

# RGICS



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# RGICS LEGISLATIVE BRIEF

**(JANUARY 2<sup>nd</sup>, 2014)**

**JUDICIAL APPOINTMENTS COMMISSION**

### **PART I. INTRODUCTION**

The Constitution (One Hundred and Twentieth Amendment) Bill, 2013 (herein after referred to as Constitution Amendment Bill) and the Judicial Appointments Commission Bill, 2013 (hereinafter referred to as JAC Bill) were introduced in the monsoon session of Parliament in 2013.

The Bill establishes a Judicial Appointments Commission which shall be responsible for selecting judges of the higher judiciary. So far, judges of the higher courts have been appointed by the ‘collegium system’ and the same has not been constitutionally provided.

The ‘collegium system’ came into being in 1993 through a judicial pronouncement. Under this system, appointments and transfers of judges are decided by a forum of the Chief Justice of India and the four senior-most judges of the Supreme Court. Under the present collegium system, the executive has no say in appointments of judges of the Supreme Court and High Courts as the recommendations of the collegium are final and binding on the government. This practice gives judges the absolute and irrefutable power to appoint of the judges of the High Courts and the Supreme Court and has been criticized for being non-transparent and undemocratic.

The last effort to replace the collegium system in 2003 was made by then NDA government but was unsuccessful. The then NDA government had introduced a Constitution Amendment Bill but the Lok Sabha was dissolved when the bill was before a Standing Committee.

A vision statement of the Law Ministry issued in October, 2009 had said the collegium system was hindering the efforts to end shortage of judges and suggested involvement of executive and legislature to hunt for the best talent.

### **PART II: CONTEXT**

- The Judicial Appointments Commission, once created, will replace the existing collegiums system of appointments to High Courts and Supreme Court.
- Article 124(2) of the Constitution will be amended to suggest that the President shall appoint judges on the 'recommendation' of JAC.
- The Constitution (120<sup>th</sup> Amendment) Bill, 2013 suggests that the JACs composition will be determined by an ordinary law.
- This law – Judicial Appointments Commission Bill, 2013 suggests the JAC will consist of 3 Supreme Court Judges, the Union Law Minister, the Law Secretary as its convenor and two 'eminent' persons appointed by a body comprising the Prime Minister, Leader of Opposition and the Chief Justice of India.
- As per Union Cabinet's decision, the composition as well as the functions of the JAC will be incorporated into the Constitution. This will ensure that JAC's terms can be modified only through a constitutional amendment requiring 2/3<sup>rd</sup> majority in Parliament, as opposed to an ordinary law which requires a simple majority.

### PART III: Summary of the Bills

The Judicial Appointments Commission Bill, 2013 was introduced in conjunction with the Constitutional (One Hundred and Twentieth Amendment) Bill, 2013.

#### Constitution (One Hundred and Twentieth Amendment) Bill, 2013<sup>1</sup>

Following are the main provisions of the Constitution (One Hundred and Twentieth Amendment) Bill:

- The Bill inserts Article 124 A which provides for setting up of the Judicial Appointments Commission and enables the Parliament to make a law to provide for its composition. Article 124B will define the functions of the Commission<sup>2</sup>.
- The Bill also enables Parliament to make a law that provides for the manner of selection for appointment as Chief justice of India and other Judges of the Supreme Court, Chief justices and other judges of the High Courts.
- The Bill also amends Articles 124 (2) and 217 (1) of the Constitution which provided for appointment of Judges to the Supreme Court and High Court respectively.

#### Judicial Appointments Commission Bill, 2013<sup>3</sup>

Following are the main provisions of the Judicial Appointments Commission Bill, 2013:

- **Composition of the Commission:**

The Bill provides that the Judicial Appointment Commission shall consist of:

- a. Chief Justice of India - Chairperson - *Ex-officio*;
- b. Two senior most Judges of Supreme Court next to Chief Justice of India - Member - *Ex-officio*;
- c. Union Minister in-charge of Law and Justice - Member *Ex-officio*;
- d. Two eminent persons to be nominated by a Committee comprising the Prime Minister, Chief Justice of India and Leader of Opposition in the House of People – Members

- **Functions of the Commission:**

The functions of the Commission relate to appointment and transfer of judges. The Bill enumerates the following functions of the Commission:

