Pandering Judges*

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Abstract

Tenured public officials such as judges are often thought to be indifferent to the concerns of the electorate and, as a result, potentially lacking in discipline but unlikely to pander to public opinion. We investigate this proposition empirically using data on promotion decisions taken by senior English judges between 1985 and 2005. Throughout this period the popular view was one of ill-disciplined elitism: senior judges were alleged to be favouring candidates from elite backgrounds over their equally capable non-elite counterparts. We find no evidence of such ill-discipline; most of the unconditional difference in promotion prospects between the two groups can simply be explained by differences in promotion-relevant characteristics. However, exploiting an unexpected proposal to remove control over promotions from the judiciary, we do find evidence of pandering. When faced by the prospect of losing autonomy, senior judges began to favour non-elite candidates, as well as candidates who were unconnected to members of the promotion committee. Our finding that tenured public officials can display both the upsides and downsides of electoral accountability has implications for the literature on political agency, as well as recent constitutional reforms.

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1 Introduction

The wisdom of subjecting public officials to democratic accountability continues to stimulate debate. The first generation of agency-theoretic models (Barro 1973, Ferejohn 1986) highlighted that elections could 'discipline' bad types. More recently, it has been argued that electoral incentives could result in 'pandering' −excessive catering to public opinion− by good types (Canes-Wrones et al 2001). This tension, coupled with evidence on the association between political constitutions and economic performance (Persson and Tabellini 2003), has renewed interest in the normative study of decision-making powers, i.e. who *should* get to decide what?

The typical approach within this field is to conflate unaccountability with tenure. Maskin and Tirole (2004), for instance, contrast an official who will stand for re-election −a "politician"− with a tenured official who, as a result of his job security, pays no heed to beliefs held by voters −a "judge"− (see also Eggertsson and Le Borgne 2006 and Schultz 2008). While useful as a modelling shortcut, caution is needed in drawing prescriptions for policy, especially those based on an assumption that tenured officials attach no weight to voters' preferences. Given the inalienable power of the Executive, decisions can be removed from tenured public officials even if employment cannot. If, as intuition suggests, public officials are keen to retain their decision-making power, then they may be accountable after all. Consequently, tenured officials may be more attractive than previously thought if such accountability is a disciplining force, but less attractive if it creates distortions similar to those alluded to for politicians.

It is one thing to urge for more a circumspect approach to modelling tenured officials on the basis of intuition, but quite another to document the presence of discipline and/or pandering in actual behaviour. As with predictions from *political* agency models, empirical evidence in this area is sorely lacking (Besley 2006). The objective of this paper is to make such a contribution. Using a unique new data set, we study the behaviour of "judges" and find evidence consistent with both the upsides and downsides of accountability.

Purposely, we focus on a scenario where in principle it would seem unlikely to find evidence of discipline and even more of pandering, namely the senior English judiciary. Senior judges are the preeminent example of public officials with lifetime tenure, which is clearly a minimum requirement for our purposes. We focus on the *English* case for two reasons.[1] First, in England, judicial resignations are extremely rare.[2] Since senior judges are already at the top of the hierachy, career concerns are unlikely to be an important force.[3] Second, the English judiciary is highly unrepresentative of the population it serves and commonly criticised for being elitist. For instance, a recent study by an educational pressure group lamented the fact

[1] We use English to refer to England and Wales. Scotland and Northern Ireland have separate legal systems.

[2] The resignation of a High Court judge in June 2005 was the first in 35 years and "risked the disapproval of the legal establishment by breaking the unwritten convention that the bench is a life sentence ended only by retirement or death", *The Guardian*, June 23 2005.

[3] This observation distinguishes our "judges" from the "bureaucrats" studied by Alesina and Tabellini (2007).

that over 50% of senior English judges had attended boarding schools (the most prestigious private schools) compared to just 1% of the general population (Sutton Trust 2005). Such a skewed social background makes it highly likely that judicial policy preferences will differ to those of the average citizen. This should translate, given the lack of discipline usually associated with tenured officials, into decisions divergent from those preferred by the median voter.

In addition to hearing cases, an important function performed by senior English judges has been to select future colleagues.[4] These appointment decisions −specifically, the decisions by promotion committees formed to fill vacancies in the Court of Appeal between 1985 and 2005− are the basis of our study. Again, this focus is easy to motivate. An obvious benefit is that it is easy to define a given promotion committee's action space: picking a candidate from the 100 or so judges serving in the High Court for the (exogenously determined) vacancy in the Court of Appeal. More importantly, the public perception was one of elitism; an observation that was widely cited by the Labour Government when stating the case for recent reforms. Assuming that official selection criteria reflect the preferences of the average citizen, it is therefore straightforward to define the equilibria highlighted by the theoretical literature. Selection of the candidate that most closely meets the official criteria can be interpreted as either a congruent or disciplined decision. A lack of discipline would instead correspond to favouring elite candidates or, to use the words of a former law lord, selecting "chaps like ourselves". Finally, we can interpret favourtism towards non-elite candidates as pandering to the electorate.

Having described the relevant legal institutions and explained how candidates are expected to meet the official criteria, in Section 3 we ask whether there is any evidence that senior judges did favour elite candidates. We start by presenting the raw data: the promotion prospects of the 275 judges serving in the High Court between 1985 and 2005. Consistent with the popular stereotype, elite judges were substantially more likely to be promoted, even after adjusting for censoring.

We explore whether this was due to favourtism in a number of different ways. First, using a discrete choice model of promotion committee decision making, we ask whether the elite differential: (i) is unresponsive to controlling for officially relevant candidate endowments; (ii) falls when controlling for endowments argued to be the micro-foundation for favourtism by political and legal commentators (personal ties to members of the promotion committee such as attending the same school or practising from the same chambers); and/or (iii) is lower for 'high stakes' vacancies generated by promotions to the House of Lords. Then, using a model of intellectual influence based on Palacios-Huerta and Volij (2004), we ask (iv) whether promoted non-elite judges outperformed promoted elite judges once in the Court of Appeal. Under the

[4]While senior judges play no role in selecting judges in the US, this is a task performed by judges in many jurisdictions. Thomas (1997) documents that judges sit on appointments committees in most Western European countries. A substantial proportion of these appointing judges are nominated by the judiciary itself, e.g. of the 33 members of Consiglio superiore della magistratura (the institution responsible for judicial appointments in Italy), 20 are directly chosen by the judiciary.

favourtism interpretation, the answers to these questions should be positive. With our answers consistently *negative*, we argue that favourtism of elites seems unlikely. Instead, the evidence from tests (i) and (iv) suggests that the raw differential is due to the fact that elite candidates were better endowed with promotion-relevant characteristics.

On this basis one might tentatively conclude that the average promotion committee was either congruent or disciplined by some form of accountability. This is somewhat premature, however. An interesting finding that emerges in test (ii) is that, controlling for promotion-relevant characteristics, personal ties to members of the promotion committee were associated with a *lower* chance of promotion. Clearly, this is reminiscent of pandering. We proceed to examine this hypothesis by identifying a time period in which the source of accountability discussed −the threat to remove decision-making power− dramatically increased.

The period we use is 2003-2005. In June 2003, the British Prime Minister took the legal world by surprise by announcing that responsibility for judicial appointments was to be transferred to a new commission that would act in conjunction with an elected cabinet minister. This announcement raised the possibility that senior judges would lose *de facto* control of promotions to lay commissioners and politicians. Critically for our purposes, the details of the reform −including the amount of power that judges would hold in the future− were not settled until March 2005. Between these dates, the senior judiciary openly lobbied the Government for more power under the new system, while still promoting judges under the old one. Clearly, these decisions (18% of our sample) were made under the threat of reform, with obvious returns to minimising perceptions of favourtism.

In Section 4 we disaggregate our results either side of this unexpected shock to the system. Our findings are consistent with the view that there was an increase in accountability and that this produced pandering behaviour. In the period before June 2003 the raw elite differential and the raw connected differential (at least one personal tie to the committee) were positive. In the period after June 2003 both decreased, with the raw connected differential actually becoming *negative*. Using our discrete choice model to control for committee and candidate characteristics strengthens our findings. The partial effect of elite status was significantly smaller (in fact negative), and the (weakly negative) association between personal ties and promotion prospects significantly stronger, after the announcement.

Our findings suggest that insulation from the electorate is never perfect. Tenured unelected officials can display behaviour, such as discipline and pandering, typically associated with *political* agents. This observation has implications for theory and policy. On the theoretical front, it casts doubt on the wisdom of equating tenure with unaccountability. Instead it may be more fruitful to regard tenured officials as separated from the electorate by a middle layer of elected officials that both shields them and threatens to remove their powers. The latter source of source of accountability does, however, provide empirical support for the emerging theoretical consensus that government employees are motivated by policy outcomes. In fact,

we highlight a new, and as yet unmodelled, dynamic trade off: tenured public officials appear to value autonomy and may take distortionary steps to protect it.

Turning to policy, our findings suggest that disatisfaction with the observed behaviour of public officials should not necessarily be taken as evidence of too little accountability and hence a need for reform. For instance, with the decisions taken by senior English judges prior to 2005 apparently driven by 'pre-market' factors rather than ill-disciplined elitism, recent constitutional reforms seem unlikely to ease public concerns. Indeed, as we argue in the Conclusion, this observation already appears to have been bourne out, with widespread disappointment following the introduction of the new judicial appointments commission in England and Wales.

