Trinity College Dublin

Coláiste na Tríonóide, Baile Átha Cliath

The University of Dublin

SCHOOL OF LAW

LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 04/2023

October 2023

[Legislative Constraint of the Executive Power to Select Judges: Unconstitutional Usurpation or Legitimate Control]

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[This paper was presented at a conference organised by the Trinity Centre for Constitutional Governance on 14 November 2023.]

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1 Introduction

The Judicial Appointments Commission Bill constrains the Government in how it advises the President to appoint judges. In advising the President in relation to the appointment of a person to a judicial office in the State, the Government shall only consider for appointment those persons who have been recommended by the Judicial Appointments Commission.[1] This constraint touches on a core constitutional function and raises complicated issues about the intersection of legislative, executive and judicial power. In this paper, I address the question of whether the constraint is unconstitutional. This question involves a close consideration of the constraints actually imposed by the Bill, understood in the context of the constitutional framework for choosing judges.

I argue, contrary to what seems a more widely held view, that the Bill's constraint is limited. It precludes the Government from advising the President to appoint a person not recommended by the Commission; but it does not require the Government to advise the President to appoint one of the persons recommended by the Commission. The Government is entitled to reject all the candidates recommended by the Commission and restart the process for filling a judicial vacancy. If my interpretation of the Bill is correct, it amounts to a legitimate control of the Government's executive power to advise the President in relation to judicial appointments. If my interpretation is incorrect, however, and the Government is obliged to recommend one of the persons recommended by the Commission, then the Bill is an unconstitutional usurpation of executive power, removing a core democratic component of judicial power.

The paper begins with an outline of the constitutional framework for judicial appointments: the explicit rules that govern judicial appointments, the background constitutional context, and general constitutional law on the interaction of legislative and executive power. The paper then outline the provisions of the Bill and how they intersect with the constitutional

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[1] Section 51.

framework. I then assess the constitutionality of the Bill in light of the constitutional principles, before exploring any effect that the double construction rule might have.

2 Constitutional framework

Article 35.1 of the Constitution provides:

> The judges of the Supreme Court, the Court of Appeal, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President.

Article 13.9 provides:

> The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government [save where otherwise specified].

The power to choose judges for the superior courts is therefore explicitly conferred on the Government. Since the Constitution in Article 6 implies that there are only three powers of government – legislative, executive and judicial – it is reasonable to characterise the power to choose judges as part of the executive power, constitutionally assigned to the Government. Because the Government is collectively responsible to Dáil Éireann, Article 13.9 establishes democratic accountability for the appointment of judges.

Unlike the legislative power (making general rules to guide human action) or the judicial power (determining legal rights and obligations through individuated decisions), the executive power is unified by neither form or function. There are broad areas of executive power identified in the Constitution, managing the nation's finances (subject to Dáil accountability) under Article 17, external relations under Article 28. Then there are more specific instances of power that arise from situations where the President must act on the advice of the Government: supreme command of the defence forces under Article 13.4, the right of pardon and the power to commute or remit sentences under Article 13.5, and the power to choose judges under consideration here. The courts have also held that there are implicit executive powers, including the power to control immigration,[2] the power to create

[2] *Laurentiu v Minister for Justice* [1999] 1 IR 1; *Bode v Minister for Justice* [2007] IESC 62.

schemes,[3] the power to conduct or establish non-statutory inquiries,[4] the power to run a state examination system.[5] The courts have struggled to articulate a single coherent basis for the recognition of executive power. The two dominant approaches have been either (a) to identify, as a matter of history, powers that have traditionally been exercised by the Government or (b) to identify inherent state powers and attribute any power to the Government if it is not assigned to the Oireachtas or the courts.[6] Following *Burke v Minister for Education*,[7] I suggested that the executive power could more simply be understood as simply the power of the Government to act in the interests of the common good, subject to any constitutionally expressed preference for legislation as the preferred mode of state action.[8]

While the courts have held that the Oireachtas cannot infringe judicial power,[9] the Oireachtas cannot delegate its own legislative power,[10] and the Government cannot fetter its executive power in foreign relations,[11] there is no general principle that all constitutionally assigned powers are protected from the actions of other organs of government. The courts have repeatedly held that the Oireachtas is competent to control the executive power.