<sup>1</sup> Bill can be accessed here: <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/120-EI.pdf>

<sup>2</sup> Cabinet Approval for insertion of Article 124B: <http://www.thehindu.com/news/national/cabinet-clears-constitutional-status-for-judicial-appointments-commission/article5504171.ece>

<sup>3</sup> Bill can be accessed here: <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/Judcial-EI.pdf>

- a. To recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
- b. To recommend transfer of Chief Justices of High Courts and the Judges of High Courts from one High Court to any other High Court; and
- c. Ensuring that the person recommended is of ability, integrity and standing in the legal profession.

The procedure for recommendation with respect to appointment of High Court Judges includes eliciting views of the Governor, Chief Minister and Chief Justice of High Court of the concerned state, in writing. This shall be in accordance with procedure specified by regulations made by the Commission.

- **Reference to Commission for filling up of vacancies**

The Bill makes the following provision with respect to reference for filling up of vacancies:

- a) Upon the arising of a vacancy in the High Court and Supreme Court, references to the Commission shall be made by the Central Government.
- b) Intimation of existing vacancies shall be made within a period of three months from the date of coming into force of this Act.
- c) In the case of vacancy due to the completion of term, reference shall be made two months prior to the date of occurrence of vacancy.
- d) In the case of vacancy due to the death, resignation, reference shall be made within a period of two months from the date of occurrence of vacancy.

- **Procedure for short listing of candidates**

The Bill makes the following provision on the procedure for short listing of candidates:

- (i) Process for selection shall be initiated by the Convener, by inviting recommendations from the Chief Justices of High Courts, the Central Government and the State Governments, for candidates fulfilling eligibility criteria.
- (ii) The Commission may make regulations to specify the procedure for short listing of candidates for considering their appointment as Judges to the High Court and Supreme Court.

### PART IV: Policy Context and Background

#### Present Scenario:

Currently, the appointment of Judges of the Supreme Court and the High Courts and transfer of judges from one High Court to another is primarily an act of the Executive as the President acts in accordance with the advice tendered by the Council of Ministers under Article 74(1) of Constitution of India.

Following are the constitutional provisions for appointment and transfer of judges:

- The Judges of the Supreme Court are appointed by the President under Article 124(2) of the Constitution while the Judges of the High Courts are appointed by the President under Article 217(1) of the Constitution.
- The President is required to hold consultation with such of the Judges of the Supreme Court and of the High Courts in the States as he may deem necessary for the purpose. However, every Judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.
- The transfer of Judges from one High Court to another High Court is made by the President after consultation with the Chief Justice of India under Article 222(1) of the Constitution.

Thus, it is evident from the constitutional provisions that the appointment/transfer of judges of higher judiciary is a joint venture of the Executive and the Judiciary in participative and in a consultative manner to protect independence of judiciary which is a "Basic Structure" of the Constitution.

The **Basic Structure doctrine** is a judicial principle that the Constitution has some *basic features* that cannot be altered or destroyed through amendments by the Parliament. The basic features have not been defined in the Constitution but have been judicially evolved. Independence of the judiciary is one of the basic features.

#### The 'Collegium' system controversy

The collegium system, which appoints judges higher courts, has its genesis in, and continued basis resting on, three of its own judgments which are collectively known as the **Three Judges Cases**.

Following are the three cases:

1. S. P. Gupta v. Union of India (1981)
2. Supreme Court Advocates-on Record Association v Union of India (1993)
3. *In re* Special Reference 1 of 1998 (1998)

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The term ‘collegium’ has not been used in the Constitution of India by framers of Constitution. However, the Judiciary through its power of interpretation of Constitution under Article 141 has expanded the term ‘the Chief Justice of India’ occurring in Articles 124 (2), 217 (1) and 222(1) to mean a collegium of select Judges which was three in Second Judges Case(1993) and further extended to five in the Third Judge Cases(1998). In effect, the opinion of the Chief Justice of India really means the views of Chief Justice taken in consultation with his four senior-most colleagues.

Over the course of the three cases, the court evolved the principle of judicial independence to mean that no other branch of the state - including the legislature and the executive - would have any say in the appointment of judges.

