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JUDICIAL INDEPENDENCE: SOME EVIDENCE FROM THE ENGLISH COURT OF APPEAL

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ABSTRACT

This paper is concerned with the existence or otherwise of conscious political interference with judicial decision taking. We produce new evidence from the English Court of Appeal to shed some light on the theoretical debate on judicial independence. This evidence rests on the fact that the procedure for promoting judges from the Court of Appeal to the House of Lords is in principle under political control: the lord chancellor, who has a key role in the promotion of judges, is a member of the cabinet and as such a political appointee. The data relate to public law decisions made by judges in the Court of Appeal over the period 1951–86. We use a competing risks survival model to establish whether the record of individual judges in deciding for or against the government was a factor that determined their promotion chances, controlling for the quality of their decision making.

I. INTRODUCTION

THE existence of a judicial branch of government that is separate from the other branches and is, to some degree, independent is a common phenomenon among democratic countries. A debate has emerged in recent years among lawyers and economists with regard to the independence of the judiciary, following the pioneering theoretical contribution by William M. Landes and Richard A. Posner.¹ While the concept of independence is itself problematic,² we are concerned in this paper with the existence or otherwise of conscious political interference with judicial decision taking. We review briefly the theoretical debate over the reasons why such interference may or may not take place, and then we produce new evidence from the English Court of Appeal that sheds some light on the debate. This evidence

We would like to acknowledge the helpful comments from two anonymous referees and from Sam Peltzman, as well as the participants at the thirteenth annual conference of the European Association of Law and Economics, Haifa, Israel.

¹ William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J. Law & Econ.* 875 (1975).

² For a discussion on the concept of independence and on the independence of the judiciary, see Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?* 13 *Int'l Rev. L. & Econ.* 349, 350–52 (1993).

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rests on the fact that the procedure for promoting judges from the Court of Appeal to the House of Lords is in principle under political control: the lord chancellor, who has a key role in the promotion of judges, is a member of the cabinet and as such a political appointee. As Gary M. Anderson, William F. Shughart, and Robert D. Tollison note, the validity of the Landes-Posner theory relies on the assumption that judges are somehow motivated to behave "independently."³ We take a broader view here and address the question of whether successive British governments have used their undoubted power to determine promotion in order to influence the judiciary.

The data we have obtained relate to public law decisions made by judges in the Court of Appeal over the period 1951–86, in cases where the government itself was a party to the dispute. We investigate whether the record of individual judges in deciding for or against the government was a factor determining their promotion chances. The technique we use is based on survival analysis with regressors: the conditional probability of judicial promotion is modeled as a function of the decision-making record of the judge, the political color of the government, and characteristics that control for the perceived quality of the judge's decisions. The paper concludes with a discussion of the results and their implications for the theoretical debate concerning judicial independence and the separation of powers.

II. BACKGROUND

Following the contribution by Landes and Posner, recent research views the separation of powers and an independent judiciary as mechanisms that help interest groups and the legislature to maximize profits from the deals between them.⁴ Landes and Posner focus on the judiciary, portraying its role as complementary to parliamentary procedural rules that are supposed to make changes in legislation more difficult and costly. Both mechanisms, according to their model, are working on behalf of the legislature and powerful interest groups, by making legislation more durable. This guaranteed durability increases the profits that the legislature and interest groups make from the deals between them. More recently, Eli M. Salzberger has argued that independent judges do indeed benefit politicians, but this may be due to factors other than their loyalty to the original legislature. Independent courts can be used to shift blame for unpopular collective decisions, they can decrease the effects of uncertainty from political ramifications of collective decision making, and they help to reduce social choice problems.

³ Gary M. Anderson, William F. Shughart, & Robert D. Tollison, On the Incentives of Judges to Enforce Legislative Wealth Transfers, 32 J. Law & Econ. 215 (1989).

⁴ Landes & Posner, *supra* note 1.

Thus the result of their independent input into collective decision making is an increase in political support for politicians.⁵

These contributions suggest a model in which judicial independence is something of value to governments, rather than a constraint that is placed on them by the public. As a consequence, we could test the validity of such a model if it were possible to observe the behavior of governments toward the judiciary in circumstances where the former have real power over the latter. A government that views the judiciary as a constraint will presumably take advantage of any legal powers it has to relax that constraint, whereas a government that views the independence of the judiciary as an asset will not exercise those powers. As Landes and Posner put it, "[T]here are various methods by which the political branches can impose costs on the judiciary, such as budget harassment, tinkering with the court's jurisdiction, and altering the composition of the judiciary by the creation of many new judgeships. Yet such devices have been resorted to infrequently, even in periods of intense hostility to judicial rulings."⁶ They go on to suggest that this is because of the damage that such devices would impose on the perceived independence of the judiciary, with consequent costs to the beneficiaries of legislation enacted by the current legislature.

