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Working in the Shadows: The Curious Case of Shadow Lord Chancellors and the Duty to Uphold the Principle of Judicial Independence

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Introduction

1. Judicial independence matters. There is a clear constitutional value in the principle but recently, in amongst much more fractured politics, the safeguarding of judicial independence is not something to be taken for granted. Recognising the need for judicial independence is central to creating a democratic system of governance and promotes the importance of the role and work of the judiciary as a whole. This article was prompted by the then Shadow Lord Chancellor's, Robert Jenrick MP, speech at the Conservative Party conference in October 2025. His comments present an opportunity to look at what can be done across party lines to engender more willingness to support judicial independence for broader constitutional benefit.
2. In light of the responses to Jenrick's speech by the Law Society and Bar Council, we are reminded of the need to clarify whose responsibility it is – and should be – to protect judicial independence. While there is legislative provision for the Lord Chancellor and Chief Justice to do so, we examine the case for extending this further to the office of shadow Lord Chancellor. We do so not by proposing more legislative reform or even policy development responsibility but by suggesting a new convention as a political means for managing this area of political action.
3. The time is now for this intervention as we are seeing quantifiable impacts of a changing discourse surrounding judges and their decision-making. We do not advocate for an immunity from criticism regarding the work of judges; instead this article reminds us of the need for parameters to this aspect of judicial accountability by drawing attention once more to the carefully-negotiated, and often blurred, boundaries between law and politics. There is space to encourage ministers, including shadow ministers, to better protect judicial independence within the constitution and we offer an approach for doing so here by recognising a new constitutional convention applicable to shadow ministers. In truth, the responsibility to protect this principle extends to all – and presenting this as a constitutional convention emphasises the weight of the

requirement. Not only that, such a convention would add clarity and definition to the language of s 3 of the Constitutional Reform Act 2005 and the constitutional actors referred to there.

Protecting judicial independence: contemporary constitutional challenges

4. The principle of judicial independence is of central importance within the democratic constitutional framework of the UK. Judges ‘should be independent’.¹ Securing tangible judicial independence has been a feature of constitutional history, with the king’s power to remove judges at his pleasure superseded by the statutory right to security of tenure for judges under the Act of Settlement 1701.² The reality of judicial independence has been contested since, with examples of Lord Chief Justices such as Lord Mansfield and Lord Ellenborough’s appointment in the late eighteenth and early nineteenth centuries to cabinet being cited as undermining this independence.³ Even in the middle of the twentieth century the security of tenure enjoyed by a judge could be circumvented, as was the case of the Prime Minister, Winston Churchill’s prompting of Lord Hewart to resign as Lord Chief Justice in 1940.⁴
5. The essential feature of the statutory protection of judicial independence was a restriction on the executive dismissing judges without first receiving an address from both Houses of Parliament. This was a negative obligation on the monarch and their ministers. And yet, the safeguarding of the principle – and its effects – via legislation has undergone recent reform, with a new positive obligation emerging following the enactment of the Constitutional Reform Act 2005. The Act imposed a positive duty on the Lord Chancellor and other ministers to uphold judicial independence.
6. Despite judicial independence once having lesser statutory protection, its long-standing symbolic power within the UK’s constitutional arrangements sees the principle accepted as a cornerstone of democracy and a vital facet of the rule of law. As Lord Hodge, Deputy President of the UK Supreme Court reminded the audience in his

¹Graham Gee and others, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press 2015) 9.

²For the history and significance of the Act of Settlement 1701 see Lord Burnett of Maldon, ‘Institutional Independence and Accountability of the Judiciary’, The Lionel Cohen Lecture 2022, Hebrew University of Jerusalem, 30 May 2022 <<https://www.judiciary.uk/wp-content/uploads/2022/07/Cohen-Lecture-300522-1.pdf>>, Sir Henry Brooke, ‘The History of Judicial Independence in England and Wales’ (2015) 5 *European Human Rights Law Review* 446; Robert Stevens, ‘The Act of Settlement and the Questionable History of Judicial Independence’ (2001) 1(2) *Oxford University Commonwealth Law Journal* 252; and Chris Monaghan, ‘The Act of Settlement 1701’ in C Monaghan (ed), *Leading Works in the History of the Constitution* (Routledge 2025).