Though there is no mention of the collegium either in the original Constitution or in successive amendments, the term ‘collegium system’ has been in use since the judgment in the Second Judges Case (1993). Although the creation of the collegium system was viewed as controversial by legal scholars and jurists, it is for the first time that the Parliament has introduced a legislation to replace it.

### **Important Cases on Appointment of Judges**

In the *First Judges* case, the Hon’ble Supreme Court gave a literal meaning to the word ‘consultation’ appearing in Articles 124 and 217 of the Constitution. The Court took the view that the opinion of the Chief Justice of India (CJI) is merely consultative and the final decision in the matter of appointment of judges is left in the hands of the Central Executive. The challenge to the ‘executive primacy’ thus failed in the first Judges case and the court held:

- Opinion of Chief Justice of India does not have primacy in the matter of appointments of judges of Supreme Court and High Courts;
- Primacy is with the Union Government of India, which is to take decision after consulting all constitutional functionaries and the Union Government is not bound to act in accordance with the opinion of all constitutional functionaries; and
- Executive should have primacy since it is accountable to people while the Judiciary has no such accountability.

In 1993, in the *Second Judges case*, a nine-Judge Bench (with majority of seven) not only overruled First Judges case but also devised a specific procedure for appointment of Judges of the Supreme Court (collegiums system) in the interest of “protecting the integrity and guarding the independence of the judiciary.”

The judges overruled that principle that Judiciary had a consultative role in appointment of judges and held:

- a) Primacy of the Chief Justice of India was held to be essential. It held that the recommendation in that behalf should be made by the Chief Justice of India in consultation with his two senior-most colleagues and that such recommendation should normally be given effect to by the executive.

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- b) Executive can appoint judges only if that is in conformity with the opinion of the Chief Justice of India;
- c) Opinion of the Chief Justice of India is determinative for transfer of judges of High Courts.

In the *Third Judges* case, again a nine judge bench elaborated and clarified the *Second Judges* case. It was held that the opinion of the Chief justice of India has to be formed on the basis of consultation with the collegium, comprising of him and the four senior most Supreme Court judges and the opinion of all members of the collegiums in respect of each recommendation should be in writing. The plurality of Judges in the formation of the opinion of the Chief Justice of India was emphasized as a check against the likelihood of arbitrariness or bias.

*In the light of the opinion preferred by the Supreme Court, a detailed Memorandum of Procedure for the purpose of appointment and transfer of Judges of higher Judiciary was prepared by the Department of Justice, Ministry of Law and Justice. While giving advisory opinion to the President of India in 1998, the Judiciary kept a condition before the then Government that the apex Court would tender the opinion if law laid down in *Second Judges Case* is considered binding upon the Government and the opinion to be tendered by them would also be binding upon the Government of India. The then Attorney General had accepted the condition of the Judiciary on behalf of Government of India and as a result of which the primacy of opinion of collegium of Judges in the appointment and transfer of Judges to the higher Judiciary has the validity of law of land till now.*

Therefore, since 1993, the recommendations of the Chief Justice of India for appointment and transfer of judges to higher judiciary became binding upon the Executive which amounted to ‘concurrence’ with the opinion of the judiciary. It made the judiciary the *de facto* appointing authority of themselves which was not the intention of Constitution framers as gathered from the Constituent Assembly Debates.

The framers of Constitution of India had given absolute discretion neither to the Executive nor to the Judiciary in the participatory and consultative process for appointment of judges to Supreme Court and High Courts. The Constituent Assembly after due deliberations, preferred the word ‘consultation’ to ‘concurrence’ in the process of appointment of judges.

### **Need for JAC**

The Statement of Objects and Reasons to the JAC Bill states that the JAC ‘*would broad-base the appointment process with equal participation of the judiciary and the executive and make it participatory so as to ensure greater transparency and objectivity in the appointments to higher judiciary.*’<sup>4</sup>

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<sup>4</sup> Statement of Objects and Reasons of the Bill can be found here: <http://164.100.47.4/BillsTexts/RSBillTexts/asintroduced/Judicial-EI.pdf> Last visited: December 21, 2013

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### **Present Collegium System**

The present collegium system is plagued with the problems of opacity and non-accountability besides entirely excluding Executive in the collaborative and consultative exercise for appointment of judges to Bench of higher judiciary.

