

# Legislative Brief

## The CEC and Other Election Commissioners Bill, 2023

The Chief Election Commissioner And Other Election Commissioners (Appointment, Conditions Of Service And Term Of Office) Bill, 2023 was introduced in Rajya Sabha on August 10, 2023.

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### Highlights of the Bill

- ◆ The Bill replaces the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991. It provides for the appointment, salary, and removal of the Chief Election Commissioner (CEC) and Election Commissioners (ECs).
- ◆ The CEC and ECs will be appointed by the President upon the recommendation of a Selection Committee. The Selection Committee will consist of the Prime Minister, a Union Cabinet Minister, and Leader of Opposition/leader of the largest opposition party in Lok Sabha.
- ◆ Recommendations of the Selection Committee will be valid even when there is a vacancy in this Committee.
- ◆ A Search Committee headed by the Cabinet Secretary will propose a panel of names to the Selection Committee. Eligibility for the posts includes holding (or having held) a post equivalent to the Secretary to the central government.
- ◆ The salary and conditions of service of the CEC and ECs will be equivalent to that of Cabinet Secretary. Under the 1991 Act, it was equivalent to the salary of a Supreme Court Judge.

### Key Issues and Analysis

- ◆ The selection process of the Election Commission may be dominated by the government, which has implications for its independence.
- ◆ Accepting the Selection Committee's recommendations in spite of a vacancy in its constitution may effectively lead to a monopoly of government members in selecting candidates.
- ◆ Making the CEC and EC's salary equivalent to the Cabinet Secretary may lead to government influence as it is fixed by the government. This is unlike the salary of a Supreme Court judge which is fixed through an Act of Parliament.
- ◆ CECs and ECs also perform quasi-judicial functions. Limiting these posts to senior bureaucrats may exclude other suitable candidates.

## PART A: HIGHLIGHTS OF THE BILL

### Context

Article 324 of the Constitution states that the Election Commission will comprise the Chief Election Commissioner (CEC) and such number of Election Commissioners (ECs), as the President may decide. The Election Commission of India (ECI) is responsible for managing the preparation of electoral rolls and conducting elections to Parliament, State Legislatures, and the offices of the President and Vice-President. The Constitution specifies that the President will appoint the CEC and ECs, subject to the provisions of an Act of Parliament. In the Constituent Assembly debates, the executive's role in appointing the CEC and ECs was discussed as the President acts on the aid and advice of the Prime Minister. Dr. B.R. Ambedkar pointed out that the election machinery should be out of the control of the government.<sup>1</sup> Members of the Constituent Assembly agreed to leave the appointment mechanism of the ECI to the discretion of Parliament.<sup>1</sup>

In 1991, Parliament passed the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act.<sup>2</sup> The Act set the salary of the CEC and ECs at the same level as a Supreme Court judge. It did not provide for their appointment process, which continued to be decided by the President.<sup>3</sup>

In March 2023, while examining the appointment of the CEC and ECs, the Supreme Court declared that their appointment should not be done solely by the Executive.<sup>3</sup> The Court noted that the ECI should be independent of Executive control. It mandated a selection process, which would hold until Parliament makes a law.<sup>3</sup> The Court directed that the appointment should be done by the President on the recommendation of a Selection Committee. The Selection Committee will consist of: (i) the Prime Minister, (ii) the Leader of Opposition in Lok Sabha, and (iii) the Chief Justice of India. The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service And Term of Office) Bill, 2023, was introduced in Rajya Sabha on August 10, 2023.<sup>4</sup> It repeals the 1991 Act and provides for the appointment process and conditions of services for the CEC and ECs.