In *Laurentiu v Minister for Justice*, a majority of the Supreme Court held that s 5(1)(e) of the Aliens Act 1935 unconstitutionally delegated legislative power to the Minister for Justice.[12] Both Denham and Keane JJ made several references to how the immigration control power was regulated by legislation, without any suggestion that such legislation was illegitimate. Denham J referred to the legislature having 'grasped the power over aliens from the executive',[13] without indicating that there was anything wrong in the Oireachtas assuming that function. Keane J said of the power to deport:

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[3] *CA v Minister for Justice, Equality and Law Reform* [2014] IEHC 532.
[4] *Shatter v Guerin* [2019] IESC 11.
[5] *Burke v Minister for Education* [2022] IESC 1.
[6] For discussion, see Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2019) [9.42]-[9.44].
[7] [2022] IESC 1.
[8] Oran Doyle, 'Executive Power and its Limits' (2023) 5 ISCR.
[9] *Buckley v Attorney General* [1950] IR 67.
[10] *Náisiúnta Leictreach Contraitheoir Éireann Cuideachta faoi Theorainn Ráthaíochta v The Labour Court* [2021] IESC 36.
[11] *Crotty v An Taoiseach* [1987] IR 713.
[12] [1999] 4 IR 26.
[13] ibid, at 63.

> It is clearly a power of an executive nature, since it can be exercised by the executive in the absence of legislation. But that is not to say that its exercise cannot be controlled by legislation and today is invariably so controlled: any other view would be inconsistent with the exclusive law making power vested in the Oireachtas.[14]

In *NHV v Minister for Justice and Equality*, O'Donnell J commented:

> The control of entry to the State by non-citizens, and the range of activities in which they can engage while here, was as a matter of history, a core function of the executive power. The question as to what extent that executive power can remain if legislation seeks to control the area is an interesting one rarely debated.

If taken to their full extent, these comments would suggest that the law-making power of the Oireachtas includes the power not only to control the exercise of executive power but also to seize that power from the Government, eliminate it and assign equivalent decision-making competences to other agencies.

While Keane J in *Laurentiu* suggested that it was the law-making power vested in the Oireachtas that authorised it to control executive power, the courts have not held that this law-making power includes the power to control the exercise of the judicial power, quite the contrary. The comments of Denham and Keane JJ in *Laurentiu* and O'Donnell J in *NHV* must rest not on a general proposition about the powers of the Oireachtas but rather on a more specific proposition about the relationship either between legislative and executive power or between the Oireachtas and the Government.

The most compelling argument in this regard, I suggest, derives from both the formal constitutional relationship between Government and Dáil and the political reality of the relationship between Government and Oireachtas. Given that the Government is politically accountable to the Dáil, it is not constitutionally problematic for the Dáil, as the dominant house of the Oireachtas, to impose legal controls on how the Government exercises its executive power. Moreover, the political reality is that a Government typically controls a legislative majority. So legislation controlling the exercise of executive power reflects not a power grab by the Oireachtas but rather a decision by the Government itself that the exercise of executive power would benefit from the values associated with legal constraint,

[14] ibid, at 93.

viz predictability, consistency. Exploring this point, David Gwynn Morgan quotes an Australian commentator:

> It has been seen that the judicial power is subject to considerations different from those affecting the other two powers; the fact that the Constitution separated judicial power from legislative and executive powers does not mean that it separated the latter powers from each other. If, as the Constitution must have contemplated in introducing responsible government, Parliament can control the executive politically, there is little logic in maintaining that the executive retains a sphere of action legally independent from parliamentary control.[15]

This account of the executive power is not of mere academic interest; it provides the basis for much important legislation. Apart from the area of immigration, the Passport Act 2008 regulates and controls how the Minister for Foreign Affairs issues passports, notwithstanding that this function falls within the executive power over external relations. In the area of judicial appointments, legislation has always controlled the Government's discretion – whether through stipulating minimum criteria for appointment to judicial office or process requirements such as introduced in relation to the Judicial Appointments Advisory Board.

3 The constraints imposed by the Bill

The Bill establishes a Judicial Appointments Commission to recommend persons for judicial office. My focus in this paper is on appointments to the superior courts. While the procedures are similar for other appointments, the constitutional issues apply most forcefully in this context.