Anderson, Shughart, and Tollison⁷ suggest that a testable hypothesis that emerges from this conjecture is that the legislature will exercise its powers over judicial remuneration in order to motivate the judiciary to act in an independent way. They test this by estimating the relationship between the salary of the chief justice of states and the number of times the state courts used substantive due process reviews in order to overturn legislation. A positive and significant relationship is deemed to show that independence at the state level is rewarded by government.⁸

Arguably, a requirement that government uses its powers positively to secure judicial independence is a relatively strong form of the Landes-Posner hypothesis. By contrast, evidence that government does not use its powers to induce judicial loyalty, even where those powers are available at no cost, would be a sufficient test of the hypothesis. In what follows, we attempt to test both strong and weak forms of the hypothesis using data from the English system of judicial promotion. Moreover, we note the definition of an "independent" judiciary at the start of Landes and Posner's

⁵ Salzberger, *supra* note 2.

⁶ Landes & Posner, *supra* note 1, at 885.

⁷ Anderson, Shughart, & Tollison, *supra* note 3, at n.3

⁸ This is of course contingent on the assumption that judges do in fact behave self-interestedly. Evidence in support of this assumption is presented in Mark A. Cohen, *The Role of Criminal Sanctions in Antitrust Enforcement*, 7, No. 4 *Contemp. Pol'y Issues* 36 (1989).

paper: "one that does not make decisions on the basis of the sorts of *political* factors (for example, the electoral strength of the people affected by a decision) that would influence and in most cases control the decision were it to be made by a legislative body such as the U.S. Congress."⁹ This definition may be interpreted as suggesting that the hypothesis described above could relate to attempts by political parties to induce judicial loyalty, as well as those by the current legislature, whatever its political color. Consequently, we incorporate both hypotheses in the empirical model established in the following section.¹⁰

III. A CASE STUDY: THE ENGLISH COURT OF APPEAL

We address the issues discussed in the previous section by examining whether politicians in Britain are using the promotion of judges in order to create dependency. The English Court of Appeal presents an ideal opportunity to test this hypothesis because politicians in Britain have the power to curtail judicial independence through appointments and promotions.

A. *Judicial Promotion in England*

The English Court of Appeal is the second highest judicial instance in England and Wales. Appeals from it can be launched, if leave to appeal is granted, with the Judicial Committee of the House of Lords, which is the highest judicial instance for the whole of Britain.¹¹ The judges of the Court of Appeal (the lord justices of appeal), as with the judges of the House of Lords (the law lords), are appointed by the queen on the advice of the prime minister after consultation with the lord chancellor.¹² The lord chancellor, who in practice holds the real power to appoint and promote judges, is a

⁹ Landes & Posner, *supra* note 1, at 875; emphasis added.

¹⁰ See also in this context the recent contribution by Orley Ashenfelter, Theodore Eisenberg, & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 *J. Legal Stud.* 257 (1995), in which the party affiliation of the ruling judge is found to be insignificant as a factor determining decisions in federal civil rights cases.

¹¹ More details on the English courts system can be found in P. F. Smith & S. H. Bailey, *The Modern English Legal System* (1984).

¹² High Court judges, who are one tier below the Court of Appeal judges, are appointed by the queen on the advice of the lord chancellor. They have to be practicing barristers for at least 10 years. Unlike first-tier judges—magistrates, justices of peace, county court judges—who are appointed by the lord chancellor and can be removed by him, the second-tier judges—High Court, Court of Appeal, and House of Lords judges—enjoy tenure during good behavior. The only personal external control over them, therefore, is through promotion decisions.

member of the cabinet (as well as a legislator and a judge) and is appointed by the prime minister as with any other political appointment.¹³

Since the judicial appointment and promotion procedure is totally subject to politicians' discretion, we can examine decisions to see whether they are consistent with particular assumptions about their objectives. Control over appointment and promotion has a potentially significant effect on judicial independence in the light of the fact that the British judiciary is in effect a career-based judiciary. The tradition that has been developed in the second half of this century is that the lord justices of appeal are High Court judges who were promoted to the Court of Appeal, and the law lords are lord justices of appeal (or the equivalent Scottish or North Irish judges) who were promoted to the House of Lords (there were only three exceptions to this course in the last 40 years). Indeed, the Court of Appeal judges are paid more than High Court judges and the law lords are paid more than Court of Appeal judges, not only in monetary terms but also in respect and status.