Due to inherent deficiencies in the collegiums system, approximately 275 posts of judges in various High Courts are lying vacant, which has direct bearing upon justice delivery system and thereby affecting the institutional credibility of judiciary.

The present collegiums system raises concern over at the quality and the system of appointments made to higher judiciary as lobbying is rampant and most eligible are often ignored.

The Parliamentary Committee Report states that through the proposed Commission, assessment of legal acumen would be done by the members of the Commission from judiciary, while members of the Commission from executive will assess antecedent/character of the candidate for appointment to the Bench of higher judiciary. It is expected that the broad base of appointment process will ensure greater transparency and objectivity in the appointments of Higher Judiciary.

### **Law Commission**

Law Commission in its Two-hundred and Fourteenth Report (2008) has observed that the Indian Constitution provides a beautiful picture of check and balances under Articles 124(2) and 217(1) for the appointment of Judges of the Supreme Court and High Courts where both the Executive and Judiciary have been given an equal and balanced role. This balance has been upset by the Second Judges Case and the original balance of power needs to be restored.

### **National Commission to Review the Working of the Indian Constitution**

The National Commission to Review the Working of the Indian Constitution (2002) recommended on the issue of appointment, transfer and removal of Judges of higher courts as under:-

*“It would be worthwhile to have a participatory mode with the participation of both the executive and the judiciary in making such recommendations. The Commission proposes the composition of the Collegium which gives due importance to and provides for the effective participation of both the executive and the judicial wings of the State as an integrated scheme for the machinery for appointment of Judges. This Commission, accordingly, recommends the establishment of a National Judicial Commission under the Constitution.”<sup>5</sup>*

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<sup>5</sup> Report can be accessed here: <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm>  
Last visited: December 21, 2013

### PART V: Political Context

While both Congress and BJP leaders agreed on the extreme necessity to have a change in the system and in creation of a National Judicial Commission, they had a different viewpoint.

- Law Minister Mr. Kapil Sibal introduced the Bill and stated, “Appointment of judges is the role of the executive and not the judiciary. By this amendment, we are not trying to interfere with the judicial processes ... We are trying to have a transparent system of appointment and participate with the judiciary to have best judges for a better future. It was in 1993 that the judiciary “rewrote the Constitution” when it introduced the collegium system of appointing judges to higher courts, disturbing the delicate balance between the judiciary, the legislature and the executive.”
- The BJP supported scrapping of the collegium system and replacing it with the JAC, but wanted the Constitution (120th Amendment) Bill, 2013, to be referred to a parliamentary standing committee.

Mr. Jaitley<sup>6</sup> said that the ‘piecemeal’ approach of the government was not practical as passage of the constitutional amendment would create a constitutional hiatus with the collegium system repealed without a new mechanism in place. He further stated that the standing committee could complete its work before the winter session and his party would support the bill on the very first day of the next session.

He further stated that the government was unnecessarily hastening the passage of the Bill that was of “extraordinary” importance and held, “When we are changing a system, all stakeholders should be allowed to participate in the process. Sending a Bill to the standing committee is part of the legislative process ... why deny this privilege of procedure to stakeholders who might come up with better suggestions that could help improve the Bill,” he said, and demanded that both the Bills, after vetted by the standing committee, could be taken up in the winter session. The Constitution Amendment Bill was passed on September 5, 2013 in Rajya Sabha without being referred to the Standing Committee and in protest of this, BJP leaders staged a walk out.

- Former Law Minister Ram Jethmalani took a stand against the Constitution Amendment Bill and termed it as “wholly unconstitutional”. In particular, he said that the composition of the JAC should be reflected in the constitution itself, and not in ordinary legislation. Otherwise, he argued, Parliament would be able to “demolish the whole thing and substitute it with a Judicial Commission which will consist of only the Law Minister.”<sup>7</sup>

<sup>6</sup> Debate can be accessed here: <http://164.100.47.5/newdebate/229/05092013/13.00pmTo14.00pm.pdf>

<sup>7</sup> Debate can be accessed here: <http://164.100.47.5/newdebate/229/05092013/18.00pmTo19.00pm.pdf>