2 Background and Data

2.1 Legal Institutions

Figure 1 illustrates the three courts relevant to our study. The Crown Court is primarily a criminal court, and cases are heard by Circuit judges. The High Court has three divisions. The Queen's Bench handles a mixture of civil and criminal cases and judicial reviews. The two other divisions handle cases in family and chancery matters. High Court judges are assigned to a division upon appointment, typically reflecting their prior legal specialism (e.g. public law specialists to the Queen's Bench, tax specialists to the Chancery Division). Most cases are heard by a single judge. The Court of Appeal has two divisions and judges are *not* assigned to a particular division upon appointment. The Criminal Division handles criminal appeals from the Crown Court, and the Civil Division civil appeals. Most cases are heard by three judges. It is common for High Court judges to sit in the Criminal Division but not in the Civil Division.

During our sample period, the vast majority of High Court appointments were from the Bar rather than the Circuit bench. In contrast, all Court of Appeal appointments were promotions from the High Court. For our analysis, it is important to identify three features of this promotions process: how vacancies arise, the composition of the selection committee, and the official criteria for promotion.

The first issue is clear cut. A vacancy arises only if a Court of Appeal judge exits or Parliament creates a new post. During our sample period, there were 85 vacancies. Of these, 69 arose due to exits (38 retirements, 1 death and 30 promotions to the House of Lords), while 16 were new posts.

Formal responsibility for these promotion decisions lay with the Lord Chancellor (and ultimately with the Queen of England), a cabinet minister rather than a serving judge. In practice, however, the system was closer to self-governance, with 'judges choosing judges'. When a vacancy arose the Lord Chancellor reviewed candidates at a meeting with the Heads of Division and a few other senior judges (Peach Report, 1999). Comments by the Judges' Council (the judiciary's representative body) suggest that serving judges played a crucial role

at these meetings:

> "the judiciary as a whole, and the Heads of Division in particular, are deeply involved in the process. The Lord Chancellor's decisions have, in practice, drawn heavily on the advice that the judiciary has been able to give. Indeed, in respect of senior judicial appointments made or recommended by the last two Lord Chancellors, it is believed that no appointment has been made to which the Heads of Division raised objection", Judges' Council (2003, paragraph 71).

In light of this evidence, we take the composition of a promotion committee formed to fill a given vacancy to be the incumbent Heads of Division and Lord Chancellor. The decision problem faced by such a committee was to select one of the serving High Court judges for promotion.

Throughout our sample period the choices made by these committees were subject to intense criticism, with claims that judges with an elite background were being given undue preference. To explore allegations of favoritism we must obviously identify the criteria upon which promotion decisions *should* be based. The official guiding principle has always been 'merit' (DCA 2005). The Judges' Council usefully elucidates how this principle has been applied in practice:

> "There is the general quality of the candidate, as a judge of demonstrated outstanding ability, and there is the requirement that the candidate should also have expert knowledge of the specialist area of the law which will be required to meet the needs of the Court of Appeal. The Court of Appeal judges are also potential candidates for membership of the House of Lords (...) The scope for further promotion must also be taken into consideration when determining at what stage of their judicial career particular candidates should be promoted." Judges' Council (2003, paragraphs 98-99).

Further clarification follows:

> 'The best testimony as to whether judges have the necessary qualities for promotion to the Court of Appeal is their track record since being appointed as judges. This, to a judicial colleague, will be demonstrated by the quality of their judgements. Those judgements will have been carefully studied on appeals by a candidate's senior colleagues.' Judges' Council (2003, paragraph 99).

We interpret the above as saying that age, experience, the match between a candidate's legal specialism and the needs of the Court of Appeal, and ability as evidenced by good judgements are the key promotion criteria. Our data collection exercise is tailored accordingly. Using the case law provider *Westlaw*, we follow each published case heard by the 275 High Court judges serving during our sample period (a total of over 28,000 cases) and then record the legal

subject and all subsequent appeals and citations. Then, at the date of each promotion decision, we construct measures of quality (reversals and affirmations by members of the promotion committee), legal specialism (High Court division and legal subject of past cases), age and experience. To capture the 'needs of the Court of Appeal', we also record the High Court division and destination (retirement or promotion) of the exiting Court of Appeal judge, if any.

2.2 Elite Status

The characteristic most commonly associated with membership of the English elite is attendance at a prestigious private school. Consistent with this interpretation, when pointing to elitism, politicians and interest groups have typically highlighted the narrow educational background of serving judges.[5]

If lay commentators tend to emphasise where judges were educated, then legal experts tend to focus on where judges worked prior to appointment. The typical employment history of a High Court judge is several decades private practice as a barrister and a short-period serving as a part-time judge. This is true for 236 (86%) of the judges in our sample, with just 38 promotions from the Circuit bench and one appointment from private practice as a solicitor. Such uniformity in the type of employment history masks important differences however. Indeed it is *where*, not whether, an individual practices as a barrister that is often thought to be the key to future success. Malleson (2000), for instance, reports a senior judge describing the relationship between membership of a top-ranking chambers and judicial office as a "golden road".

We incorporate both educational and occupational factors when defining our elite status variable. First, we assign the 74 judges appointed to the High Court bench directly from a top-ranking chambers to the elite group, and the 38 judges promoted from the Circuit bench to the non-elite group. We define a set of chambers to be top-ranking if it is included in *The Lawyer* Top 30 ranking (see Table A1). As one might expect given the "traditional nature of the Bar" (Malleson 2000), these two groups differ markedly in terms of educational background. Both the proportion of privately educated and the proportion of Oxbridge educated judges are significantly higher in the group appointed from a top-ranking chambers relative to the group promoted from the Circuit bench. Of the remaining 163 judges, 42 attended a state-run school. To allow for a direct effect of education (beyond access to top-ranking chambers), we assign these judges to the non-elite group. This gives us a total of 195 elite judges and 80 non-elite judges.

[5]We noted the remarks of an educational pressure group in the Introduction (Sutton Trust 2005). This, and a subsequent report on the background of journalists, prompted *The Independent* to run a frontpage article under the headline "Stranglehold" on July 15 2006. See also the evidence given to the House of Commons Home Affairs Select Committee by a Labour MP in 1996: "we are concerned that an astonishing 80% of the senior judiciary were privately educated".

Before comparing promotion prospects across these groups, we briefly pause to ask *why* elite judges might be favoured. In this respect, the leading explanation for the existence of favoritism is that the (overwhelmingly elite) committee members might have a tendency to look for candidates who share their narrowly-defined background.[6] In fact, a former law lord actually admitted on TV in 1992 that judges tend to look for "chaps like ourselves". Following the legal literature, we will refer to this possibility as 'self-cloning'. With this micro-foundation for favoritism in mind, we also construct a connectivity status variable to measure whether a judge has the same narrowly-defined background as any members of the promotion committee. To illustrate, a candidate for a particular vacancy will be deemed elite if he practised from a top-ranking chambers but he will only be *connected* (at least along this dimension) if a member of the promotion committee also practised from the same physical location.

3 Did Senior Judges Favour Elites?

3.1 Unconditional Evidence

Consistent with the public perception of elitism, Figure 1 shows that elite judges overwhelmingly dominated the senior judiciary in late 2005. The Figure also shows that the percentage of elite judges is higher as one moves up the hierarchy, suggesting that the prevalence of elites is not just a consequence of the narrowness of the pool from which High Court judges are selected. Instead, elites seem more likely to be chosen at each stage of the judicial career. The main drawback of Figure 1 is that it only portrays judges serving on the last day of our sample period. In Panel A of Table 1 we study all 275 High Court judges serving between June 1985 and December 2005. Around 30% of these judges were promoted to the Court of Appeal, whereas 26% retired without being promoted. Among elite judges these percentages are 40% and 21% respectively. Strikingly, only 11% of non-elite judges were promoted, whereas 40% retired while still serving in the High Court. The last column in Panel A of Table 1 confirms that the differences across groups are statistically significant.

One weakness of Panel A is that it does not adjust for censoring. This is important because close to 40% of our sample of High Court judges were still practising at the end of 2005. Differential censoring among elite and non-elite judges − for instance due to non-elite judges joining the High Court later in time − could in principle be responsible for these findings. To account for this, we take an inflow sample of 240 judges appointed between 1980 and 2005 (a subset of the stock sample of 275) and compute Kaplan-Meier survivor functions overall

[6]The importance of personal ties figured prominently in the political and scholarly debate. For instance, Drewry (1998) points to the 'old-boy-network' that forms the basis of the appointment process. Similarly, continuing his evidence to the Home Affairs Select Committee (see the previous footnote) the Labour MP comments: "It appears to be self-perpetuating does it not? They all know each other, many of them went to school together, most of them went to university together and they have no doubt known each other all the time dining in their various Inns of Court (...) they appear to move in very limited circles."

and separately for elite and non-elite judges. The first column of Panel B reveals that the (censoring-adjusted) likelihood that a judge will be promoted within 14 years is 56%. The next columns show that this likelihood is much higher for elite judges (65%) than for non-elite judges (24%). A Log Rank test strongly rejects the hypothesis that the survivor functions are equal for elite and non-elite judges.

3.2 Empirical Strategy

The unconditional evidence certainly supports the popular stereotype: elite judges *were* more likely to be promoted. The question is whether this differential arose because promotion committees were actually favouring elite judges or because elite judges were better endowed with promotion-relevant characteristics.[7] We attempt to shed light on this issue in a number of different ways.

First, using a simple empirical model of promotion committee behaviour, we explore whether the elite differential is robust to controlling for the four promotion criteria discussed in Section 2. In doing so, we also control for connectivity status. Suppose, as we have argued, that the most plausible micro-foundation for favoritism (if it exists) is 'self-cloning'. Then, under the favoritism interpretation, controlling for connectivity should reduce the size of the elite differential. Next, using the same empirical model, we examine situations where the committee faces a greater need to promote a candidate of high ability. If the elite differential is truly the result of favoritism, we should expect the promotion committee to indulge in it less when the Court of Appeal is relatively starved of talent, say due to the loss of a high ability judge to the House of Lords, than in the normal course of affairs. In sum, we should see a lower elite differential for 'high stakes' vacancies generated by promotions relative to those generated by retirements or new posts. Finally, we examine the behaviour of the promoted judges themselves. Under the favoritism interpretation, a non-elite candidate must have some other compensating characteristic, such as ability, to be selected over an elite candidate. As such, we should expect the average promoted non-elite judge to be more able than the average promoted elite judge (cf. Lazear and Rosen 1990). This observation motivates our final test: a comparison of the performance of elite and non-elite judges *after* joining the Court of Appeal.