B. Data

Our empirical analysis represents an attempt to examine the relationship between judges' degree of loyalty to the government (or the party) and their chances of being promoted from the Court of Appeal to the House of Lords. "Loyalty" is defined here as the propensity to decide cases according to the government's (or the party's) will.¹⁴ However, to the extent that governments (or interest groups influencing governments) are concerned with other objectives such as the need for efficiency, equity, and justice in judicial decision making, there will also be other factors that influence the chance of promotion: namely, those that determine the perceived quality of judicial decision making. Consequently, our aim was to uncover the extent to which loyalty and quality in judicial decision making were competing factors in determining promotion from the Court of Appeal. To do this it was necessary to collect data on a sample of decisions by judges while in

¹³ On the roles of the lord chancellor, see Fred L. Morrison, *Courts and the Political Process in England 199–266* (1973); Patrick Atiyah, *Judicial-Legislature Relations in England, in Judges and Legislators 129* (Robert A. Katzman ed. 1988). The procedure for appointment and promotion of judges was described by Morrison, *supra* at 70, as the most significant political input into the judicial system.

¹⁴ The Landes-Posner model of the independence of the judiciary uses this measure of loyalty to define "judicial independence." A dependent judiciary, according to this model, would decide cases "in conformity with the views of the current rather than the enacting legislature," while an independent judiciary would "interpret and apply legislation in accordance with the original legislative understanding" (Landes & Posner, *supra* note 1, at 879). Applying this model to the English system of government, in which there is no real separation between the executive and legislature, we can substitute "the government" for "the legislature."

the Court of Appeal and to relate these to their subsequent careers. Furthermore, these decisions had to involve the potential for demonstrating loyalty to the government or the political party.

The government has its own interests in many kinds of legal disputes, probably in all fields of law, but these interests are not always easy to detect. We focused, therefore, on the cases in which the government itself was a litigant. From those we selected for empirical analysis only the cases in which the defendant was a minister or his or her department.¹⁵ These cases are usually identified as a "battleground" between the citizen and the authorities, and our assumption was that when a plaintiff succeeds in this type of case, this is seen as a defeat for the government, more so than in other public law cases.

We collected data on all such cases in the period 1951–86,¹⁶ which amounted to 461 judgments, or around 1,200 individual opinions (in most cases three judges participated in the decision, although some cases were heard by only one or two judges). Subsequently, we created an individual profile for each of the 64 judges of the Court of Appeal who heard public law cases during the period of the research and who had completed a term of office during this period. A variable TIMECA was calculated as the number of years a judge served in the Court of Appeal prior to promotion or retirement. In addition the following variables were constructed as proxies for loyalty and quality.

1. Loyalty

- AGA = the percentage of decisions in which the judge decided against the government. This variable represents a direct test of our main hypothesis: if it is negatively related to the chance of promotion, it indicates that disloyalty is penalized (or equivalently, loyalty is rewarded). Subsidiary variables were also created to reflect the judges' decisions against Conservative governments (TORYAGA) and against Labour governments (LABAGA).
- REV = the percentage of decisions in which the judge reversed (partly or fully) a judgment of a lower court; if this is combined with the previous variables multiplicatively, we have interaction terms (AGAREV, AGATREV, AGALREV, respectively).

¹⁵ This group of cases usually falls within (or strongly correlates with) the subgroup of constitutional and administrative law decisions.

¹⁶ We could not obtain data prior to 1951 because only from that year were all the Court of Appeal decisions transcribed. We chose not to use the Law Reports (which report cases prior to 1951) because they do not report all decisions and they create, therefore, suspected selection bias.

These variables were included to reflect the fact that a simple affirmation of a lower court's decision against the government might not be as disloyal as the more proactive reversal of a lower court's decision in favor of the government.