Section 42(1) provides as follows:

> The Minister [for Justice] may request the Commission to make recommendations for appointment or for nomination for appointment to judicial office, as the case may be, where—
>
> (a) a judicial office stands vacant, or

[15] Lane, *The Australian Federal System* (1979), pp 65–66 quoted in David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall, Sweet & Maxwell, Dublin, 1997), p 278.

(b) he or she reasonably anticipates that there will be a vacancy in a judicial office.

The Bill does not specify what it means for a judicial office to stand vacant. Article 36 of the Constitution requires that the number of judges in each court shall be regulated in accordance with law. The formula adopted in legislation is that the 'number of judges in [particular court] shall not be more than X'. There is therefore no statutory minimum that could impose an obligation on the Minister to initiate the process for filling a judicial vacancy. The best interpretation of section 42(1) is probably that wherever the number of judges on a particular court falls below the statutory maximum, there is a vacancy that vests the Minister with a discretion ('may request') to start the process for filling that vacancy.

Importantly, the Bill imposes no obligation on the Minister to initiate the process for filling a judicial vacancy. There might be a constitutional obligation on the Government to advise the President to appoint a judge where the number of judges on a particular court fall below a constitutional minimum. The Constitution envisages that the Supreme Court must have five members to perform certain constitutional tasks, including hearing Article 26 references. More amorphously, the Constitution envisages that justice be administered in courts established by law. Failing to appoint enough judges to prevent the collapse of the justice system would be unconstitutional. As the statutory maximum number of Supreme Court judges is currently 12 – 10 ordinary members and two *ex officio* members – it is difficult to anticipate a situation where the constitutional obligation to secure a sufficient number of judges would be engaged. Apart from such wholly exceptional cases, there would be no obligation on the Minister for Justice to initiate the process for appointing a new judge. If the Minister – absent the unlikely constitutional obligation – is under no obligation to initiate the process for filling a judicial vacancy, the initiation of that process does not *per se* generate an obligation on the Government to advise the President to appoint a judge. Any such statutory obligation on the Government could only derive from a statutory obligation that applies to the Government after it receives the Commission's recommendations.

Section 47(1) of the Bill provides:

The Commission shall, following its consideration of applications in accordance with section 46, recommend to the Minister—

(a) where there is one judicial office in the State to be filled in a court, 3 persons for

appointment to that judicial office, and

(b) where there is more than one judicial office in the State to be filled in the same court, 3 persons and 2 additional persons for each second and subsequent vacancy for appointment to those judicial offices.

Where the Commission cannot recommend the requisite number of candidates or cannot recommend any candidate, whether by reason of the number of applications and/or the failure of applicants to meet the standards set by section 46, the Commission must inform the Minister of the fact and set out in writing the reasons why.

Section 51 is the critical provision of the Bill. It provides:

(1) In advising the President in relation to the appointment of a person to a judicial office in the State, the Government shall only consider for appointment those persons who have been recommended by the Commission to the Minister under section 47.

(2) The Government shall request the Commission to confirm, prior to advising the President in relation to the appointment of a person to a judicial office, that the person concerned is an eligible person.

This provision intersects with the constitutional provisions addressed above: that judges of the superior courts 'shall be appointed by the President' and that this power and/or function 'shall be exercisable and performable by him only on the advice of the Government'. Unless the number of judges on a particular court have fallen below the constitutional minimum, there is no constitutional obligation on the Government to advise the President to appoint a judge.

In this context, we can say the following about section 51:

- It imposes no obligation on the Government to advise the President to appoint a judge.
- It precludes the Government from advising the President to appoint a person who has not been recommended by the Commission.
- It does not – expressly – oblige the Government to advise the President to appoint one of the persons recommended by the Commission.

- The obligation on the Government is to 'only consider for appointment those persons who have been recommended by the Commission'.
- This obligation arises in the context where the Government is exercising its constitutional discretion 'to advise the President in relation to the appointment of a person to judicial office'.
- The obligation is not stated to arise when the Government is advising the President to appoint a person to judicial office.