## Key Features

- **Election Commission:** The Election Commission will consist of a Chief Election Commissioner (CEC) and other Election Commissioners (ECs). The President will periodically fix the number of ECs.
- **Appointment of the Commission:** The Commission will be appointed by the President, upon the recommendation of the Selection Committee. The Selection Committee will comprise the Prime Minister, Cabinet Minister, and Leader of Opposition in Lok Sabha (or leader of the single largest opposition party). A Search Committee headed by the Cabinet Secretary will suggest five names to the Selection Committee. The Selection Committee may consider any person other than those suggested by the Search Committee.
- **Eligibility criteria:** The CEC and ECs must: (i) be persons of integrity, (ii) have knowledge and experience in the management and conduct of elections, and (iii) be or have been Secretary (or equivalent) to the government.
- **Term and reappointment:** Members of the Election Commission will hold office for six years, or until they attain the age of 65 years, whichever is earlier. Members of the Commission cannot be re-appointed. If an EC is appointed as a CEC, the overall period of the term may not be more than six years.
- **Salary and pension:** The salary, allowances, and other conditions of service of the CEC and ECs will be equivalent to that of the Cabinet Secretary. They will have an option to draw pension and other retirement benefits from the service that they belonged to previously.
- **Removal:** The Bill retains the manner of removal of CEC and ECs as specified in the Constitution. The CEC may be removed in the same manner and on the same grounds as a Supreme Court Judge. ECs may be removed only upon the recommendation of the CEC.

## PART B: KEY ISSUES AND ANALYSIS

### Independence of the Election Commission

The Constitution envisages the Election Commission (ECI) as an independent body that is responsible for conducting free and fair elections. The Supreme Court has noted that such a body should be completely insulated from external pressures from the ruling party, and must not be chosen by the Executive exclusively.<sup>3,5</sup> Members of the Constituent Assembly had also noted that the responsibility of conducting elections should be entrusted to people who are free from political influences and local pressures.<sup>1</sup> Dr. B.R. Ambedkar had stated that for elections to be free in the real sense of the word, they should be taken out of the hands of the government of the day.<sup>1</sup> The Supreme Court (2023) has also stated that any action of the ECI which treats political parties in an uneven or arbitrary manner could breach the right to equality.<sup>3</sup> Over several judgements related to judicial independence, the Court has established that independence requires insulation from the government during appointments and while performing its functions.<sup>6</sup> Several provisions in the Bill may undermine the independence of the ECI.

#### Selection Committee is dominated by the government

The appointment of the CEC and ECs under Article 324 is subject to a law made by Parliament. The Supreme Court (2023) noted that the Constituent Assembly intended to provide for an independent Election Commission whose appointment is regulated by law and not decided by the Executive.<sup>3</sup> The Court ruled that until Parliament made a law for such process, CEC and ECs will be appointed on the recommendation of a Selection Committee. This Committee will comprise the Prime Minister, the Chief Justice of India, and the Leader of Opposition in Lok Sabha (or leader of the largest opposition party).<sup>3</sup>

The Bill specifies that the Selection Committee will consist of the Prime Minister, a Cabinet Minister, and the Leader of Opposition in Lok Sabha (or leader of the largest opposition party). Thus, the Selection Committee

has a majority of members from the government of the day, which may undermine the independence of the ECI.

Note that heads of several other independent bodies such as the Chief Information Commission and the Central Vigilance Commission are appointed by a panel similar to the one proposed in this Bill.<sup>7</sup> However, for constitutional bodies such as the Union Public Service Commission and the Comptroller and Auditor General of India, the appointment is made by the President. The Supreme Court noted that the ECI stands on a higher pedestal in the constitutional scheme due to its functions and duties. This is reflected in the fact that the ECI's appointments will be made subject to a law made by Parliament.<sup>3</sup>