GOVT = in order to test whether political parties are more likely to promote their own appointees irrespective of their decision-making record, we construct a binary variable that varies over the duration of a judge's term of office, taking the value one when the government in power is of the same political party that appointed the judge initially to the Court of Appeal, and zero otherwise.¹⁷

2. Quality

REVHL = the percentage of decisions in which the judge was subsequently reversed (partly or fully) by the House of Lords. Given that the House of Lords is the ultimate arbiter of the law in England, this variable is a proxy for the extent to which the judge's decisions are thought to be correct.¹⁸

BOPINION = the percentage of nonelaborated (that is, merely concurrences and not reasoned) decisions given by the judge. Arguably less weight should be given to such decisions when measuring the quality of decision making.

APPOINTC = the age at which the judge was appointed to the Court of Appeal. The younger the judge at appointment, the higher the likelihood that he is considered to be a "high flyer," marked out for promotion.

Table 1 shows descriptive statistics for the variables described above.

¹⁷ The 36 years covered by this research saw 24 years of Conservative rule and 12 years of Labour rule. Labour and Conservative governments had equal opportunities to appoint judges to the Court of Appeal, relative to the periods of time in which they were in power. The Conservatives, who were in power for two-thirds of the relevant period, appointed 57 lord justices of appeal—about two-thirds of the total Court of Appeal appointees during this period. Labour governments appointed 29 lord justices of appeal—about one-third of the appointees. Crucially, we find no evidence that the frequency of judges' decisions against the government varies depending on the party in power: the mean percentages of decisions against the government were 23.74 and 23.66, with standard deviations of 12.87 and 13.40, respectively, when comparing the governments of different political parties.

¹⁸ For convenience in this context, we use the term "House of Lords" to refer to the judicial committee of the House of Lords, which is considered to be apolitical. That is, we refer not to the House of Lords as a second legislative chamber, but rather to a distinct group of people who are professional judges, all of whom were previously lower tier judges. All of them finish their careers as judges and do not seek political or other appointments. The only structural difference between them and lower court judges is, therefore, the fact that lower judges have aspirations to be promoted, while the law lords do not.

TABLE I
DESCRIPTIVE STATISTICS ($N = 64$ Judges)

Variable	Minimum	Maximum	Mean	SD
TIMECA	1	15.00	7.34	3.07
APPOINTC	48	73.00	60.86	5.30
BOPINION	0	100.00	35.16	22.51
REVHL	0	100.00	26.77	37.25
AGA	0	53.33	24.16	13.19
REV	0	66.67	29.69	15.72

C. Methodology

Given data on the dates at which judges were promoted to the House of Lords, in addition to proxies for loyalty and quality as described above, our objective was to estimate the combined significance of these measures as explanations for the observed promotion decisions over time. Consequently, we model empirically the duration of service within the Court of Appeal, where promotion to the House of Lords is one end point and retirement is another. Our estimation methodology needed to take into account the fact that the observation of a promotion or retirement in any given year is the outcome of a sequence of conditional probabilities (or "hazards") of promotion or retirement in previous years. Inspection of the raw data on length of service in the Court of Appeal reveals that there is a tendency for the average promotion and retirement hazards to increase over time. Using actuarial methods, empirical hazard functions can be plotted in 3-year intervals (Figure 1).

This tendency for the promotion hazard to increase with length of service presumably reflects the cumulative effect of judicial experience on the promotion prospects of individual judges. The fact that the retirement hazard increases over time is clearly a function of age.

It is possible to examine the way in which the conditional probabilities of promotion or retirement vary systematically between judges. In other words, the hazard functions can be defined as functions of the observed characteristics of the individual judge (x) as well as of elapsed time in service at the Court of Appeal (t). If it is assumed that the time-related component of the hazard function is independent of the judge's characteristics, a proportional hazards model can be constructed for each of the events:

$$\lambda_j(t; x) = \lambda_j(t)e^{\beta_j'x_j} \quad (1)$$

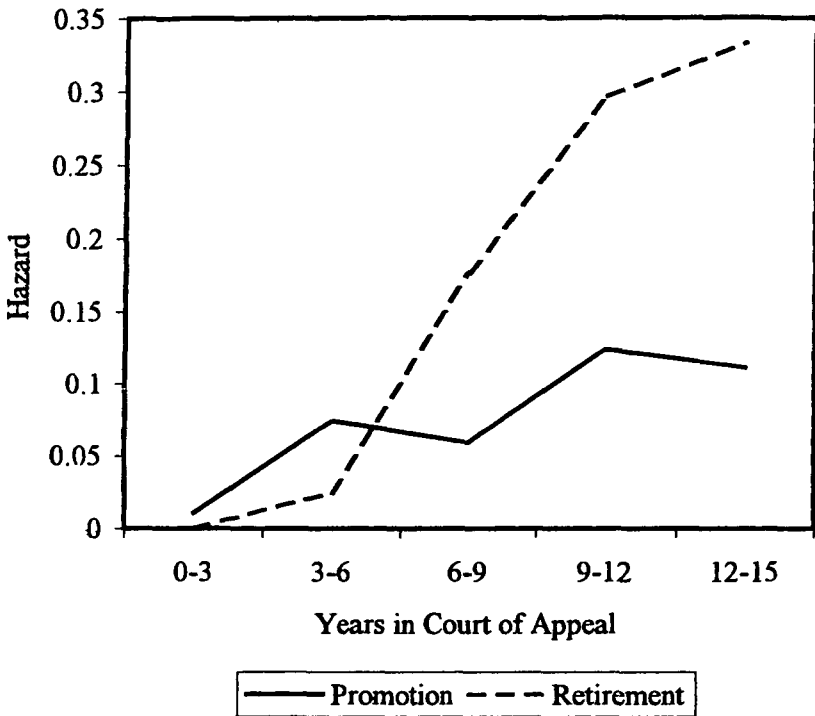


FIGURE 1.—Promotion and retirement hazards

This is equivalent to assuming that for event j there exists a baseline hazard function $\lambda_j(t)$ that shifts up or down proportionately according to the value of the characteristics x_j and the estimated parameters β_j . These parameters can be estimated by maximum likelihood methods given an appropriate functional form for $\lambda_j(t)$. Here we choose to assume a Weibull distribution, given that the conditional probability of promotion increased over time for our sample of judges:

$$\lambda_j(t; x) = \alpha t^{\alpha-1} e^{\beta_j x_j} \tag{2}$$

The parameter α of the Weibull distribution indicates the extent to which the hazard of event j increases (or decreases) over time.¹⁹

One of the advantages of using this approach is that it is fairly straight-

¹⁹ If $\alpha > 1$, the hazard is increasing; if $\alpha < 1$, the hazard is decreasing.

forward to incorporate time-varying covariates into the modeling process.²⁰ If we replace the covariate vector x_j with $x_j(t)$ in the above hazard function specification, then this acknowledges both sources of time-dependent change: that due to the behavior of the baseline hazard for all judges and that due to the change in the covariate vector over time, which will clearly differ between judges. In the context of this paper, the variable GOVT defined above is a time-varying covariate in this sense.²¹

In what follows, we model a judge's duration of service in the Court of Appeal as the combined effect of independent hazards.²² Initially, we model the effects of promotion by any government and retirement as the joint determinants of length of service. Subsequently, we model the effects of promotion by a Conservative government, by a Labour government, and retirement as the combined determinants of length of service. In both models, each hazard in turn can be modeled using equation (2), with the other hazards being treated as censored (that is, incomplete) observations. To avoid the possibility of bias from differing periods of observation, we include in our sample only those judges who have completed lengths of service in the Court of Appeal over the period 1951–86 (that is, 62 judges).

The empirical specification for model 1 therefore consists of two hazard functions as follows:

$$\begin{aligned} \lambda_{\text{prom}}(t; x) = \alpha t^{\alpha-1} \exp(\beta_0 + \beta_1 \text{APPOINTC} + \beta_2 \text{BOPINION} \\ + \beta_3 \text{REVHL} + \beta_4 \text{AGA} + \beta_5 \text{REV} \\ + \beta_6 \text{AGAREV} + \beta_7 \text{GOVT}), \end{aligned}$$

and

$$\lambda_{\text{retire}}(t; x) = \alpha t^{\alpha-1} \exp(\beta_0 + \beta_1 \text{APPOINTC}).$$

²⁰ D. R. Cox & D. Oakes, *Analysis of Survival Data*, ch. 8 (1984).

²¹ A problem may arise if the covariate vector $x_j(t)$ is not a complete specification of all of the sources of heterogeneity in the sample: there may be unobservable factors that determine the promotion chances of judges. Consequently, the hazard function could incorporate a stochastic element as follows:

$$\lambda_j(t; x) = \alpha t^{\alpha-1} e^{\beta_j x_j + u},$$

where u represents the stochastic influence of unobservable heterogeneity on the hazard rate. The parameters of a mixture distribution to take account of this can be estimated using maximum likelihood methods providing that there is an assumed distribution for u . In testing for the effect of unobserved heterogeneity on our findings reported below, we adopted the conventional approach in assuming a gamma distribution with mean one and variance θ . However, the latter proved to be insignificant in all cases.

