. These are the kinds of questions which, had they been asked, the Constitution Committee would have described as having "…undermin[ed] the independence of those subsequently appointed or appear[ed] to pre-judge their future decisions".[233] The integrity of the questioning would be buttressed by the fact that the UKSC Justice-nominate would see the JCJA's questions prior to the pre-appointment hearing and would therefore be able to prepare their best answers, flag up any problematic questions or, in extremis, withdraw from the process. Avoidance of embarrassment to UKSC Justices-nominate would contribute to maintaining a non-partisan process, because it would likely remain welcoming to those unaccustomed to acting in a manner calculated to their political benefit – in other words, non-partisans.

Fifthly, there would not be a risk of appointing lame duck[234] Justices to the UKSC, where the Minister of the Crown and the JCJA Chair tabled a corresponding motion to address the Crown, in spite of a negative or qualified recommendation from the JCJA. That decision would ultimately be for the House of Commons – which would represent more of the electorate, more directly, than either the Government or JCJA – so the UKSC Justice would nevertheless enjoy a democratic mandate.

Competence of Judicial Recruiters

The competence of the UKSC Presidents and lawyers to sit as UKSCSCers is reasonably undisputed, due to their qualifications and experience, so I will presume their competence to act on analogous UKSCRPs. Likewise, the debate around greater political involvement in judicial recruitment generally recognises the proficiency of legally qualified parliamentarians, for example, the King's Counsel appointed to the House of Lords. This debate also tends to accept the competence of the LC and, by extension, the MoJ to do so. This is a reasonable presumption,

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[231] Professor R Hazell et al, 'Improving Parliamentary Scrutiny of Public Appointments' (*The Constitution Unit*, Jul 2017*) https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/pre-appt-scrutiny.pdf*, p 44, para 7.9, accessed 9th May 2024.

[232] Hogg (n223), p 538.

[233] Constitution Committee, *Judicial Appointments* (HL Paper 272, 2012), p 19, para 46

[234] House of Commons Library, *Parliamentary Involvement in Public Appointments* (Research Paper 39, 2008), pp 41–42, para VC.

even after the CRA 2005 reforms to the office,[235] because most LCs have been lawyers[236] and the MoJ has departmental expertise in administering judicial policy.

In contrast with the conclusion of the Blair Government and Constitution Committee, even lay parliamentarians would be "…competent to assess the [UKSC] appointees' legal or judicial skills".[237] They can enact, amend and repeal legislation – so consistency suggests that they would be able to recruit those who would be faithfully interpreting it. Common law may be distinct from statute, but it is subordinate to the latter thus this distinction fails to prove lay parliamentarians' inadequacy to the task. Moreover, concern as to their legal credentials would be misplaced, because two fifths of a UKSCSC must be lay members.[238] All else being equal, lay parliamentarians would surely possess the same capacity for identifying judicial quality which is possessed by lay UKSCSCers, because they would have legislative experience atop the shared absence of professional qualifications. Further or alternatively, the JCJA Chair (who may be a layperson) would have the most direct access to judicial expertise at the (shortlisting and interview) stages when the greatest degree of discernment between judicial candidates would be required.

Finally, MPs – especially on the PAC – are not necessarily accountants yet they have competently recruited C&AGs, without politicising the office, for five decades. For the latter two, MPs have also robustly, but fairly, questioned C&AGs-designate on matters which are also relevant to judicial performance, such as their collegiality and ability to act dispassionately. Accordingly, lay parliamentarians could use those same skills for competently recruiting UKSC Justices.

Diary Capacity for Judicial Recruitment

The roles of the UKSC President, observer and LC on or in relation to UKSCRPs are analogous to their roles on or in relation to UKSCSCs, so they would presumably possess the requisite time therefor. The JCJA Chair would likely possess enough time for chairing a UKSCRP, because that would be a part time role and MPs often have these – as ministers or select committee chairs, for

[235] CRA (n34), Part 2.

[236] Lord Chancellor and Secretary of State for Justice (*GOV.UK*, 2024) https://www.gov.uk/government/ministers/secretary-of-state-for-justice accessed 29 Apr 2024.

[237] House of Commons Constitutional Affairs Committee, *Judicial appointments and a Supreme Court (court of final appeal): First Report of Session 2003–04: Volume I* (HC 48-I, 2004), pp 26–27, para 83.

[238] The Supreme Court (Judicial Appointment Regulations) 2013, rr 5(2) and 13(3).

example. The Permanent Secretary to the MoJ would also likely have enough time for sitting as a UKSCRPlist, because the MoJ has from time to time employed a Second Permanent Secretary[239] to whom the former could temporarily delegate its functions.

