Social networks and the law

Did 'judges choosing judges' – the age-old English practice for making judicial appointments – lead to well-connected candidates being favoured? Jordi Blanes i Vidal and Clare Leaver examine the significance of social networks in the legal profession – and the impact of a recent reform of the system.

In June 2003, Prime Minister Tony Blair took the legal world by surprise when he announced sweeping reforms of the English justice system. A key feature of these reforms was the creation of a judicial appointments commission (JAC), whose remit included appointing and promoting members of the senior judiciary. Its creation would end the age-old practice of senior judges reviewing and short-listing candidates for formal approval by a cabinet minister.

Many felt that the reforms were long overdue. One point of contention was the involvement of a cabinet minister in selecting senior judges. But criticisms extended beyond calls for a 'separation of powers'. The senior judiciary was regularly accused of elitism, being out of touch and having one single overriding objective: maintenance of the status quo. The practice of 'judges choosing judges' was widely deemed to be responsible for a judiciary out of step with modern sensitivities.

A cursory look at the gender, racial and educational composition of the senior judiciary did not help. Watchdogs, newspapers and even the Home Affairs Select Committee of the House of Commons regularly produced reports underlining the fact that most senior judges were white, upper class men.

Furthermore, many of these judges had practiced in the same barristers' chambers, attended the same universities (essentially Oxbridge) and even gone to the same fee-paying schools. These personal connections, together with a general preference for 'elite' candidates, were thought to be responsible for the lack of diversity among the senior judiciary. Put simply, the popular view was that equally qualified non-elite candidates were being overlooked.

Before the creation of the judicial appointments committee, senior judges were, if anything, favouring non-elite candidates

Our research explores this claim for promotions from the High Court to the Court of Appeal, using information on the background of the 275 judges who had served in the High Court between 1985 and 2005. Since elite is a generic term encompassing a variety of educational and professional characteristics, we simplify the exposition by classifying a judge as 'elite' if he (and it was almost always he) had attended a private school and/or Oxbridge followed by a top ranking barristers' chambers.

Unsurprisingly, we find that 71% of the judges in our sample were elite. We also see that elite High Court judges were more

likely to be promoted to the Court of Appeal. By the end of 2005, 39% of the elite judges had been promoted compared with just 11% of the non-elite judges.

Our question is: could this difference be regarded as evidence of the favouritism of elite candidates? To answer it, we first need to understand the criteria that are supposed to guide the promotion of judges. The official guiding principle has always been 'merit'. In practice, this has meant choosing candidates who are young yet experienced, who have a legal specialism matching the needs of the Court of Appeal and who display high ability, as evidenced by their track record on the bench.

In our baseline analysis without any controls, elite status is associated with a fourfold increase in the odds of a candidate being chosen for a given promotion. But once we control for candidates' age, experience, legal specialism and performance, this effect more than halves.

This tells us that (at least part of) the reason for the difference in promotion rates is that elite candidates were better endowed with promotion-relevant characteristics. Indeed, our data reveal that elite judges were on average two years younger when they entered the High Court. They were also more likely to have expert knowledge of public and civil law, the kinds of law that are more in demand in the Court of Appeal.

When reform was under discussion, non-elite candidates were significantly more likely to be promoted

To explore the favouritism hypothesis further, we conduct two additional tests. Since many commentators point to the role of social networks, we first look to see whether elite judges might have fared better because they were personally connected to the promotion committee. To do this, we analyse information on the backgrounds of the individuals responsible for filling each Court of Appeal vacancy between 1985 and 2005.

Our question is: are candidates more likely to be chosen when they have gone to the same school, attended the same Oxbridge college and/or worked in the same chambers as a member of the promotion committee? Surprisingly, we find that the opposite was true: better connected candidates were less likely to be chosen. This finding is clearly at odds with the notion that elite judges benefited from their social networks.

We also look to see how elite and non-elite judges performed after promotion to the Court of Appeal. Favouring elite candidates would imply that the average promoted elite candidate is less able than his non-elite counterpart. Consequently, under the favouritism hypothesis, we would expect promoted elite judges to do less well in the Court of Appeal (and therefore issue less influential decisions) than promoted non-elite judges. In fact, our findings are the exact opposite: elite judges received more citations than their non-elite counterparts.

To summarise, a closer look at the data reveals that the promotions process was a complex one. On the face of it, elite judges had an advantage. But a large part of this advantage appears to have been due to their higher endowment of promotion-relevant characteristics – their 'merit' – and not, as many have argued, their social networks.

Elite judges' advantage in promotions was due to their merits not their social networks

Regardless of this observation, it is fair to say that in the early 2000s, pressure was building up to reform the system. One intriguing question is whether judges attempted to pre-empt these reforms by selecting non-elite candidates.

Between 2003 and 2005, the Labour government had committed to reforming the system, but there was considerable uncertainty about the final composition of the JAC. During this period, several alternatives – in which judges held very different levels of influence – were considered. Since senior judges were actively lobbying to influence the final composition of the new body, it is reasonable to hypothesise that any perception of favouritism during this period would have been damaging to their case.

Consistent with this, we find that during this 'high stakes' period, non-elite candidates were significantly more likely to be promoted than during previous periods. Furthermore, being connected to members of the promotion committee was even more damaging to promotion prospects than during normal times.

Our findings have implications for the policy debate surrounding the JAC. Tellingly, the chair of the Home Affairs Select Committee remarked that in terms of appointing candidates with a less traditional background, the new system is 'actually worse' than the previous system with its greater judicial influence. In response, the government proposed to hand 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 perceived poor performance of the commission. It suggests that the proposed 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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