**Table 1: Suggestions made by various Commissions/Courts for composition of the Selection Committee**

Body	Members
Goswami Committee (1990)	For CEC: Appointed by the President in consultation with the Chief Justice + Leader of Opposition of Lok Sabha (or leader of the largest party in Lok Sabha). For EC: Appointed by the President in consultation with the Chief Justice + Leader of Opposition of Lok Sabha (or leader of the largest party in Lok Sabha) + CEC.
The Constitution (Seventieth Amendment) Bill 1990*	Chairman of Rajya Sabha + Speaker of Lok Sabha + Leader of the Opposition (or the leader of the largest party) in Lok Sabha. The CEC was further made a part of the consultative process in the appointment of the Election Commissioners.
National Commission to Review the Working of the Constitution Report (2002)	Prime Minister + Leader of the Opposition in Lok Sabha + the Leader of the Opposition in Rajya Sabha + the Speaker of Lok Sabha + the Deputy Chairman of Rajya Sabha.
Law Commission (2015)	Prime Minister + the Leader of Opposition of Lok Sabha (or the leader of the largest opposition party in Lok Sabha) + the Chief Justice.
Supreme Court (2023)	Prime Minister + Leader of Opposition in Lok Sabha (or leader of single largest opposition party in Lok Sabha) + Chief Justice.

Note: \* Introduced in Rajya Sabha and withdrawn by the House in 1994.

Sources: Writ Petition (c) No. 104 of 2015, Anoop Baranwal v Union of India, Supreme Court, March 2, 2023; PRS.

**Table 2: Selection Process of the Election Commission in certain countries**

Country	Appointing Authority	Selection Committee/Process
South Africa	President	President of the Constitutional Court (Chairperson), representative of the Human Rights Court, representative of the Commission on Gender Equality, and the public prosecutor.
United Kingdom	The monarch, upon approval by the House.	<ul style="list-style-type: none"> <li>▪ The Speaker's Committee on the Electoral Commission with MPs as members, oversees the recruitment of electoral commissioners.</li> <li>▪ The candidates for these posts are then approved by the House of Commons and appointed by the British monarch.</li> <li>▪ The Speaker asks the Leader of the House to table a motion for an address to appoint the recommended candidates.</li> </ul>
United States	President	The Commission is appointed by the President and confirmed by the Senate.
Canada	-	Appointed by a resolution of the House of Commons.

Sources: Writ Petition (c) No. 104 of 2015, Anoop Baranwal v Union of India, Supreme Court, March 2, 2023; PRS.

### Selection Committee's recommendations to be valid in spite of vacancy or defect in constitution

Bill: Clause 7 (2)

The Bill upholds the validity of the Selection Committee even if there is a vacancy or defect in constituting the Committee. Similar provisions exist in some other laws for selection of members to statutory bodies.<sup>8</sup> However, a vacancy in this Committee will only arise in certain circumstances. Of the three members in the Committee, the posts of the Prime Minister and a Cabinet Minister cannot be vacant. The post of the Leader of Opposition in Lok Sabha may be vacant, if Lok Sabha is dissolved. Thus, a vacancy may arise only before a general election, and in such a case, the Selection Committee will consist exclusively of ruling party members.

### Selection Committee may overlook Search Committee's suggestions

Bill: Clause 8 (2)

Under the Bill, the Selection Committee selects names from a panel of five people suggested by the Search Committee. The Selection Committee may go beyond the names suggested by the Search Committee, and choose any other candidate. On one hand, this may undermine the role of the Search Committee which is specifically constituted to look for capable and qualified candidates. On the other hand, the provision may ensure that the candidates considered for CEC and EC positions are not controlled solely by the Search Committee, which is entirely composed of civil servants.

### Salary of CEC and ECs to be decided by the government

Bill: Clause 10

Under the 1991 Act, salaries of CEC and ECs are equivalent to the salary of a Supreme Court Judge.<sup>2</sup> The Bill equates the salary of the CEC and ECs to that of the Cabinet Secretary of the government. Both salaries are currently equivalent but they are regulated differently. Article 125 of the Constitution requires that the salary of a Supreme Court Judge be fixed by an Act of Parliament. However, the salary of a Cabinet Secretary salary is

fixed by the government upon the recommendation of the Central Pay Commission.<sup>9</sup> Thus, the Bill may be allowing for greater control of the Executive in determining the salary of the CEC and ECs.

## Eligibility criteria may exclude other suitable candidates

Bill: Clause  
5

Under the Bill, only a person who is or has been at a rank equivalent to Secretary to the government will be eligible to be the CEC or EC. In addition to administrative functions, an Election Commission also acts in a quasi-judicial capacity.<sup>3,5</sup> It decides on the disqualification of Members of Parliament and State Legislatures and adjudicates disputes such as those arising out of allotting symbols, or registering political parties.<sup>10,11</sup> By limiting the eligibility criteria of the CEC and ECs to civil servants, the Bill may exclude other qualified individuals from such posts.