My impression is that the general understanding of section 51 is that it does not merely preclude the Government from advising the President to appoint a person who has not been recommended by the Commission but also imposes an obligation on the Government to advise the President to appoint one of the persons recommended by the Commission. But it is difficult to see why section 51 should be interpreted to include this second positive obligation. First, if this were the statutory intent, it could much more clearly have been captured in the following way: In advising the President in relation to the appointment of a person to a judicial office in the State, the Government shall *advise the appointment of one of* those persons who have been recommended by the Commission to the Minister under section 47. Second, if the provision began, 'In advising the President to appoint a judge', that would imply that the Government was actually exercising its constitutional power to advise the President to appoint a person, in which case the limitation to considering the persons recommended by the Commission would necessarily require the Government to advise the appointment of one of those persons. But instead the Oireachtas has chosen the more removed wording, 'advise the President in relation to the appointment of a person to judicial office'. This wording does not appear to commit the Government to actually advising the President to appoint a person.

Contrary to these points, it could be argued that the legislation is unclear in the opposite direction. If the legislative intent was that the Government could reject the persons recommended by the Commission, this could have been directly stated. Or the provision could have started, 'In deciding whether to advise the President in relation to the appointment of a person to judicial office'. The wording of section 51 neither clearly imposes an obligation on the Government to accept one of the persons recommended by the Commission nor clearly grants the Government the power to reject one of the persons

recommended by the Commission. On the basis of ordinary principles of statutory interpretation, however, we should be slow to impose an obligation on the actor where that could have been clearly expressed in the legislation but was not.

Perhaps it could be argued that section 51 implies a temporal progression whereby the Government has already decided to exercise its constitutional discretion to advise the President and is therefore bound to bring that exercise of discretion to conclusion with an actual recommendation, only three persons having been considered. But again, there is nothing in section 51 to impose an obligation on the Government to advise the President to appoint a judge, and the wording 'advise the President in relation to the appointment of a person to judicial office' appears to permit the Government to inform the President that there is, in its view, no suitably qualified candidate at present and therefore it is not advising the President to appoint a person to judicial office.

Perhaps an obligation to advise the President to appoint one of the Commission's recommended persons could be derived from the scheme of the Bill as a whole. The strongest argument I can identify for such an obligation is to point to what would happen if the Government – in effect – rejected the Commission's recommended persons and offered no advice to the President to appoint a judge. If this resulted in a procedural impasse whereby a judicial position could never be filled, that would militate in favour of the Government being obliged to accept one of the Commission's recommended candidates. But it is difficult to see why a procedural impasse should arise. Where there is a judicial vacancy, unless the number of judges on a court has fallen below a constitutional minimum, the Minister has a discretion to commence the process of appointing a new judge, so it is difficult to argue that such a process must conclude with the appointment of a judge. If the Government chooses not to advise the President to appoint one of the persons recommended by the Commission, it is open to the Minister once again to determine that a judicial vacancy exists and exercise her discretion to request the Commission to make recommendations for appointment. It is unlikely that a situation would arise where the number of judges on any court had fallen below a constitutionally acceptable level, particularly given that the statutory maximum for Supreme Court judges is significantly higher than the constitutional minimum. It is even more unlikely that such a situation would intersect with a situation where the Commission nominated candidates who were

unacceptable to the Government. But even in this unlikely scenario, it is difficult to see why it would be problematic for the Government to delay an appointment while the Commission undertook a new search to recommend new persons.

Might the interpretation I have suggested lead to an impasse, whereby the Commission repeatedly nominates candidates who have been rejected by the Government? If the interpretation of the Bill that I have suggested is correct, then it would be ultra vires the Commission to re-recommend persons not accepted by the Government. My interpretation of the statute, reached against a backdrop of executive discretion whether to advise the President to appoint a judge, entails that the Government is entitled to reject all of the persons recommended by the Commission. The Commission would exceed its powers by compelling the Government to consider again candidates whom it has already rejected.

We are left with two readings of the Bill:

- Reading 1: if advising the President to appoint a judge, the Government can only choose a person recommended by the Commission. However, the Government is not compelled to advise the President to appoint a judge and can reject all recommended candidates, allowing the Minister for Justice to request the Commission to recommend different persons.
- Reading 2: once the Commission recommends persons for judicial appointment, the Government is obliged to advise the President to appoint one of those persons.