3.3 Discrete Choice Results

In choosing an empirical model we balance a desire to capture institutional details − in particular the relative performance evaluation implicit in a committee selecting a candidate from the current stock of High Court judges − with constraints imposed by the small sample size. Our specification, McFadden's choice model, has some attractive features (e.g. the freedom to

[7] In posing this question we have not ruled out the possibility that promotion committees were favouring non-elite candidates. If elite candidates were better endowed with promotion relevant characteristics, then pandering behaviour could still produce a raw elite differential.

estimate on a subset of alternatives) but does impose some strong assumptions. We discuss this modelling choice in Section 3.5, after we have presented our results.

Empirical Model Consider a promotion committee n that forms to fill a vacancy arising in the Court of Appeal. The set of alternatives facing this committee is the current stock of High Court judges. Letting U_{nj} denote the utility this committee derives from choosing alternative j, its choice problem is to maximise $U_{n_j} = V_{nj} + \varepsilon_{n_j}$,where V_{nj} is known by the researcher up to some parameters and ε_{n_j} is known to the committee but treated by the researcher as random. Given this choice problem, the probability that promotion committee n chooses alternative i is

$$P_{ni} = \Pr\left[\varepsilon_{n_j} - \varepsilon_{ni} < V_{n_i} - V_{nj} \quad , \forall j \neq i\right]. \tag{1}$$

We proceed on the assumption that we can specify V_{nj} sufficiently well such that the unobserved portion of utility for one alternative provides no information about the unobserved portion of utility for another alternative (i.e. the ε_{n_j} are independent over j). Given a further assumption that these unobserved portions of utility are iid extreme value, (1) can be re-written as the standard Logit choice probability (McFadden 1974)

$$P_{ni} = \frac{\exp(V_{ni})}{\sum_j \exp(V_{nj})}. \tag{2}$$

As is standard, we adopt the linear in parameters form $V_{nj} = \beta' \mathbf{x}_{n_j} + c_j$, where $\mathbf{x}_{n_j}$ is a vector of observables that vary over both alternatives and committees and c_j is an alternative-specific constant which ensures that ε_{n_j} has zero mean. Table 2 provides summary statistics for the variables included in $\mathbf{x}_{n_j}$. The probability of committee n choosing the alternative that we observe it choose is

$$_i(P_{ni})^{y_{ni}}, \tag{3}$$

where $y_{ni} = 1$ if committee n chose i and zero otherwise. Assuming that promotion committees act independently,[8] the log of the probability of observing our choice data is

$$LogL(\beta, \gamma, \mathbf{c}) = \sum_{n=1}^{N} {}_i y_{ni} \ln P_{ni}, \tag{4}$$

where $\mathbf{c}$ is a vector of alternative-specific constants.

Maximisation of (4) to obtain parameter estimates would be straightforward were it not for the fact that promotion committees face a large number of alternatives. Given statutory increases in the size of the High Court, the number of alternatives also varies over committees; e.g. a committee meeting in 1985 faces 76 alternatives, while a committee meeting in 2005 faces 108 alternatives. To conserve degrees of freedom, we estimate the model on a *subset of alternatives*. Specifically, we take 5 random draws without replacement from the set of unchosen

[8] Ruling out preferences for conformity or non-conformity, this really only requires that past committee choices do not place meaningful constraints on current choices - i.e. that there are enough similar alternatives.

alternatives at the date of each vacancy and then add these to the 85 chosen alternatives to give a total sample size of 510.[9] Since all alternatives have the same chance of being selected into the subset, (4) is still the appropriate log likelihood function for our selected data (see Train 2003, p. 68-70).

Results The first column of Table 3 confirms our earlier finding that having an elite background is associated with a higher likelihood of promotion. The exponential of the coefficient gives an indication of magnitude. In this unconditional baseline specification, elite status is associated with a 3.8-fold increase in the odds of an alternative being chosen for promotion by a given promotion committee.

In the second column we include controls for the promotion criteria discussed in Section 2. Both age at entry and experience in the High Court are included in quadratic form. 'Ability as evidenced by sound judgements' is proxied by the percentage of a candidate's prior cases that have been reversed (affirmed) by a member of the promotion committee. We attempt to capture the match between legal specialism and the needs of the Court of Appeal in two different ways. First, we ascertain whether an alternative and the departing Court of Appeal judge (if there is one) share the same High Court division. To illustrate, consider a committee charged with filling a vacancy created by the departure of a Court of the Appeal judge who served in the Chancery division while in the High Court. By this definition, we would expect roughly 15% of this committee's alternatives to match on legal specialism. Second, to reflect heterogeneity in work undertaken by judges appointed to the Queen's Bench Division, we divide each alternative's prior cases into seven court/legal subject categories and include the number of cases in six of these categories together with the total number of cases.[10]

Including these promotion-relevant characteristics more than halves the estimated elite coefficient (from 3.84 to 2.42, noting than the baseline change in odds is one). This is remarkable, especially since our measures of the promotion criteria are undoubtedly imperfect. Such a decrease in the coefficient certainly casts doubt on the hypothesis that the remaining elite differential is due to favoritism.

The reasons for the marked decline in the elite differential are apparent in Table 2. Elite judges are on average two years younger when they enter the High Court. This is an advantage because of the committee's need to consider "the scope for further promotion". Elite judges are also more likely to hear cases in, and hence have "expert knowledge of", public and civil law. Given the dramatic rise in judicial reviews and the fact that High Court judges assist with criminal but not civil cases in the Court of Appeal, these are precisely the areas of expertise

[9] We exclude non-meaningful alternatives with less than 2 years experience or who exit on the same day.

[10] While we interpret the number of cases in each category as legal specialism, an alternative interpretation might emphasise non-random case allocation. Auxilliary regressions (available upon request) show that this interpretation is unlikely as our court-subject measures are highly correlated with measures that pre-date appointment, such as the specialism of the judge's chambers or the judge's self-reported specialism as a barrister.

most in need in the Court of Appeal.

In the third column of Table 3 we investigate whether sharing the same narrowly defined background with members of the promotion committee increases a candidate's chances of promotion (the leading micro-foundation for the favoritism hypothesis). We consider four dimensions: whether the candidate (i) attended the same school, (ii) attended the same university (college if Oxford or Cambridge), (iii) practised from the same chambers or (iv) belonged to the same (sporting or gentleman's) club as any member of the promotion committee. Our connectivity measure to the Lord Chancellor (Heads of Division respectively) is the percentage of these dimensions that the candidate is connected to the Lord Chancellor (average Head of Division). Note from Table 2 that, unsurprisingly, elite candidates are much more connected than non-elite judges.

The results in Table 3 show that, contrary to what one would expect under the favoritism hypothesis, judges with strong personal ties to the Heads of Division are *less* likely to be promoted. The coefficient is economically as well as statistically significant: an increase in connectivity to the Heads of Division of one standard deviation leads to a decrease in the odds of being selected from one to $.73 = \exp(-6.075 * .05)$. On the other hand, being connected to the Lord Chancellor does not seem to decrease (or increase) a candidate chances of promotion.

Lastly, we find no evidence that the elite differential is lower for 'high stakes' vacancies generated by further promotions from the Court of Appeal. It therefore does not seem as if non-elite judges are more in demand when the Court of Appeal is relatively starved of talent.[11]

3.4 Post Promotion Results

Measuring Performance We compare the performance of judges after joining the Court of Appeal in terms of *positive voluntary citations* by other judges in unrelated cases. We choose this measure because, in principle, positive citation counts should reflect ability in the most important dimension of a Court of Appeal judge's work, namely clarification and expansion of the law and its legal principles.[12] Before discussing econometric concerns, we first explain the concept of a positive voluntary citation.

The citations in our database come pre-coded by lawyers at *Westlaw*. Almost all are positive and fall into one of three categories: 'applied', 'followed' and 'considered'. The label 'applied' is assigned when the principles of law in the annotated case have been applied to a new set of facts and circumstances; that is, when the citing judge did not have to (since the facts and circumstances of his case were different), but nevertheless chose to, use the principles of law developed in the cited case. Arguably, legal principles of the cited case were 'applied'

[11] This is true even when we control for the elite status of the departing judge to account for potential favourtism in the promotion from the Court of Appeal to the House of Lords.

[12] The legal literature also favours citation counts over other measures of senior judicial performance. See Choi and Gulati (2004), Posner (2005) and the Florida State University Review Special Issue in 2005.

because they were more sound, useful, persuasive and original than those in other cases. The label 'followed' is assigned when the citing judge is bound by the rule of precedent. Since a judge who is obliged to apply the legal principles of an earlier case is not necessarily endorsing them, we do not use 'followed' citations as evidence of good performance. Finally, the label 'considered' is assigned when the court in the annotating case has discussed the decision in the annotated case but has not actually followed it; that is, a reference has been made to the cited case, but its legal principles have not been explicitly endorsed. Since we cannot be certain that the citation reflects good and original legal thinking by the cited judge, we also drop 'considered' citations from our measure. The dependent variables described below are solely based on counts of 'applied' citations.