The JCJA would also be convening as regularly as UKSCSCs currently do and its quorum would be equal to a UKSCSC. Given that UKSCSCers and PAC members have other responsibilities, enough JCJA members would probably possess the time for its work. Moreover, half of the JCJA membership would be peers and, lacking constituency responsibilities, would have the flexibility to reconcile their diaries with their colleagues from the House of Commons. The PAC may have to engage in the selection of a C&AG once per decade only, but this reduced workload is made up for by its responsibility for scrutinising public accounts – which includes writing two reports per week –[240] and its role in selecting the NAO Chair every third year.[241] The JCJA would be solely responsible for pre-appointment hearings, therefore it would have time for vetting the more numerous and frequent UKSC nominations. Besides, these hearings would both be reasonably short and infrequent, lasting on average an hour and a half [242] every fifth year.[243] It is similarly presumable that there would be available parliamentary time for the motions to address to the Crown, since these debates would be short[244] even on the rare occasion they were to go to division.[245]

There would be a potential risk – practically small, because the UKSC sits in panels – of vacancies on the UKSC remaining unfilled, when Parliament is in recess. The solution would be to provide that the Crown-in-Council could appoint acting UKSC Justices, during a parliamentary recess, by Letters Patent which

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[239] MoJ, 'Appointment of Jo Farrar as Second Permanent Secretary at the MoJ' (*GOV. UK*, 2021), https://www.gov.uk/government/news/appointment-of-jo-farrar-as-second-permanent-secretary-at-the-ministry-of-justice accessed 9 May 2024.

[240] House of Commons PAC, *Selection of the new C&AG: 12th Report of Session 2008–09* (HC 256, 2009), evv 9, q 54.

[241] Sched 2, paras 3 and 5, to BRNAA 2011.

[242] 'PAC: Wed 11th Feb 2009' (*Parliament Live*, 11th Feb 2009) https://www.parliamentlive.tv/Event/Index/22a08350-5893-4198-b84a-0d5c8f12514a accessed 9th May 2024; and 'PAC: Wed 16th Jan 2019' (*Parliament Live*, 16th Jan 2019) https://www.parliamentlive.tv/Event/Index/8b4b70de-8f01-4c94-b740-f41a9acd3806 accessed 9 May 2024.

[243] 'Biographies of the Justices' (*UKSC*) https://www.supremecourt.uk/about/biographies-of-the-justices.html accessed 9 May 2024; and 'Former Justices' (*UKSC*) https://www.supremecourt.uk/about/former-justices.html accessed 9 May 2024.

[244] Cf HC Deb 23rd Jan 2008, vol 470, cc 1520–1535; HC Deb 20th May 2009, vol 492, cc 1521–1531; and HC Deb 6th Mar 2019, vol 655, cc 1000-1005.

[245] HC Deb 16th Dec 1987, vol 124, cc 1185–1204.

were countersigned by the JCJA Chair and whose commissions would expire at the end of the next parliamentary session.[246] The choice should continue to be limited to senior territorial judges[247] or the supplementary panel envisaged by the CRA 2005,[248] to ensure that temporary appointees are subject to at most an equal behavioural incentive – regarding promotion to higher office – to a judge lower down on the judicial hierarchy.

Miscellaneous Objections to Pre-Appointment Hearings

I will succinctly treat the host of other objections to pre-appointment hearings, which are relevant to the UKSC. Firstly, certain public appointees, such as the Chair of the Financial Conduct Authority,[249] are instead subject to pre-commencement hearings due to their market sensitivity.[250] Appointments to the UKSC do not possess that kind of market sensitivity, because their supervisory jurisdiction over the exercise of public power, by bodies such as the FCA,[251] only amounts to an indirect market oversight. Also, these powers may only be exercised in response to a claim being brought before it, whereas the FCA may act on its own initiative.[252]

Secondly, the JCJA would be unlikely to appear unjustifiably weak due to its pre-appointment report being ignored. In the rare instance[253] in which this were to happen, the JCJA may not necessarily appear weak. If weakness is appraised in terms of other institutions conforming to its preference, then it might do – subject to the degree of contention, and thus room for reasonable disagreement, between differently composed institutions. However, it might appear justifiably weak, because the House of Commons' power to override a joint committee of elected Members and unelected Peers of Parliament would be a democratic safeguard. The JCJA might appear strong – if strength is appraised in terms of the intellectual value provided by an institution – because its pre-appointment hearing would be the most recent, comprehensive and public examination of the UKSC Justice-nominate and the recruitment process thereof. Accordingly, that examination