In my view, Reading 1 is preferable. But I shall consider the constitutional issues that arise in relation to both readings. We can present the constitutional issues in the following way. Is it an excessive legislative interference with executive power for the Oireachtas to prevent the Government from advising the President to appoint a person not recommended by the Commission? Is it an excessive legislative interference with executive power for the Oireachtas to require the Government to advise the President to appoint one of the persons recommended by the Commission? The second question arises under Reading 2 and subsumes the first question. But because Reading 1 only raises the first question, it is appropriate to consider them separately.

4 Application of constitutional principles to the Bill

The case law establishes beyond any doubt that the relationship between executive power and legislative power is not the same as the relationship between judicial power and legislative power. It is untenable to contend that Article 13.9 per se precludes legislative interference with an untrammelled executive discretion to advise the President in relation to judicial appointments. The dicta of Denham, Keane and O'Donnell JJ in the immigration context come close to suggesting that the full law-making power of the Oireachtas allows any level of regulation, control or abrogation of executive power. But all judicial dicta are made in a particular context and care is required before they are extended more broadly. Two related features of the immigration control power suggest that the comments of these distinguished jurists should not be applied so broadly. The immigration control power is an *implicit* executive power that relates to the *general running* of the state. The executive power in relation to judicial appointments, in contrast, is explicit. On its own, the distinction between explicit and implicit power is not constitutionally relevant. But the Government's role in relation to judicial appointments is part of a carefully calibrated distribution of constitutional power between the organs of state. In particular, it realises an important value. The Government's political accountability to the Dáil renders it democratically accountable for its choice of judges. Looked at from the opposite perspective, the democratic legitimacy of judicial power in the state is underpinned by the fact that those who exercise judicial power are chosen by a democratically accountable actor. It is legislative interference with this principle, rather than the more general question of legislative interference with executive power, that raises constitutional concerns.

We can examine the two questions of concern in this light. Is it constitutionally problematic to prevent the Government from advising the President to appoint a person not recommended by the Commission? This limitation does serve a legitimate legislative objective of preserving public confidence in the judiciary. Being a judge is a difficult job involving a wide range of skills, including legal knowledge and human perspicacity, and requiring human attributes such as impartiality, empathy balanced with detachment, and quite simply the ability to make decisions. Few people exhibit all these skills and attitudes all the time, but perfection is not the standard. By and large, most judges have served with distinction and, even with the benefit of hindsight, were manifestly suitable for appointment. But this state of affairs is not guaranteed. Unquestionably, there have been

judges who should not have been appointed, whether because they lacked the skills or personal attributes required to administer justice.

It is also the case that political affiliation has played a role in judicial appointments. Again, there is no *a priori* reason why a person with political affiliation should not be appointed a judge. The question is only whether they have the requisite skills and personal attributes. Most judges appointed from this group have demonstrated those skills and attributes and served with distinction. But, because we know that politicians like to appoint their political associates to public positions in general, questions are raised where persons with obvious political affiliations are appointed as judges. These questions might be well grounded or they might be baseless: opposition parties have political incentives to criticise Government decisions, irrespective of the qualities of those considered for judicial office. The charge of cronyism is a powerful one. Nevertheless, the very fact of such questions being asked can undermine public confidence in the neutrality and competence of the judiciary.

It addresses this concern to preclude the Government from advising the President to appoint a judge not recommended by the Commission. This control of executive power assures the general public that every judge has been independently assessed as exhibiting the required skills and attributes for judicial appointment. In the event that a political associate of the Government is appointed as a judge, the public will know that an independent commission has approved that person.

In my view, this legislative control of executive power is not excessive. It responds to a real problem but does not trench on the democratic accountability for judicial appointments because it does not *require* the Government to appoint any person. If the Government considers that all persons recommended are inappropriate – for whatever reason – the Government can under Reading 1 refuse to advise the President and, through the Minister for Justice, initiate a new process for filling a judicial vacancy.

Far greater concerns arise under Reading 2. If the Government must accept one of the persons recommended by the Commission, the democratic accountability for judicial appointments and hence for the exercise of judicial power under the Constitution is undermined. The Government could have any number of reasons for rejecting a candidate. It could differ from the Commission in its assessment of the candidate's skills and attributes. It could have access to security information, unavailable to the Commission, suggesting that

the person is inappropriate for appointment. If judicial appointments were to become more politically polarised than is currently the case, the Government could simply not wish to appoint persons whom it considered to have undesirable views on the issues that would come for judicial resolution. For our purposes, it does not matter why the Government might object to a candidate. A legislative requirement that the Government appoint a candidate whom it did not wish to appoint subverts a fundamental constitutional principle of democratic accountability. If Reading 2 is correct, the Bill is – in my view – unconstitutional.