Econometric Concerns Clearly, if we studied the performance of judges throughout their time in the Court of Appeal, our results would be affected by ability-related attrition. That is, since the best performers leave for the House of Lords, we would end up comparing the performance of the losers of the following promotion tournament. Since the most rapid promotion in our sample occurred after 585 days, we compare the performance of judges during their first 585 days in the Court of Appeal.

A further concern is that citations could be driven by strategic behaviour rather than ability. One possibility is that citation prone cases could be allocated to judges with a particular profile. Our conversations with the government agency responsible for the administration of the courts suggest that the allocation of cases in the Court of Appeal is in fact exogenous to judicial background characteristics. The key factor is whether a judge is available when the listing officer is notified of the case. Further evidence that the allocation of cases is (statistically speaking) identical across groups is provided in Table A3 where we show that a rich measure of the legal subject of a case (with around 90 categories) is uncorrelated with the background of the judges sitting in that case.

Turning to strategic citation behaviour itself, the leading possibility is that citations are more likely to occur within background groups than across them. For instance, elite judges may be more likely to cite other elite judges due to social preferences or better knowledge of their cases. If this is true, then judges belonging to the larger group (in this example the elite group) could receive a higher number of citations, independent of their true ability. To allow for this possibility, we disaggregate our dependent variables by the elite status of the *citing* judge. A less plausible possibility is that a judge might cite a newly promoted Court of Appeal judge because he anticipates that this judge could (many years in the future) become a Head of Division and will remember the favour. Since members of the House of Lords no longer face career concerns, we would ideally disaggregate our dependent variable by the court of the citing judge. Unfortunately, the number of citations by law lords is sufficiently small to preclude such analysis. We do, however, use an index of intellectual influence (Palacios-Huerta and Volji 2004) as one of our dependent variables. As we discuss below, this measure

over-weights citations by cases in the House of Lords and therefore partially addresses such concerns.

Empirical Models and Results Our first specification, reported in the first column of Table 4, is a Poisson regression. In Panel A this regression is run at judge-level. Specifically, we relate the number of citations that a judge (one of the 85 chosen by the committees modelled in Section 3.2) received across all of the cases in which he was presiding and in his first 585 days in the Court of Appeal to his background characteristics. We include a dummy for elite status to explore whether non-elite judges perform better than elite judges, as one would expect under the favourtism interpretation of the raw elite differential. In fact, we find the opposite: the elite coefficient is positive. In view of the possible association between connectivity and promotion, we also include a dummy that takes the value 1 if the judge was connected to any member of the committee that promoted him, referring to this as 'connectivity-at-promotion' status. If elites were favoured and connectivity was the microfoundation, then one would expect the group that was *un*connected-at-promotion to perform better post-promotion. Again, we find no such evidence. Consistent with the negative impact of connectivity reported in Section 3.3, the connected-at-promotion coefficient is positive (albeit insignificant).[13]

In Panel B we disaggregate to case-level, relating the number of positive citations that a Court of Appeal case (one of the 8928 in our data) received to the background of the presiding judge. To control for attrition, we introduce a variable 'Presiding Judge Just Arrived' to indicate whether the presiding judge was appointed to the Court of Appeal within the previous 585 days. We also introduce the interaction between 'Presiding Judge Just Arrived' and 'Elite'.[14] Again, the results run counter to the favourtism interpretation: cases with recently promoted non-elite presiding judges received fewer citations than cases with recently promoted elite presiding judges. The mean response is economically significant: the coefficient .906 indicates that an elite status almost doubles the number of citations.

A natural count of citations is a relatively coarse measure of performance, as it treats all citations equally. Since a citation by the House of Lords is almost certainly a better indicator of good performance than a citation from a lower court, it would be preferable to construct a measure where each citation is allocated an endogenous determined weight depending on the stature of the citing court. In the second column of Table 4 we use such an 'index of intellectual influence' as our dependent variable (with a Tobit rather than OLS specification to account for the preponderance of zeros). Our index weights each citation by the endogenously determined influence of the citing court, which is computed using the methodology characterised in

[13]Anticipating the results in Section 4, we suspect that the small size of the connectivity-at-promotion coefficient may be due to the fact that these regressions omit judges appointed after 2003 (explaining why the sample size is 61 rather than 85). With our data ending in 2005 we do not have sufficient Court of Appeal cases to calculate citation counts for these later promotions.

[14]To ease the interpretation of interactions we do not consider the effect of connectivity.

Palacios-Huerta and Volij (2004).[15] Using this measure as our dependent variable leaves our results (qualitatively) unchanged. Non-elite judges and unconnected judges do not appear to be more intellectually influential upon promotion.

Of course, at this stage the charge could still be made that strategic citation behaviour is clouding our results. In the final two columns of Table 4 we report results for our index of intellectual influence measure disaggregated by the elite status of the citing judge. If citations are more likely within background groups, then (if it exists) we should finally see evidence of favourtism in the fourth column where we focus on citations from non-elite judges. Again, we find no such evidence. Elite judges influence more strongly not only other elite judges *but also non-elite judges*. This finding, together with our findings in Table A3 on the allocation of cases, reinforces our confidence that elite judges are better performers − at least in terms of this particular dimension of performance − than non-elite judges.

3.5 Discussion

We stress at the outset that we do not (and given our empirical strategy could not) claim to have resolved *conclusively* whether senior judges favoured candidates with an elite background. Rather, we limit ourselves to the following more nuanced conclusions. Pooling over our sample period, elite judges were substantially more likely to be promoted than non-elite judges. The weight of evidence suggests that this was because elite judges were better endowed with promotion relevant characteristics than non-elite judges.

Our justification for the latter claim is three-fold. First, we have found direct evidence consistent with the endowments interpretation: (i) the elite differential more than halves once we include proxies for official promotion criteria, and (ii) newly promoted elite judges exerted stronger intellectual influence on both elite and non-elite judges than newly promoted non-elite judges. Second, we have found direct evidence inconsistent with the favoritism interpretation (at least in the 'self-cloning' form referred to in legal and policy circles): sharing the same narrowly defined background with members of the promotion committee was associated with a *lower* chance of promotion. Third, we failed to find direct evidence consistent with the favoritism hypothesis: the elite differential is not lower for high stakes vacancies. The only evidence in favour of the favoritism hypothesis is indirect (at best, especially given our imperfect proxy for ability): the small residual elite differential *could* still be due to favoritism.

In view of the small sample size, we have used an empirical strategy that is simple and hence open to criticism. In particular, one might point to the independence of irrelevant alternatives property of the discrete choice model. We use the logit specification because it allows us to estimate on a subset of alternatives (the full set is greater than $N = 85$). In our setting, it seems reasonable that adding another alternative (effectively a 'slot' that is not intrinsically any more or less like any other) would leave the ratio of choice probabilities unaffected and

[15] Details of the variable construction are provided in Appendix B.

result in proportionate substitution. Consistent with this, the dramatic reduction in the elite differential is also present in a survival framework that, by construction, does not impose IIA.[16]

4 Did Senior Judges Pander in the Face of Reform?

In the previous Section we examined the hypothesis that senior judges showed a 'lack of discipline' by favouring elite candidates for promotion to the Court of Appeal, and found little evidence in its favour. In fact, if anything we actually found evidence of 'pandering', since personal ties to the promotion committee seem associated with a *lower* chance of promotion.

This was not the view held by many politicians, lobby groups and press commentators however. As Appendix C describes in detail, allegations of elitism and calls for an independent appointments commission were frequent throughout our sample period. Senior judges were strongly opposed to reform, openly stating their reluctance to cede control over promotions, and until 2003 managed to kill in the ground all such attempts by both Conservative and Labour governments. On June 12 2003, however, the Labour Prime Minister unexpectedly announced that a new body would take responsibility for judicial appointments, including promotions to the Court of Appeal. As we argue in Appendix C, the specific composition of this new body was subject to considerable uncertainty for nearly two years, with alternative proposals − in which judges held very different levels of influence− being considered. Since senior judges actively lobbied to influence the final composition of the new body, it is reasonable to hypothesize that any perception of favoritism during this period would have been damaging to their case.

The purpose of this Section is to investigate whether this hypothesized increase in the returns to minimizing perceptions of favoritism affected promotion decisions in the period after June 2003. In doing so, we highlight that neither the official criteria for promotion nor the identity of the Heads of Division forming the committee changed in June 2003. In particular, the same Heads of Division − a group that we will call the 'Heads at Announcement' − had been in charge since July 2000 and remained in their posts until after the reform passed into law in March 2005.[17]

4.1 Unconditional Evidence

We first investigate whether the raw data indicate any change in the behaviour of the promotion committee. The first cells of Panel A in Tables 5a and 5b reveal that 6% of the High Court judges serving between July 2000 and 11 June 2003 were promoted (by the 'Heads at An-

[16] Results from survival models are reported in earlier versions of this paper, and are available upon request.

[17] There is one caveat: the identity of the Lord Chancellor did change in June 2003. However, note that it is the connectivity to the Heads of Division that determines a candidate chances of promotion. Connectivity to the Lord Chancellor plays no role. This fact, together with the quotes from Section 2, suggests that in practice the promotion decisions are delegated to the Heads of Division.

nouncement') during this pre-announcement period. Disaggregating, we find evidence of elite and connected differentials of 9% and 7% respectively. These differentials are smaller than in Table 1 and only significant at the 10% level, reflecting in part the shorter time frame. The second row of Panel A in Tables 5a and 5b repeats the exercise for High Court judges serving between 12 June 2003 and April 2005. Again, close to 6% of these judges were promoted (by the 'Heads at Announcement') during this post-announcement period. Now, however, the elite and connected are 1% and −4% respectively. Neither differential is statistically different from zero, although for connectivity status the negative difference in difference estimate is significant at the 10% level. As such, the raw data provide weak evidence that personal ties to the promotion committee were *less* favorable for promotion in the post-announcement period relative to the earlier period.