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[246] Cf Constitution of the USA, Art II, s 12.
[247] CRA (n34), s 38.
[248] CRA (n34), ss 38–39.
[249] House of Commons Library, *Pre-appointment hearings* (Briefing Paper no 04387, 2017), p 22, para 4.6.1.
[250] MoJ, *The Governance of Britain*, p 29, para 79.
[251] Eg, *R (ex parte APPG on Fair Business Banking) v FCA* [2023] EWHC 1616 (Admin)
[252] Financial Services and Markets Act 2000, ss 1B-1EB.
[253] Cf House of Commons Library, *Pre-appointment hearings* (Briefing Paper no 04387, 2017), pp 9–10, para 2.1.

could be used by the public as a standard against which to measure the UKSC Justice's performance and evaluate whether or not future similar judges ought to be selected in a similar fashion.

Thirdly, it would be quite unlikely for parliamentary involvement to make appointments to the UKSC challengeable, via judicial review[254], because they would be exercisable on an address to the Crown by the House of Commons. Although Parliament is within the scope of the ECHR –[255] which would be relevant only to the extent that the JCJA could hypothetically impinge on a UKSC Justice-nominee's Art 8 right to respect for private and family life by intrusive questioning –[256] it is without the scope of domestic courts, due to the Bill of Rights 1689, Art IX.

CONCLUSION

The crux of the debate concerning the proper extent of ministerial and especially parliamentary involvement in judicial appointments is the interpretation of judicial independence. The narrow interpretation is merely the visible absence of prejudice or improper influences on adjudication, because that is required for a judge to decide and to be seen to decide a matter solely based on the evidence before it. Alternatively, the broad interpretation of judicial independence prohibits substantial ministerial and parliamentary involvement in judicial appointments, insofar as that would inherently expose judges to improper influence and permit judges to have likeminded prejudices. The democratic deficit of the UKSC Model is a product of this latter interpretation, because UKSCSCs are divorced from ministers; the parliamentarians to whom they are accountable; and the voters to whom those parliamentarians are themselves accountable. Conversely, the C&AG Model would rectify this democratic deficit, because the public would both indirectly elect the persons who would co-nominate UKSC Justices and directly elect those who would approve the appointment thereof.

The C&AG and the UKSC are fundamentally similar, because both institutions neutrally interpose in and decide complex contentions or potential contentions between the Government and Parliament (inter alia). Both also have the power to directly and indirectly affect public policy, to similar degrees, hence so many protections of auditor and judicial independence are shared. The differing intentions for the different protections of the C&AG and UKSC are unimportant,

[254] House of Commons Library, *Parliamentary Involvement in Public Appointments* (Research Paper 39, 2008), para VD, pp 43–44.

[255] Eg, *A v United Kingdom* (Application 35373/97) (2002) 36 EHRR 917, ECtHR.

[256] Cf House of Commons Library (n254), para VD, p 43.

because – despite having and being the product of greater official discretion – the former is and must continue to be in an independent position between the Government and Parliament. As the Blair Government and Constitution Committee have said, such a position is and would continue to be desirable of UKSC Justices. Given that the C&AG and UKSC are subject to comparable inputs, the C&AG Model can be reasonably expected to reproduce its outcomes if translated onto the latter. To the extent of any doubt as to its translatability, comparison between the UK, US and Canada demonstrates that a Supreme Court's propensity towards partisanship stems from a combination of strong powers; indefinite tenure; and constitutional entrenchment – not legislative involvement in appointments thereto – because the former three factors empower the judiciary relative to the other branches of government.

The primary insight from the C&AG Model is that a bipartisan appointment model negates and is perceived as negating the competing ideologies of the co-nominators; encourages successful cooperation by conferring bilateral responsibility for the nomination; and is thereby conducive to non-partisan appointees. The C&AG Model's translation onto UKSC judicial appointments would also be straightforward, as the new judicial recruitment institutions would be staffed by analogous departmental and parliamentary personnel. The C&AG Model may have to be adapted to appointments to the UKSC by engaging both Houses of Parliament, but both design choices would be the consequence of marrying the functions of the appointing body with those of the officeholder. Similarly, the C&AG Model may need to be adapted to the greater volume and frequency of appointments to the UKSC to fairly and clearly replicate its outcomes at scale, but these adaptations dovetail with the current UKSC Model. Critically, the translation would retain the institutional dominance of the House of Commons.

The two preceding paragraphs being established, the broad interpretation of judicial independence is excessive. Reconciliation of ministerial and parliamentarian coaction in judicial appointments could effectuate, rather than compromise, judicial independence. This reconciliation is desirable, since it would give individuals – through their representatives – appropriate power to determine the composition of the Court with the final interpretation of the laws passed on their behalf.