5 The double construction rule

In *McDonald v Bord na gCon*, the Supreme Court considered a challenge to the constitutionality of certain provisions of the Greyhound Industry Act 1958.[16] The provisions empowered an Bord na gCon to exclude a person from (a) being on any greyhound racetrack, (b) being at any authorised coursing meeting, (c) being at any public sale of greyhounds. One of Mr McDonald's grounds of challenge was that this provision did not provide adequate fair procedures before a decision was made. Walsh J identified a rule of statutory interpretation that was required by the presumption of constitutionality:

> The Greyhound Industry Act of 1958, being an Act of the Oireachtas, is presumed to be constitutional until the contrary is clearly established. One practical effect of this presumption is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction. It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant.[17]

[16] [1965] IR 217.
[17] ibid, at 239.

In order to ensure that the legislation could be held constitutional, Walsh J read in provisions to the effect that a proper investigation with natural justice would be carried out before an exclusion order was made:

> The wording of the provisions of sections 43 and 44 does not exclude the application of the principles of natural justice to these investigations. While the Board may determine the manner in which the investigation shall be carried out the clear words or necessary implication which would be required to exclude the principles of natural justice from such investigation are not present in the sections.[18]

The double construction rule thus mandates the courts to write in any saving provisions provided they are not clearly excluded by the wording of the Act.

The double construction rule is often presented as a tiebreaker between two equally open interpretation variants. But it more commonly arises where the court adopts an otherwise somewhat less plausible interpretation in order to preserve the constitutionality of a statute. The courts have occasionally adopted highly improbable interpretations of a statute,[19] although there are limits.[20] Recently, Murray J has emphasised the limits of what can be achieved under the double construction rule. It 'allows the adjustment of a single statutory provision so as to align it with constitutional requirements, it does not thereby permit the imposition of an entirely new legislative regime'. [21]

It is difficult to separate the force of the double construction rule from one's underlying view of the credibility of the interpretation variants. In my view, the double construction rule puts beyond doubt the case for adopting Reading 1 rather than Reading 2. Reading 2 results in an insuperable constitutional problem. Reading 1 raises no such problem and is reasonably open. Indeed, in my view Reading 1 is preferable without reference to the double construction rule. Reading 2 seems to deploy the opposite of the double construction rule – reading into the Bill an obligation on the Government that is not clearly stated, i.e. to advise the President to appoint one of the Commission's recommended candidates – in order to render the Bill unconstitutional. But if one's starting point is different and one considers that

[18] ibid, at 243.
[19] Cooke v Walshe [1984] IR 710.
[20] Kelly v Minister for Environment [2002] 4 IR 191.
[21] A, B and C v The Minister for Foreign Affairs and Trade [2023] IESC 10, Murray J [92]

the legislative scheme necessarily involves such an obligation, then one might be slow to deploy the double construction rule to circumvent that obligation.

One possibly relevant point here is that the aspect of the double construction rule at issue here is the interpretation of a statutory provision rather than how a decision-maker might exercise power under that provision.[22] As such, the Supreme Court can definitively resolve the interpretation issue in the Reference and not run the risk that a different interpretation could be adopted in future under an Act that would then be immune from constitutional challenge.

6 Conclusion

In summary, my conclusions are as follows:

1. The JACB precludes the Government, when advising the President to appoint a judge, from choosing a person not recommended by the Commission.
2. This is a constitutional control of the executive power on the part of the Oireachtas; it responds to a real concern about the perceived neutrality of the judiciary; it does not interfere with the principle of democratic accountability for judicial appointments.
3. While the Bill is not clearly drafted, the JACB does not require the Government to advise the President to appoint one of the persons recommended by the Commission. The Government is entitled to reject all candidates, allowing the Minister for Justice to determine that a judicial vacancy persists and to request the Commission to recommend candidates.
4. If point 3 is wrong, and the Government is obliged to appoint one of the persons recommended by the Commission, the Bill is unconstitutional.
5. The double construction rule provides further support for the proposition that point 3 is correct.

[22] See in contrast re Article 26 and the Employment Equality Bill 1996.