These raw statistics fail to adjust for censoring, however. In Panel B of Tables 5a and 5b we provide similar evidence, this time from Kaplan-Meier survivor functions. Our approach here is motivated by the promotion hazard in Figure 2 which reaches a maximum at seven years and is close to zero after 10 years of experience.[18] With this observation in mind, we compare the elite (connected) differential in survivor functions for two adjacent cohorts of judges: those with 8-10 years and 10-12 years experience at June 2003. Our logic stems from Figure 2: the less-experienced cohort could plausibly have been affected by a change in committee behaviour whereas the more-experienced cohort could not.

It is hard to think why there should be a difference in the elite (connected) difference in Kaplan-Meier survivor functions across two adjacent and otherwise similar cohorts, other than via a change in committee attitude towards elite (connectivity) status. We find that there is indeed such a difference. In Table 5a the Log Rank test rejects the null of equality of survivor functions across elite status for the10-12 years cohort but not for the less-experienced 8-10 years cohort. In Table 5b, consistent with the evidence in Panel A, the sign of the connected differential in the proportion predicted to be promoted within 12 years is positive for the 10-12 years cohort but *negative* for the 8-10 years cohort. These findings are consistent with the view that eligible non-elite judges were passed over for promotion prior to the announcement but then 'saved' in the post-announcement period.

4.2 Discrete Choice Results

We now use the specification outlined in Section 3.3 to examine the conditional evidence for a change in promotion committee behaviour following the announcement of the reforms.[19] We do so in the obvious fashion, namely by interacting our variables with a dummy 'Reform' that captures whether a promotion committee makes its decision after June 12 2003.

[18] Precisely the same pattern is true out-of-sample, e.g. for the inflow sample between 1960 and 1980.

[19] As noted in footnote 12, unfortunately data limitation prevent us from repeating the post-promotion specification in Section 3.4.

The first column of Table 6 contains a single interaction with the elite status variable. The sign of the coefficient 'Elite*Reform' is negative and statistically significant, indicating a large change in the elite differential following the announcement of the reforms. While the elite differential is positive during the baseline period, it actually becomes negative during the post-announcement period.

In the second column we add interactions with our main connectivity variable. The negative coefficient 'Connectivity to Heads' indicates that being strongly connected to the Heads of Division decreased a candidate's chances of promotion in the baseline period. The negative coefficient 'Connectivity to Heads*Reform' suggests that it decreased these chances *even more* during the post-announcement period. The change in behaviour is economically as well as statistically significant: an increase in connectivity of one standard deviation decreases the odds of being promoted from one to $.801 = \exp(-4.437 * .05)$ during the baseline period but to a significantly lower $.173 = \exp((-30.605 - 4.437) * .05)$ during the post-announcement period.

In the third column of Table 6 we add interactions with the nature of the vacancy being filled. The introduction of these triple interactions calls for some care in interpreting the coefficients. For instance, the coefficient 'Elite' should now be interpreted as the elite differential for Court of Appeal vacancies generated as a result of a retirement during the baseline period. The statistically insignificant 'Elite*Promotion Vacancy' coefficient suggests that, during the baseline period, the elite differential was not different for different types of vacancies. Similarly, the sum of the coefficient 'Elite' and 'Elite*Reform' (i.e. $-2.512 = 1.798 - 4.310$) captures the elite differential for retirement vacancies during the post-announcement period. The sum of the four coefficients (i.e. $1.596 = 1.798 - 4.310 - 1.496 + 5.604$) captures the elite differential for promotion vacancies during the post-announcement period. Testing whether the sum of 'Elite*Promotion Vacancy' and 'Elite*Promotion Vacancy*Reform' is equal to zero is therefore equivalent to testing whether, during the reform period, the elite differential was different for different types of vacancies. We reject the null hypothesis of this test at the 10% level (p-value=.059). This provides weak evidence that, during the post-announcement period, elites were more likely to be selected to fill promotion vacancies than retirement vacancies.[20]

4.3 Discussion

There are two separate issues to discuss here: whether non-elites/unconnected judges were indeed favoured and, if so, whether any such finding can really be attributed to pandering and the threat of reform. There is certainly evidence of the former. Controlling for promotion

[20] An alternative way of interpreting these coefficients is to note that the post-announcement period led to a decrease in the likelihood of elites filling retirement vacancies (the p-value of the 'Elite*Reform' coefficient is .001) but did not lead to a decrease in the likelihood of elites filling promotion vacancies (testing whether the sum of 'Elite*Reform' and 'Elite*Promotion Vacancy*Reform' is zero we obtain a p-value of .532).

criteria, the elite differential changed sign from positive to negative in the period after June 2003. In contrast, most of our proxies for promotion-relevant characteristics did *not* change during this period. For an omitted quality variable to explain the increase in fortune of the non-elite, it would therefore have to be orthogonal to the measures suggested by the Judges' Council.[21] Similarly, we see that the connected differential changes from being small and only weakly significant to strongly negative in the period after June 2003. Arguably, it is even harder to attribute this change to omitted (non-elite) candidate quality; given our other controls, variation in connectivity status is essentially driven by *committee* characteristics.

The issue of attribution is far harder and, ultimately, can only be speculated about. The most obvious alternative to pandering is that we have observed an unexpected form of ill-discipline, whereby the promotion committee *actually preferred* to appoint non-elite candidates. We feel this is unlikely. First, we found no suggestion of this possibility among the political and academic commentators of the period. Second, the same Heads of Division were in place from July 2000 until April 2005. Historically, this group held the balance of power within the committees and, as we have argued, previously appeared to have been disciplined or congruent. Interpreting our findings as reflecting the true preferences of the promotion committee would require claiming that the same Heads of Division somehow changed their preferences dramatically in June 2003. Third, although the overall composition of the committees did change, the only prominent new member − a new Lord Chancellor − both played a small role in the actual decisions and stood to gain little from imposing his preference as his position was to be abolished as part of the reforms.

We conclude by pointing to one final piece of evidence against the stereotypical claim that senior judges favoured elites. The change in the elite differential was different, depending on the nature of the vacancy generated in the Court of Appeal. While it decreased for 'low stake vacancies' − those generated by a Court of Appeal judge exiting into retirement or the statutory creation of a new post − it remained unchanged for 'high stake vacancies', generated as a result of a promotion. Consequently, while the elite differential was statistically similar for both types of vacancies during the baseline period, it became much higher for promotion vacancies relative to retirement vacancies during the post-announcement period. This finding that elite judges were more likely to access 'high stakes' vacancies even in the post-announcement period provides further evidence against the hypothesis of favoritism discussed in Section 3. During the post-announcement period, promoting non-elite judges arguably became more attractive. However, this did not appear to have translated into an increase in non-elites accessing 'high stake vacancies'. It seems that another force − higher merit or endowment of promotion-relevant characteristics − was acting as a countervailing force.

[21] The few proxies that changed did so by making elite judges even better candidates relative to non-elite. The aforementioned omitted quality variable would therefore have to be *negatively* correlated with these variables.

5 Concluding Remarks

This paper has addressed two empirical questions. Did senior judges show a lack of discipline by favouring elites? And did senior judges pander in the face of reform? Our answers to both questions are qualified given the limitations of the available data. To the first, we say *unlikely*. And to the second, *quite possibly*.

At a general level, these findings contribute to our understanding of the incentives and behaviour of public officials. As we noted in the Introduction, a growing theoretical literature has analysed the decision-making distortions that can arise when informed politicians wish to signal congruence of preferences with voters. Empirical evidence of such pandering behaviour is scarce however. This paper is, to the best of our knowledge, the first to document it −albeit in tenured public officials, rather than the elected politicians usually considered. In this sense, our findings also cast doubt on the wisdom of drawing sharp distinctions between "judges" and "politicians". Tenure need not imply unaccountability and, in turn, a lack of discipline *or* pandering behaviour.

On this point, we note a somewhat forlorn postscript to the English experience of constitutional reform. Barely two years after it was introduced, the work of the new judicial appointments commission has been criticised. Tellingly, the chair of the Home Affairs Select Committee recently remarked that, in terms of appointing candidates with a less traditional background, the new system is "actually worse" than the previous system under the tenure of the last Lord Chancellor. Responding to claims that, despite their reduced influence, judges have still been managing to favour elite and well-connected candidates, the Government is currently proposing to hand in even more control to lay commissioners. Our evidence that senior judges were, if anything, favouring non-elite candidates under the previous system offers an alternative explanation for the 'poor' performance of the commission, one that suggests the further reforms will not be a quick fix. Rather, the data indicate that attention would be better focused on widening access at the early stages of a legal career.

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Appendix

A Tables

See Tables A1- A3.

B Index of Intellectual Influence

We now outline the method used in Section 3.3 to weight each citation by the intellectual influence of a representative article in the citing court. To construct this measure of intellectual influence we use the ranking method in Palacios-Huerta and Volij (2004) −henceforth PHV. We first identify the set of seven courts in our database:

$$J = (HL, CACiv, CACrim, QBD, CHD, FAM, EAT)$$

We use the forty thousand cases in our database to construct the primitives of our problem. We construct a matrix of citations across courts, $C = (c_{ij})_{(ij)\in J\times J}$, where c_{ij} captures the total number of citations of cases in court i by cases in court j during our sample period. From C we can easily calculate $c_j = \sum_{i\in J} c_{ij}$ (the total sum of citations made by cases in court j) and $D_C = diag(c_j)_{j\in J}$ (the diagonal matrix with the sums of the courts' citations as its main diagonal). Lastly, we construct a vector $a \in (a_i)_{i\in J}$ (the number of cases in each court) and $A = diag(a_i)_{i\in J}$.