²² This approach is known as a competing risks model; see Cox & Oakes, *supra* note 20, ch. 9.

The first three regressors (APPOINTC, BOPINION, REVHL) in the promotion hazard are indicators of judicial quality as explained above; the second three regressors (AGA, REV, AGAREV) are measures of the judge's record in deciding cases in which the government is a litigant (irrespective of the political party in power). The final regressor (GOVT) is a time-varying covariate included in order to test whether governments show favor to judges who were initially appointed by their own party.

In model 2, the promotion decisions by governments of different political colors are investigated separately in relation to the judges' records during differing governments' periods of office. Hence, the complete empirical specification is

$$\begin{aligned}\lambda_{\text{con}}(t; x) = & \alpha t^{\alpha-1} \exp(\beta_0 + \beta_1 \text{APPOINTC} + \beta_2 \text{BOPINION} \\ & + \beta_3 \text{REVHL} + \beta_4 \text{TORYAGA} + \beta_5 \text{REV} \\ & + \beta_6 \text{AGATREV} + \beta_7 \text{LABAGA}),\end{aligned}$$

$$\begin{aligned}\lambda_{\text{lab}}(t; x) = & \alpha t^{\alpha-1} \exp(\beta_0 + \beta_1 \text{APPOINTC} + \beta_2 \text{BOPINION} \\ & + \beta_3 \text{REVHL} + \beta_4 \text{LABAGA} + \beta_5 \text{REV} \\ & + \beta_6 \text{AGALREV} + \beta_7 \text{TORYAGA}),\end{aligned}$$

and

$$\lambda_{\text{retire}}(t; x) = \alpha t^{\alpha-1} \exp(\beta_0 + \beta_1 \text{APPOINTC}).$$

Here the Conservative and Labour promotion decisions are specified as a function of judicial quality, together with separate decision-making variables reflecting the record of the judges during different periods of government (TORYAGA, LABAGA, AGATREV, AGALREV).

D. Results

Table 2 presents the results of estimating model 1 above using standard maximum likelihood methods. The parameter α is strongly significant and greater than one in both regressions, confirming that the conditional likelihoods of being promoted or retiring increases with length of service. The β coefficients reported in Table 2 are the estimated marginal effects on the hazards of retirement and promotion. For ease of interpretation, it is helpful to use the expression for the expected duration of service before a given event where the hazard has a Weibull form as in equation (2) above:

TABLE 2
MODEL 1 RESULTS

VARIABLE	RETIREMENT HAZARD		PROMOTION HAZARD	
	Coefficient	<i>t</i> -Statistic	Coefficient	<i>t</i> -Statistic
Constant	-5.2685	-10.8060	1.4331	.8990
APPOINTC	.0477	6.2440	-.0710	-2.6080
BOPINION			.0060	1.1670
REVHL			-.0089	-2.7600
AGA			.0356	1.3830
REV			.0206	1.0020
AGAREV			-.0014	-1.8440
GOVT			.0423	.2040
α	4.2764	5.9760	2.2710	5.4380
<i>N</i> (completed)		37		27
<i>N</i> (censored)		27		37
Log likelihood		-10.21171		-41.53063

$$E(t|x) = e^{-\beta'x/\alpha} \Gamma\left(1 + \frac{1}{\alpha}\right), \quad (3)$$

where $\Gamma[\cdot]$ is the standard gamma function, β is the vector of estimated coefficients, and α is the Weibull parameter. Given this, and the results of Table 2, the expected duration of service prior to retirement for a judge at the mean value of regressors is 9.64 years; the expected duration of service prior to promotion for the same judge is 11.71 years. Differentiating the logarithm of equation (3) with respect to individual regressors gives

$$\frac{\partial \ln E(t|x)}{\partial x_i} = -\beta_i. \quad (4)$$

That is, the negative of the coefficients reported in Table 2 can be interpreted as elasticities: they give the proportionate change in the expected duration of service with respect to a unit change in the regressors. Hence, every additional year of age at appointment to the Court of Appeal leads to a statistically significant 4.8 percent reduction in the expected duration to retirement (that is, by 0.46 years) and a statistically significant 7.1 percent increase in the expected duration to promotion (that is, by 0.83 years). Similarly, each additional percentage point added to the percentage of a judge's cases that were reversed by the House of Lords significantly increases the expected duration to promotion by 0.9 percent, or by 0.11 years. Consequently the results broadly confirm our hypothesis that the perceived quality of judicial decision making is a factor influencing judicial promotion.