### **PART VI: Existing Issues in the Bill**

#### **Issues raised by Jurists**

- Some of the Jurists who appeared before the Parliamentary Standing Committee have stated that the proposed Commission has representation from Executive through the Minister of Law & Justice and this will amount to interference of Executive in the appointment of judges and thereby will affect the independence of judiciary.
- Jurists have argued that the draft Bills must articulate the goals of creating a competent, independent and socially diverse judiciary through a transparent and accountable process to select judges who uphold constitutional values and whose individual and institutional conduct is of the highest ethical standard.
- It is also unclear whether the JAC is a selection or appointment body as the JAC shall 'recommend' persons to the President and Governor respectively. Is the head of the executive bound by this recommendation or may she exercise jurisdiction?

#### **Issues raised by Bar<sup>8</sup>**

Senior Advocate Mr. Anil Diwan, President of the Bar Association raises the following concerns over the JAC:

1. Composition of the JAC is not part of the Constitution and is not constitutionally established. Unless the proposed Article 124 A is expanded to include the composition of the JAC and the process of appointment it will be open to abuse by temporary majorities in Parliament and therefore poses a threat to the rule of law.
2. Issue: The criticism against the collegium system was lack of transparency, no consultations with the Bar, favouritism, the lack of a level-playing field for meritorious members of the Bar, no list of potential candidates prepared after advertisements and nominations to be put up in the public domain and lack of guidelines and criteria in the selection process.

Response: These core concepts must be incorporated in the Constitution Amendment and not left to be addressed by the Central government or the JAC.

3. The JAC Bill provides that the Central government will appoint the officers and employees of the Commission, making its secretariat a government department. If the secretariat or officers and servants of the JAC are treated as government departments, there are a hundred ways of making the JAC dysfunctional. In addition, the confidentiality and secrecy of the JAC deliberations cannot be maintained.

<sup>8</sup> Article can be accessed here: <http://www.thehindu.com/opinion/lead/upholding-judicial-independence/article5430672.ece>

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Response: The officials and personnel of the Commission should be appointed in the same manner as those of the Supreme Court (Article 146), viz. by the CJI or such other judge or officer of the court as he may direct. The importance of an independent secretariat is a *sine qua non* for an independent and politically neutral JAC.

### **PART VII: Suggestions by Parliamentary Standing Committee**

The Parliamentary Standing Committee in its report submitted on December 09, 2013 has suggested the following:

#### **A. On the composition of Judicial Appointments Commission**

The Standing Committee has made the following recommendations:

- Structure and functions of Judicial Appointments Commission needs to be protected under Article 368 of the Constitution of India to safeguard independence of judiciary which is a Basic Structure of Constitution;

Following demand by jurists and the opposition, government has granted constitutional status to the JAC to ensure that its composition cannot be altered through an ordinary legislation.

- There should be three eminent persons in the Commission instead of two as provided for in the Bill and at least one out of the three Members should be from SC/ST/OBC/Women/minority preferably by rotation. The area of eminence for the Eminent members in the Judicial Appointments Commission needs to be specified in the Bill;
- To avoid the tie in the consensus of the Commission's view, composition of the Commission may be increased to seven with Hon'ble Vice President of India as Chairman;
- Representation from the Bar in the composition of the Commission;

#### **B. On the functions of Judicial Appointments Commission**

In this regard, the Standing Committee has made the following recommendations:

- State level Judicial Commission on the lines of JAC may be provided in the Bill; A body comprising Governor, Chief Minister, Leader of Opposition of Legislative Assembly, Chief Justice of High Court may be provided for consultation of names to be recommended to JAC for appointment of judges of that High Court; and
- Fifty percent of High Court Judges may be reserved for judges of Subordinate Judiciary.

#### **C. Procedure of Short listing of Candidates**

In this regard, the Standing Committee has made the following recommendations:

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- Procedures for short-listing candidates for selection to the Bench of higher Judiciary be laid down through rules and regulations under the Bill.
- Creation of a Statutory Search Committee for short-listing candidates of the consideration of JAC.