Using these primitives, our objective is to construct a (normalised) cardinal ranking of the courts in J, that is, a vector of non-negative valuations $(v_i)_{i\in J}$. We will interpret v_j as the intellectual influence of a representative article in court j. Intuitively, we would like a court j to receive a higher valuation when it is cited both more often *and by more influential courts.* Of course, this creates a simultaneity problem. Following PHV, we derive v as the solution to the following equation:

$$CD_C^{-1}Av = Av$$

PHV show that this ranking method is the unique method satisfying the properties of anonymity, invariance to citation intensity, weak homogeneity, weak consistency, and invariance to splitting of courts. We display the computed valuations in the first column of Table A4, together with the matrix of citations and the vector of number of cases. Lastly, we use the computed valuations to weight the citations received by a case. For example, if a case received two citations from CA Crim cases and one citation from a FAM case, we calculate the intellectual influence of this case as $.23 = 2 * .08 + .07$.

Table A4

Cited Court	Valuation	# of Cases	Citing Court						
			HL	CA Civ	CA Crim	QBD	CHD	FAM	EAT
HL	.64	769	95	556	187	556	230	41	102
CA Civ	.11	8928	81	1873	19	1400	807	163	335
CA Crim	.08	7606	27	16	2405	85	7	4	1
QBD	.03	12977	23	405	70	1615	136	10	16
CHD	.04	6128	14	271	6	169	907	8	8
FAM	.07	1107	5	95	0	22	5	190	0
EAT	.03	1921	4	58	1	8	2	0	410
Total	1	39436	249	3274	2688	3855	2094	416	872

C A Brief History of The Constitutional Reform Act

Consultation in the 1990s. In 1994, in the wake of criticism from, e.g., Justice (a legal reform group) and The Law Society, the Lord Chancellor commissioned a Select Committee enquiry into judicial appointments, including consideration of a judicial appointments commission (JAC). Interim reports indicated that the Committee was split over the need for an independent JAC, with Labour members broadly in favour and Conservative members against. Consistent with this, at the 1995 Party Conference Labour publicly declared its support for a JAC. Significantly, the Judges' Council was strongly opposed, largely on the grounds that it would introduce politics into the process. In oral evidence to the Committee, the Lord Chief Justice (then the senior Head of Division) declared that he could not "imagine anything more horrific". The will of the judiciary quickly won out, with the Committee concluding in 1996 that there was no need for a large scale change.

Aborted consultation in 1997. Shortly after the election in May 1997, details of Labour's plans for a JAC were leaked to the press. The judiciary again seized the opportunity to voice its disapproval, with a senior Court of Appeal judge happily going on record to say that "Judges rightly would be concerned, until they see the White Paper, about the dangers of politicising the system".[22] Although plans for a consultation exercise were formally announced a month later, the White Paper itself never emerged. In October 1997, the Lord Chancellor declared that the consultation had been shelved. This u-turn did not go unnoticed and prompted a sequence of questions in the House of Commons. In the summer of 1999, in the face of unprecedented criticism of the appointments system (fuelled by the rise of judicial review under the Human

[22] "Labour faces row over reforms to end elitism in the courts", *The Times*, May 27 1997.

Rights Act 1998), the Lord Chancellor appointed Sir Leonard Peach to report on the operation of the appointments procedure. The terms of reference were strictly limited, however. Peach was to look at how appointments were made, not by whom, effectively ruling out consideration of a JAC. His report led to the creation of the Commission for Judicial Appointments, a (confusingly named) oversight body. Criticisms of the system rumbled on, however, heightened by negative reports by the CJA and the establishment of JACs in Scotland and Northern Ireland.

Reform Announced in 2003. In June 2003, the Prime Minister "took the legal world by surprise" (Malleson 2004) by simultaneously announcing that a JAC would be introduced and the (1,000 year old) office of the Lord Chancellor abolished. This time there was no prior consultation, with senior judges, the Attorney General and the speaker of the House of Lords all unaware of the plans. The nature of the announcement prompted comments that the Government was trying to wrestle power from the judges.[23] Although the Government did not consult on whether to introduce a JAC, it did solicit views on how the commission should operate. Broadly speaking, the Government was in favour of a recommending commission that left ultimate responsibility for appointments to a minister (citing the need to safeguard democratic accountability), while the judiciary was in favour of an appointing commission with a "promotions panel" consisting primarily of judges for the Court of Appeal and above (citing the need to safeguard judicial independence, as well as their superior knowledge of candidates). The passage of the Bill proved to be protracted. In February 2004 the Constitutional Affairs Committee reported that the Bill should be considered in draft, as the consultation had been "rushed". This did not happen but, at its second reading, the Bill was referred to a House of Lords Select Committee (a highly unusual step not used since the 1920's) as there had been no time for "pre-legislative scrutiny". The Bill, replete with a Concordat, finally received Royal Ascent in March 2005, nearly two years after its controversial announcement.

[23]See, for instance, Justice (who had called for a JAC since 1992) voicing their fears in *The Times*, "Is this a ruthless grab for power?" July 1 2003, and an article in *The Economist* questioning whether the Government was intent on "nobbling" the judiciary, "Blair's own goal" July 19 2003.

Figure 1. The Structure of the Court System in England and Wales in 2005

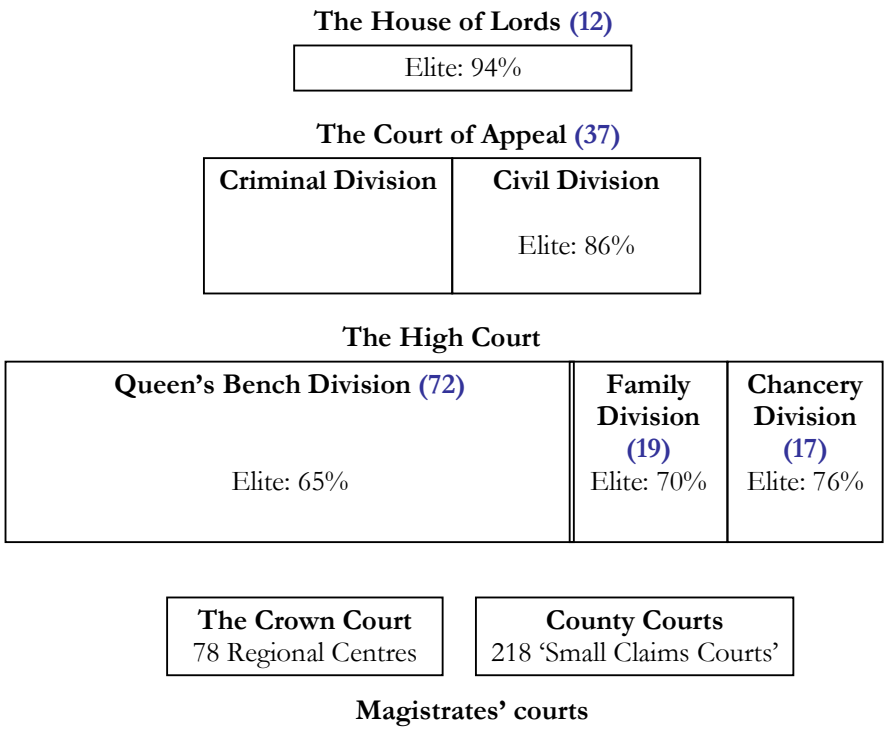

Figure 2. Promotion Hazard Rate

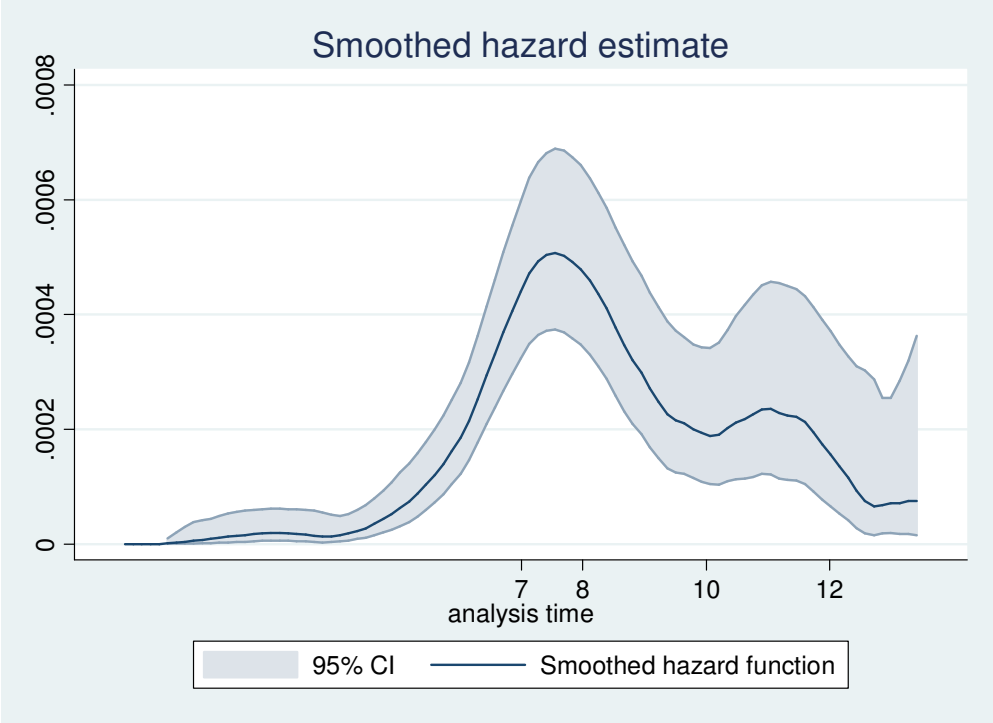

Table 1. Exits from the High Court, by Elite Status

Panel A: Stock Sample, Unadjusted[1]

State	*Full Sample*		*Elite*		*Non-Elite*		*Difference*	
	No.	Col %	No.	Col %	No.	%	%	*p*-value
Still Practicing	108	39.27	74	37.95	34	42.50	-4.55	.485
Promoted	**85**	**30.91**	**76**	**38.97**	**9**	**11.25**	**27.72**	**.000**
Retired	73	26.55	41	21.03	32	40.00	-18.97	.001
Died in Office	7	2.55	3	1.54	4	5.00	-3.46	.099
Transfer to ECJ	1	0.36	0	0	1	1.25	-1.25	.119
Resigned	1	0.36	1	.51	0	0	-.51	.523
Total	275	100	195	100	80	100		

Panel B: Inflow Sample, Kaplan Meier Adjusted[2]

	Full Sample	*Elite*	*Non-Elite*	*Log Rank Test*
	% after 14yrs	% after 14yrs	% after 14yrs	*p*-value
Promoted	56.00	65.81	24.49	.001

Notes:

1. Unadjusted statistics based on the 275 judges serving between 3 June 1985 and 31 December 2005. Exit states at 31 December 2005.
2. Kaplan-Meier adjusted statistics based on the 240 judges appointed between 1 Jan 1980 and 31 December 2005. This inflow sample is a sub-set of the stock sample. Null hypothesis for log rank test is equality of survival functions.