TABLE 3
MODEL 1 ELASTICITIES

	$\frac{\partial \ln E(t x)}{\partial \text{AGA}}$	<i>t</i> -Statistic	$\frac{\partial \ln E(t x)}{\partial \text{REV}}$	<i>t</i> -Statistic
Median judge	.0036	.355	.0151	1.911
Seventy-fifth percentile	.0209	1.761	.0266	2.578
Ninetieth percentile	.0409	2.029	.0365	2.539

As far as the loyalty hypotheses are concerned, the statistically insignificant coefficients on AGA, REV, and AGAREV appear at first sight to suggest that judges who more frequently decide against the government, or reverse the decisions of lower courts that were in favor of the government, are no less likely to be promoted early than other judges. However, the inclusion of an interaction term means that the marginal effect of a small change in the proportion of decisions against the government is a function of two coefficients (the direct coefficient and the coefficient on the interaction term):

$$\frac{\partial \ln E(t|x)}{\partial \text{AGA}} = -0.0356 + 0.0014\text{REV}.$$

Similarly, the marginal effect of a small change in the proportion of decisions that reversed the decision of the lower court is given by

$$\frac{\partial \ln E(t|x)}{\partial \text{REV}} = -0.0206 + 0.0014\text{AGA}.$$

Clearly, these elasticities will vary with the assumed values for AGA and REV, and consequently we present a range in Table 3.²³

Hence, for the median judge in terms of decision making, neither elasticity is significant at the 5 percent level, whereas for judges with a decision-making record known to be in the ninetieth percentile of judges in terms of deciding against the government or reversing the decisions of lower courts, the elasticities are statistically significant. For such judges, a percentage point increase in their decisions against the government would result in a 4.1 percent increase in their expected duration to promotion (that is, by 0.48 years); a percentage point increase in their reversals of lower court decisions would result in a 3.65 percent increase in their expected duration to promotion (that is, by 0.43 years). These findings appear to indicate that

²³ Standard errors for the elasticities are computed from the asymptotic covariance matrix.

governments do not penalize decisions against themselves per se, but only if there is evidence that judges systematically and frequently reverse decisions made by lower courts that were for the government. Arguably, this suggests that independence is not penalized, but evidence of antigovernment bias may be penalized for a small number of judges.

The insignificant coefficient on the time-varying covariate GOVT representing the political party in power while a judge is serving in the Court of Appeal indicates that political parties when in government do not appear to favor judges who they themselves appointed earlier to the Court of Appeal. However, this model does not distinguish between decisions made during periods of Conservative or Labour governments, and therefore the hypothesis that political parties reward judges who decide in their favor and against the other party when in government is not tested.

Model 2 (as set out in the previous section) attempts to remedy this by separating judicial promotions and decisions made during periods of Conservative and Labour governments, and the results are shown in Table 4. Unfortunately the number of promotions during Labour governments was insufficient to yield statistical significance to the parameters of the hazard function for that event. However, this was not so for the promotions during Conservative governments. The results for the hazard of a Conservative promotion in relation to judicial quality tend to mirror those reported above: younger judges, and those who had fewest cases reversed by the House of Lords, were significantly more likely to be promoted. As far as the loyalty variables were concerned, we again report the elasticities taking into account the interaction effects as above (Table 5). Here again, we find that the record of judges in deciding against Conservative governments was un-influential by itself in determining promotions by Conservative governments. Only when such decisions are combined with a tendency to reverse the decisions of other judges in lower courts was there a significant effect. In this case judges with the median proportion of decisions against the government would see their duration to promotion increased by 0.36 years for every percentage point they increased the rate at which they reversed lower court decisions. For judges in the ninetieth percentile of decisions against the government the equivalent figure rises to 0.54 years.