In other countries, members of bodies equivalent to the ECI have a wider eligibility criteria.<sup>12</sup> For instance, in the United States, members must not be elected or appointed officers, or hold federal government positions in the executive, legislative, or judicial branch at the time of their appointment. In South Africa, the Election Commission is a five-member body, of which one must be a judge. All members must be South African citizens who do not have high party-political profiles.

## Other issues related to the Election Commission's independence

The Supreme Court and several committees including the Goswami Committee (1990) have made suggestions to ensure independence of the ECI. These relate to: (i) the removal process of CEC and ECs, and (ii) administrative independence of the ECI. These suggestions have not been addressed in the Bill.

### Lack of parity in removal of the CEC and ECs

Bill: Clause  
11

Under Article 324 of the Constitution, the CEC can only be removed from his office in a manner similar to that of a Supreme Court judge.<sup>13</sup> An EC can be removed from office upon the recommendation of the CEC. The Bill retains these grounds for removal under the Constitution. However, there may be concerns about the lack of parity in the removal procedure of the CEC and the ECs.

Until 1991, the ECI did not consist of any ECs.<sup>5</sup> Following the appointment of the ECs, the Supreme Court (1995) examined the hierarchy between the CEC and an EC and stated that ECs are considered to be at par with the CEC.<sup>5</sup> The Bill also provides an equal status for the CEC and EC with both positions receiving the same salary, and having an equal say in decision-making. In 2023, the Supreme Court examined the issue and said that it could not mandate parity in removal, as the Constitution provides for different removal processes. It stated that extending the protection to ECs to safeguard their independence is a matter for Parliament to consider.<sup>3</sup> Any changes to the removal process of the ECs would require a Constitutional Amendment.

### Administrative independence of the Commission

The Goswami Committee and the ECI have recommended an independent secretariat for the ECI along the lines of Lok Sabha, Rajya Sabha, the Supreme Court, and High Courts.<sup>14,15</sup> The Supreme Court (2023) also noted the importance of having an independent secretariat for the functioning of the ECI.

1. The Constituent Assembly Debates, Volume VIII, [June 15](#) and [June 16](#), 1949.
2. [The Election Commission \(Conditions of Service of Election Commissioners and Transaction of Business\) Act, 1991](#).
3. [Anoop Baranwal v Union of India](#), WP (Civil) 104 of 2015, Supreme Court of India, March 2, 2023.
4. [The CEC And Other Election Commissioners \(Appointment, Conditions Of Service And Term Of Office\) Bill, 2023](#).
5. [T.N. Seshan, CEC of India vs Union of India and others](#), WP (Civil) 805 of 1993, Supreme Court of India, July 14, 1995.
6. [Supreme Court Advocates-on-Record - Association and another vs Union of India](#), WP (Civil) 1303 of 1987, October 6 1993 and [Special Reference Case 1 of 1998](#), Supreme Court of India, October 28, 1998.
7. [The Right to Information Act, 2005](#) and [The Central Vigilance Commission Act, 2003](#).
8. [Electricity Act, 2003](#), [The Major Port Authorities Act, 2021](#), and [The National Dental Commission Act, 2023](#).
9. [Report of the Seventh Central Pay Commission](#), November 2015.
10. Article 103 and 192, [The Constitution of India](#).
11. [The INC \(I\) vs Institute of Social Welfare and others](#), Civil Appeal 3320-21 of 2001, Supreme Court, May 10 2002.
12. Section 306(3), [Federal Election Campaign Act, 1971](#), and Section 6, [Electoral Commission Act, 1996](#).
13. Article 124, [The Constitution of India](#).
14. Report of the Committee on Electoral Reforms (Goswami Report), Ministry of Law and Justice, May 1990.
15. [Proposed Election Reforms](#), Election Commission of India, December 19, 2018.

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