Table 2. Summary Statistics, by Elite Status

	Full Sample		*Elite*		*Non-Elite*		*Data Source*
	Mean	SD	Mean	SD	Mean	SD	
Elite Status							
Elite	.73	.45	1	0	0	0	Annuals[1]
Connectivity Status							
To Heads[2]	.04	.05	.05	.06	.02	.04	Annuals
To Lord Chancellor	.02	.07	.02	.07	.01	.05	
Promotion Criteria							
Age at HC appointment (yrs)	53.17	3.84	52.54	3.73	54.86	3.61	MoJ
Experience (yrs)	7.10	3.52	7.02	3.31	7.32	4.04	
Match with needs of Court of Appeal							
Vacancy same HC Division (%)	.42	.42	.40	.42	.46	.40	MoJ
Number of Cases in:							
CHD	12.15	33.67	12.38	34.01	11.55	32.85	Westlaw
Family in FAM/QBD	4.77	10.83	5.20	11.59	3.63	8.42	
Criminal law in QBD	3.74	7.68	3.55	7.52	4.24	8.10	
Public law in QBD	6.75	14.03	7.49	15.30	4.76	9.66	
Civil law in QBD/EAT	14.93	21.67	16.86	23.25	9.85	15.76	
CA Crim	25.85	43.36	20.51	35.59	39.94	56.99	
CA Civ	2.98	8.70	3.27	9.66	2.20	5.31	
Total	71.26	69.65	69.36	68.85	76.30	71.75	
Ability as Evidenced by Judgements							
Reversed by a Head of Division	.06	.15	.06	.14	.06	.17	Westlaw
Affirmed by a Head of Division	.11	.26	.12	.29	.07	.20	
'Stakes' of the Vacancy							
Promotion Vacancy[3]	.42	.41	.43	.41	.40	.39	MoJ

Notes: Means calculated for the 510 alternatives in the estimation sub-sample (see Section 3).

1. Data on education (school and university) from Who's Who. Data on occupational location from the Law List, the Bar List, Butterworth's, Haver's Companion to the Bar, Chambers and Partners, and Hazell's Guide.
2. Connectivity score measured along four dimensions: same school, same university (same college if Oxbridge), same chambers and same Gentleman's Club (the latter is obtained from Who's Who). Connectivity is normalised to [0,1]. The maximum score (i.e. 1) would be achieved if an alternative was connected to all four Heads of Division along all four dimensions.
3. Promotion Vacancy measures whether the vacancy in the Court of Appeal (for which the High Court judge is a candidate) has been generated as a result of a promotion of a Court of Appeal judge. It takes value 1 when this is the case and value 0 when the vacancy has been generated as a result of the retirement of a Court of Appeal judge or the statutory creation of a new post. For the few occasions where there is more than one unfilled vacancy, Promotion Vacancy measures the proportion of vacancies generated by promotions.

Table 3. Discrete Choice Models

Dependent Variable: 1 if judge *j* is chosen by promotion committee *n*, 0 otherwise												
Alternative Set: committee *n*'s choice plus 5 judges selected at random from the set of **contemporaneously** serving HC judges[1]												
Explanatory Variables	1 (Baseline)			2 (Plus Committee Criteria)			3 (Plus Connectivity)			4 (Plus Vacancy Var.)		
	Coeff	RobSE	exp(b)	Coeff	RobSE	exp(b)	Coeff	RobSE	exp(b)	Coeff	RobSE	
Elite	1.349 ***	.386	3. 85	.887 **	.453	2.42	1.007 **	.430	2.74	1.381	.693	
Elite*Promotion Vacancy[2]										-.935	1.151	
Connectivity to Heads							-6.072 **	2.362		-6.457 **	2.675	
Connectivity to Lord Chancellor							1.75	2.516		1.929	2.570	
***J*-1 Alternative Constants?**	No			Yes			Yes			Yes		
Promotion Criteria?												
Age at HC appoint. (quadratic)	No			Yes			Yes			Yes		
Experience in HC (quadratic)	No			Yes			Yes			Yes		
Vacancy same HC division	No			Yes			Yes			Yes		
Case-based legal specialism	No			Yes			Yes			Yes		
Affirmed by a Head	No			Yes			Yes			Yes		
Reversed by a Head	No			Yes			Yes			Yes		
No. of Committees (N)	85			85			85			85		
No. of Observations (NJ)	510			510			510			510		
Log Likelihood (βhat)	-143.65			-63.59			-62.03			-61.79		
Pseudo R^2 = 1-(LL(βhat)/LL(0))	.057			.583			.593			.594		

Notes:
1. Random draws from a set excluding judges with less than two years experience. Unreported coefficients can be found in the Appendix in Table A2.
2. Promotion Vacancy, Connectivity to Heads and Connectivity to Lord Chancellor described in Table 2

Table 4. Post Promotion Performance in the Court of Appeal (Civil Division)

Explanatory Variables	Poisson Regression. Dep Var: # Citations			Tobit Regressions. Dependent Variable: Index of Intellectual Influence					
	All Citations			All Citations		Citations from Elite Presiding Judges		Citations from Non-Elite P. Judges	
	Coeff	RobSE	Mean Response	Coeff	RobSE	Coeff	RobSE	Coeff	RobSE
Panel A: Judge-level Regressions									
Elite	1.21 **	.262	4.39	.229 **	.098	.183 *	.106	.098 **	.047
Connected at Promotion	.013	.220		.002	.055	.003	.061	.000	.019
Controls									
Total Number of Cases	.068 ***	.008		.020 ***	.003	.019 ***	.003	.003 ***	.001
Time at Entry in CA	-.002 ***	.000		-.001 **	.000	-.001 **	.000	.000	.000
No. of Observations	61			61		61		61	
Log Pseudo Likelihood	-126.36			-3.68		-4.13		-27.91	
Panel B: Case-level Regressions									
Presiding Judges Just Arrived	-.985 **	.391	-.222	-.108 ***	.041	-.100 **	.045	.096 *	.054
P. Judge Just Arrived * Elite	.906 ***	.402	.204	.103 **	.042	.096 **	.047	.092 *	.055
Controls									
Quartic Time Trend?	Yes			Yes		Yes		Yes	
No. of Observations	8928			8928		8928		8928	
Log Pseudo Likelihood	-5793.24			-2096.11		-1911.19		-927.55	

Notes: In Panel B the regressions are run on the 8928 cases from the Court of Appeal (Civil Division) held on *Westlaw*. The number of positive voluntary citations by the mean case is .226.

Table 5a. Exits from the High Court Pre-Reform/Reform Period, by Elite Status

Panel A: Stock Sample, Unadjusted[1]

State	*Full Sample*		*Elite*		*Non-Elite*		*Difference*	
	No.	Col %	No.	Col %	No.	%	%	*p*-value
Pre- Announcement								
Promoted	**8**	**5.93**	**8**	**8.60**	**0**	**0**	**8.60**	**.051**
Total	135	100.00	93	100.00	42	100.00		
Post- Announcement								
Promoted	**7**	**5.69**	**5**	**6.02**	**2**	**5.00**	**1.02**	**.820**
Total	123	100.00	83	100.00	40	100.00		
Difference							-7.58	.210

Panel B: Inflow Sample, Kaplan Meier Adjusted[2]

	Full Sample	*Elite*	*Non-Elite*	*Log Rank Test*
	% after 12yrs	% after 12yrs	% after 12yrs	*p*-value
10-12 yrs Before Cohorts				
Promoted	58.75	82.22	0	.001
8-10 yrs Before Cohorts				
Promoted	44.26	50.00	28.27	.251

Notes:

1. Unadjusted statistics for "Pre Reform" based on the 135 judges serving between 17 July 2000 (the first day with the same Heads of Division) and 11 June 2003 (last day before reform announcement). Unadjusted statistics for "Reform" based on the 123 judges serving between 12 June 2003 and 6 April 2005 (the last day with the same Heads of Division).
2. Adjusted statistics for "10-12 yrs Before Announcement Cohorts" based on the 31 judges appointed between 12 June 1991 and 12 June 1993. Adjusted statistics for "8-10 yrs Before Announcement Cohorts" based on the 21 Judges appointed between 13 June 1993 and 12 June 1995.