### D. Other recommendations:

- Laying down of guidelines for transfer of judges should be made clear by the Commission;
- Creation of an all India Judicial Service (as envisaged of Article 312 of Constitution) to attract best talent for lower judiciary from where 33% of higher judiciary is created.
- Reducing vacancies is also a major objective for creation of the JAC. The Report suggested that future vacancies should be officially detected six months in advance, and be filled within a week of arising. The committee recommends that the JAC should initiate process of appointment of judges “well in advance” and the vacancies should be filled up “in a time-bound manner”.
- Retirement age of High Courts and Supreme Court Judges to be increased from 65 to 68, respectively;
- Rotation of the post of Chief Justice of India amongst Judges of Supreme Court;
- Judicial Appointments Commission must be within the ambit of the Right of Information Act, 2005;
- The clause of the Bill providing for separate opinions from the Governor, the chief minister and the chief justice of the concerned high court is not only unnecessarily time consuming but wrongly limits the scope of consultation.
- The judges’ selection procedure must be such that it gives eligible member of Bar an opportunity to be considered for appointment as judges of High Court in an objective and transparent manner.
- Judicial Appointments Commission to recommend to the President of India for removal of judges and replace the cumbersome process of impeachment of judges.

### PART VIII: Best Practices

None of the democratic countries in the world except India follow a mechanism where the judges appoint themselves. Many constitutions adapt the principle of separation of powers to design an inter-institutional process to constitute the judiciary. These institutions operate as a check and balance to ensure that no single institution has an overweening influence on judicial composition.

A few global practices which have resulted in a transparent and robust JAC can be incorporated in the Indian scenario<sup>9</sup>:

1. Composition of the JAC and the process of appointment must be set out in the Constitution.
  - The process of judicial appointment through a JAC and the new appointment process must be entrenched through constitutional amendment to resemble sections 174, 175 and 178 of the South African Constitution, 1996.
  - Unless the proposed Article 124 A is expanded to include the composition of the JAC and the process of appointment it will be open to abuse by temporary majorities in Parliament and therefore poses a threat to the rule of law.
2. It is also unclear whether the JAC is a selection or appointment body as the JAC shall ‘recommend’ persons to the President and Governor respectively. Is the head of the executive bound by this recommendation or may she exercise jurisdiction? It may be useful to clarify the scope of the discretion enjoyed by the executive — to appoint or not appoint — those recommended by the JAC.

Section 174(4) of the South African Constitution, 1996 sets out a more elaborate requirement that constrains the President’s discretion and mandates that she give reasons while accepting or rejecting a recommendation.

3. The Constitution Amendment Bill must articulate the qualities necessary to be a judge of the higher courts in India. It must institute a culture that is sensitive to diversity in the higher judiciary to break the allegations that nepotism and kinship ties dominate the current appointment process.
  - The South African Constitution mandates that that an “appropriately qualified” and “fit and proper” person may be appointed and that judges must reflect the racial and gender composition of the country.
  - Similarly, the UK Constitutional Reforms Act, 2005 specifies that subject to the condition of merit and good character, the JAC is expected to encourage diversity in the range of persons selected.
4. Following the South African and United Kingdom model, where Judicial Service Commissions call for nominations through public advertisements and holding public interviews for appointment of judges, the same should be applied in India to ensure transparency and to attract best available talent.

<sup>9</sup> Article can be accessed at: <http://www.thehindu.com/opinion/lead/recasting-the-appointments-debate/article5452452.ece>

### **PART IX: Conclusion**

The current practice of ‘collegium system’ has been labelled as an undemocratic system and the JAC Bill definitely provides a better alternative but a lot of debate and discussion is required to be conducted before it turns into legislation as it concerns a matter of immense importance.

While legal experts and political parties have arrived at a consensus on the content of the Bill, there is no clarity as to who will be the ‘two eminent’ persons who are proposed to be the members of the JAC and on what considerations they will be selected.

The government’s hurry to pass the bill has raised serious aspersions on the intention of the government. The non transparency of the current collegium system should not be made a pretext for giving the Executive sweeping powers in the matter of judicial appointments.<sup>i</sup>

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**Reference:**

Parliamentary Standing Committee Report on Judicial Appointments Bill. Accessible at:  
<http://www.prsindia.org/uploads/media/Judicial%20Appointment/SCR-%20Judicial%20Appointments%20Commission%20bill.pdf>