IV. DISCUSSION AND CONCLUSIONS

The results outlined above have interesting implications for the positive analysis of separation of powers and the independence of the judiciary. On the one hand, we can reject the cynical view that judges enjoy no independence at all and that the decisions on promotion of judges are based solely on raw political considerations. We found that the perceived quality of

TABLE 4
MODEL 2 RESULTS

VARIABLE	RETIREMENT HAZARD		PROMOTION HAZARD (Con)		PROMOTION HAZARD (Lab)	
	Coefficient	t-Statistic	Coefficient	t-Statistic	Coefficient	t-Statistic
Constant	-5.2658	-10.8060	2.5244	1.3300	-.7792	-2.160
APPOINTC	.0477	6.2440	-.0826	-2.4410	-.0228	-.3530
BOPINION			.0083	1.4620	-.0175	-.7520
REVHL			-.0082	-2.3720	.0004	.0410
TORYAGA			.0283	1.2950	-.0461	-1.5890
LABAGA			-.0072	-.9450	-.0015	-.0280
REV			-.0037	-.1870	.0209	.5800
AGATREV			-.0009	-1.2110		
AGALREV					-.0002	-.1640
α	4.2764	5.9760	2.3172	5.1890	4.5960	1.7380
N (completed)	37			22		5
N (censored)	27			42		59
Log likelihood	-10.21171			-36.24352		-7.580682

TABLE 5
MODEL 2 ELASTICITIES

	$\frac{\partial \ln E(t x)}{\partial \text{TORYAGA}}$	<i>t</i> -Statistic	$\frac{\partial \ln E(t x)}{\partial \text{REV}}$	<i>t</i> -Statistic
Median judge	-.0035	-.4020	.0262	2.3270
Seventy-fifth percentile	.0074	.5740	.0334	2.4190
Ninetieth percentile	.0200	.9210	.0397	2.2750

judges plays a notable part in their promotion. The chance of promotion from the Court of Appeal to the House of Lords was significantly determined by a lower reversal rate of the judge's decisions in the House of Lords and the age of the judge at his appointment to the Court of Appeal.

Out of these variables the most significant quality proxy is the lower rate of reversal by the House of Lords. It ought to be mentioned that this is of course an "internal" quality measure, based on the traditional assumption that the decision of the highest court reflects "the law" of the land. It also reflects the fact that the law lords are usually consulted with regard to promotion of judges to their court and they will naturally view judges with a lower reversal rate as better judges who deserve promotion. Similarly, a younger age of appointment to the Court of Appeal can be a signal of quality in the lower courts.

Our results also show that the degree of independence of a judge, measured by the rate of decisions against the government or reversals of favorable decisions in lower courts, do not by themselves significantly harm the judge's promotion chances. However, when judges combine a tendency to decide frequently against the government with a tendency to reverse frequently the decisions of other, lower court, judges, then this appears to harm their chances of promotion. A plausible interpretation of this finding is that while governments have no desire to punish disloyalty, defined as a willingness to decide against the government on the merits of the case, they are concerned to deter bias, defined as a determination to decide against the government whatever the merits of the case. This interpretation is consistent with the Landes-Posner hypothesis: successive legislatures would find it difficult to sell legislation to interest groups if the judiciary is biased either for or against the government. In either case, the effect of bias would be to reverse legislation every time there is a change in government. The evidence reported above suggests that an unbiased and independent judiciary is seen as an asset by politicians.

Moreover, our finding that political parties do not seem to fast-track their own appointees nor those who decide in their favor suggests further that

the benefits from an independent judiciary are perceived to be relatively long-term. Governments do not change very often in Britain, and our result indicates that politicians gain rewards not only from securing a judiciary that preserves legislation from interference from new executives but also from new governments.²⁴

BIBLIOGRAPHY

- Anderson, Gary M.; Shughart, William F.; and Tollison, Robert D. "On the Incentives of Judges to Enforce Legislative Wealth Transfers." *Journal of Law and Economics* 32 (1989): 215–28.
- Ashenfelter, Orley; Eisenberg, Theodore; and Schwab, Stewart J. "Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes." *Journal of Legal Studies* 24 (1995): 257–81
- Cohen, Mark A. "The Role of Criminal Sanctions in Antitrust Enforcement." *Contemporary Policy Issues* 7, No. 4 (1989): 36–46.
- Cox, D. R., and Oakes, D. *Analysis of Survival Data*. London and New York: Chapman & Hall, 1984.
- Landes, William M., and Posner, Richard A. "The Independent Judiciary in an Interest-Group Perspective." *Journal of Law and Economics* 18 (1975): 875–901.
- Salzberger, Eli M. "A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?" *International Review of Law and Economics* 13 (1993): 349–79.

²⁴ This is not the only explanation for why politicians value judicial independence. Note that the rejection of political favoritism can indicate the need for an incoming government to transfer responsibility for "doing something" after gaining power; see Salzberger, *supra* note 2.