Table 5b. Exits from the High Court Pre/Post Reform Announcement, by Connectivity Status

Panel A: Stock Sample, Unadjusted[1]

State	*Full Sample*		*Connected to HD*		*Not Connected to HD*		*Difference*	
	No.	Col %	No.	Col %	No.	%	%	*p*-value
Pre- Announcement								
Promoted	8	5.93	5	10.64	3	3.41	7.23	.091
Total	135	100.00	47	100.00	88	100.00		
Post- Announcement								
Promoted	7	5.69	1	2.94	6	6.74	-3.80	.420
Total	123	100.00	34	100.00	89	100.00		
Difference							-11.03	.083

Panel B: Inflow Sample, Kaplan Meier Adjusted[2]

	Full Sample	*Connected to HD*	*Not Connected to HD*	*Log Rank Test*
	% after 12yrs	% after 12yrs	% after 12yrs	*p*-value
10-12 yrs Before Cohorts				
Promoted	58.75	63.64	52.00	.322
8-10 yrs Before Cohorts				
Promoted	44.26	30.00	54.39	.366

Notes:

1. Unadjusted statistics for "Pre Announcement" based on the 135 judges serving between 17 July 2000 (the first day with the same Heads of Division) and 11 June 2003 (last day before CRA announcement). Unadjusted statistics for "Post Announcement" based on the 123 judges serving between 12 June 2003 and 6 April 2005 (the last day with the same Heads of Division).
2. Adjusted statistics for "10-12 yrs Before Announcement Cohorts" based on the 31 judges appointed between 12 June 1991 and 12 June 1993. Adjusted statistics for "8-10 yrs Before Announcement Cohorts" based on the 21 Judges appointed between 13 June 1993 and 12 June 1995.

Table 6. Discrete Choice Models, with Time Period Interactions

Dependent Variable: 1 if judge *j* is chosen by promotion committee *n*, 0 otherwise						
Alternative Set: committee *n*'s choice plus 5 judges selected at random from the set of **contemporaneously** serving HC judges[1]						
Explanatory Variables	5		6		7	
	Coeff	RobSE	Coeff	RobSE	Coeff	RobSE
Elite	1.223 ***	.474	1.178 **	.490	1.798 **	.795
Elite*Reform	-2.535 **	1.111	-2.600 **	1.206	-4.310 ***	1.241
Elite*Promotion Vacancy					-1.496	1.368
Elite*Promotion Vacancy*Reform					5.604 ***	2.330
Connectivity to Heads	-5.853 **	2.638	-4.437 *	2.671	-5.032 *	2.836
Connectivity to Heads*Reform			-30.605 ***	11.214	-30.237 ***	11.307
Connectivity to Lord Chancellor	1.880	2.545	1.956	2.593	2.233	2.671
***J*-1 Alternative Constants?**	Yes		Yes		Yes	
Promotion Criteria?	Yes		Yes		Yes	
No. of Committees (N)	85		85		85	
No. of Observations (NJ)	510		510		510	
Log Likelihood (βhat)	-61.26		-59.21		-58.60	
Pseudo R^2 = 1-(LL(βhat)/LL(0))	.597		.611		.615	

Notes: 1. Random draws from a set excluding judges with less than two years experience. Unreported coefficients can be found in the Appendix in Table A3.

Table A1. Classification of London Sets by Law Directory Ranking

Specialism	Ranked?	Sets	
Civil	Lawyer Top 30	Brick Court (7/8 Essex Street), Essex Court (24 Lincolns Inn) 1 Essex Court (Temple), Fountain Court (Temple) 20 Essex Street, 7 King's Bench Walk (Temple), Keating Chambers (15 Essex Street) 4 Pump Court (Temple), Littleton Chambers (Temple)	9
	C& P Listed	1 Brick Court (Temple), Cloisters (1 Pump Court, Temple) 2 Crown Office Row (Temple), Devereux Chambers (Devereux Court) 2 Essex Court, 3 Essex Court, 4 Essex Court (Temple) 10 Essex Street, Falcon Chambers (Temple), Farrar's Building (Temple) Francis Taylor Building (Temple), 3 Gray's Inn Place (Gray's Inn) 1 Harcourt Buildings (Temple), 12 King's Bench Walk (Temple) Lamb Building (Temple), Monckton Chambers (Gray's Inn) New Court, 2 New Square, 5 New Square, 7 New Square, 8 New Square (Lincoln's Inn) 1 Paper Buildings (Temple), 6 Pump Court (Temple), 5 Raymond Buildings (Gray's Inn), 11 South Square (Gray's Inn) 2 Temple Gardens (Temple)	26
Public	Lawyer Top 30	39 Essex Street, 1 Crown Office Row (Temple), 4-5 Gray's Inn Square (Gray's Inn), Matrix Chambers (Gray's Inn), 2-3 Gray's Inn Square (Gray's Inn)	5
	C& P Listed	2 Garden Court (Temple), 4 Breams Buildings, 2 Harcourt Buildings (Temple) 11 King's Bench Walk (Temple), 2 Paper Buildings (Temple) Took Court Chambers (14 Took's Court)	6
Chancery	Lawyer Top 30[1]	9 Old Square, 13 Old Square (Lincoln's Inn) 7 Stone Buildings (Lincoln's Inn)	3
	C& P Listed	Erskine Chambers (Lincoln's Inn), Gray's Inn Chambers (Gray's Inn) 1 New Square, 3 New Square (Lincoln's Inn) 11 Old Square (Lincoln's Inn), 4 Stone Buildings, 5 Stone Buildings (Lincoln's Inn)	7
Crime	C& P Listed	9 Bedford Row, 36 Bedford Row, 4 Brick Court (Temple), 23 Essex Street 1 Gray's Inn Square (Gray's Inn), 1 Hare Court, 2 Hare Court (Temple) 5 Paper Buildings (Temple) 4 King's Bench Walk, 5 King's Bench Walk, 6 King's Bench Walk (Tempe)	10
Family	C& P Listed	2 Dr Johnson's Building (Temple) 1 King's Bench Walk (Temple), 1 Mitre Court Buildings (Temple) 4 Paper Buildings (Temple), Queen Elizabeth Building (Temple)	6
Not C& P Listed		Dr Johnson's Building (Temple), Goldsmith Building (Temple) 3 Paper Buildings (Temple), 2 Pump Court (Temple) Chambers of Peter Rook (Lion Court), 11 New Court (Lincoln's Inn) 5 Essex Court (Temple)	7

Notes: Lawyer Top 30 Ranking in 2005 (used to classify sets as a 'leading London set); C&P Listings in (at least one of) 1990, 1994/5, 1999/2000 and 2003/4.

1. The Lawyer Top 30 entry as Maitland Chambers.

Table A2. Unreported Coefficients from Table 3

Dependent Variable: 1 if judge *j* is chosen by promotion committee *n*, 0 otherwise				
Alternative Set: committee *n*'s choice plus 5 judges selected at random from the set of contemporaneously serving HC judges				
Explanatory Variables (all calculated up to tournament date)	3 (Plus Connectivity)		4 (Plus Vacancy Var.)	
	Coeff	Robust SE	Coeff	Robust SE
Age:				
Age at High Court Entry (yrs)	4.972 ***	1.692	5.027 ***	1.684
Quadratic Term	-.051 ***	.165	-.0510 ***	.0164
Experience:				
Experience in HC (yrs)	1.357 *	.710	1.313 *	.738
Quadratic Term	-.094 **	.038	-.092 **	.039
Appeal Based Measures:				
Reversed by a Head of Div (%)	-3.309	2.345	-3.280	2.377
Affirmed by a Head of Div (%)	-.487	1.107	-.451	1.124
Case Based Legal Specialism				
Vacancy Same HC Division (%)	1.555 ***	.022	1.590 ***	.540
# cases in CHD (1)	-.035	.025	-.035	.025
# family law cases in FAM/QBD (2)	-.070 *	.042	-.071 *	.042
# criminal law cases in QBD (3)	-.056	.052	-.058	.054
# public law cases in QBD (4)	-.028	.029	-.029	.030
# civil law cases in QBD/EAT (5)	-.029	.024	.030	.024
# cases in CA Crim (6)	-.057 **	.022	-.058 **	.022
# cases in CA Civ (7)	[redacted]		[redacted]	
Total # cases (sum 1-7)	.064 ***	.022	.065 ***	.022
F-test Case Specialism Ctrls (*p*-value)	.002		.002	
No. of Committees	85		85	
No. of Observations	510		510	
Log Likelihood (βhat)	-62.03		-61.79	
Pseudo R^2 = 1-(LL(βhat)/LL(0))	.593		.594	

Table A3. Case Allocation in the Court of Appeal (Civil Division)

	Dependent Variable											
	Presiding Judge Just Arrived?		Judge 2 Just Arrived?		Judge 3 Just Arrived?		Presiding Judge Just Arrived & Elite Background?		Judge 2 Just Arrived & Elite Background?		Judge 3 Just Arrived & Elite Background?	
	F-Statistic	*p*-Value	*F*-Statistic	*p*-Value	*F*-Statistic	*p*-Value	*F*-Statistic	*p*-Value	*F*-Statistic	*p*-Value	*F*-Statistic	*p*-Value
Legal Subject Dummies	.91	.711	1.03	.398	1.18	.121	.90	.740	1.06	.324	1.02	.426
No. of Dummies	90		90		90		90		90		90	
Controls												
Quartic Time Trend?	Yes		Yes		Yes		Yes		Yes		Yes	
No. Observations	8928		8702		6204		8928		8702		6204	
R-Squared	.031		.034		.074		.026		.030		.055	

Notes: Regressions run on the 8928 cases from the Court of Appeal (Civil Division) held on *Westlaw*. Each regression includes 90 legal subject dummies. The F-statistic and p-Values refer to a test of the joint significance of these 90 legal subject dummies.