³The appointment of Lord Ellenborough to cabinet in 1806 was particularly controversial, with the Prime Minister, Lord Grenville defending this during parliamentary debates. In an exchange with the Earl of Bristol, Grenville’s explanation and reliance of precedents of the Lord Chief Justice attending cabinet or advising the king on the Privy Council failed to convince the Earl of Bristol, who declared that he

could not help thinking the appointment highly objectionable, notwithstanding the explanation of the noble lord. To him it appeared repugnant to the constitution, and incompatible with the due administration of justice; and, on these grounds, he should certainly submit it to the consideration of the house on Monday next; for which day it was ordered that their lordships be summoned to attend. (HL Deb 24 February 1806, vol 6, col 179)

⁴Robert Stevens, ‘Hewart, Gordon, first Viscount Hewart (1870–1943), Judge’, *Oxford Dictionary of National Biography* (3 January 2008).

2018 speech, 'Preserving judicial independence in an age of populism', that 'Judges take a judicial oath to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will"'.⁵ Protecting judicial independence is vital since it is 'a critical component of the concept of the rule of law'.⁶

7. While the importance of the principle may be understood, the question of responsibility for its protection remains up for discussion. Changing constitutional environments can sometimes bring such a question front and centre. As Shetreet and Turenne note, judicial independence 'is perhaps best understood in relation to the background of any given society'.⁷ It has long been accepted that as a matter of constitutional convention the Lord Chancellor (when they were head of the judiciary) would take responsibility for upholding judicial independence. The classic image of a pre-Constitutional Reform Act 2005 Lord Chancellor summons up Lord Hailsham. As a heavyweight political figure, it was evident that he saw his role as Lord Chancellor as representing the judiciary in Cabinet and defending them. Lord Hailsham was clear why judicial independence mattered, what the expectations were of a Lord Chancellor, even in the face of public criticism of the judiciary:

In England an honourable, but comparatively recent, tradition insulates judicial appointments, as well as judicial security of tenure, from political pressures. My own view is that this is one of the main tests of a good Lord Chancellor.⁸

As Lord Chancellor I can testify to the fact that by far the bitterest and most frequent complaints I receive from the public relate to the professional judiciary.⁹

Judicial independence is the secret of the reputation justly held by British justice. The achievement of judicial independence at the end of the seventeenth century, enshrined in the Bill of Rights and the Act of Settlement, is just as important a landmark in the history of liberty under law as the victory of Parliament over the Crown, and is not adequately recognised as such. It depends on security of tenure for the judges and immunity from attack either by Parliament or the executive or from the media.¹⁰

8. Indeed, the key competency of a successful Lord Chancellor was to defend judicial independence:

If he does it well, he is a good lord chancellor whatever his other defects.¹¹

9. There is a clear constitutional importance in the principle but in more recent, fractured political times, the safeguarding of judicial independence is not something to be taken

⁵Lord Hodge, 'Preserving Judicial Independence in an Age of Populism', North Strathclyde Sheriffdom Conference, Paisley, 23 November 2018, 3 <https://supremecourt.uk/uploads/speech_181123_9ce4b9f447.pdf> accessed 31 March 2026.

⁶*ibid.*

⁷Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, Cambridge University Press 2013) 401.

⁸Lord Hailsham of St Marylebone, *Hamlyn Revisited: The British Legal System Today* (Stevens & Sons 1983) 35.

⁹*ibid.* 35.

¹⁰*ibid.* 54–55.

¹¹The quotation is found in Jake Richards, 'The Fall of the Lord Chancellor' *Prospect* (15 May 2020) <<https://www.prospectmagazine.co.uk/politics/40226/the-fall-of-the-lord-chancellor>> accessed 31 March 2026.

for granted. We must not, as McIntyre describes, subscribe to the ‘creeping myth of inevitability’ of the principle’s position within the constitution and in turn, ‘too quickly become blind to potential threats’.¹² In fact, there is evidence that the deliberate undermining of the principle has become another example of judges being used in a heated – and unhelpful – game of political football. One risk is that those advocating for judges’ independence from (party) politics, are not always clear themselves as to the boundaries of any criticism. For example, appearing before the House of Lords Constitution Committee in September 2025, as part of the Committee’s Rule of Law inquiry, the (now former) Lord Chancellor and Secretary of State for Justice, Shabana Mahmood MP stated that it ‘is one thing to criticise a decision but another thing entirely to bring a judge’s integrity into question’¹³ since this ‘risks their safety, undermines public confidence in the justice system and erodes the rule of law’.¹⁴ While Mahmood speaks to the wider benefits of the principle, the suggestion that judicial decisions may be criticised is challenging to reconcile with many readings of the principle.

10. The long-established principle of judicial independence can be a foregrounded theme in the coverage of contemporary controversies: controversies which may question the extent of the protection the principle should provide. Why is it that judges are permitted a different kind of accountability to that of politicians? This questioning is entirely fair since to emphasise – and mandate – the protection of judges’ independence on both an individual and collective basis is to suggest that judges may be immune from criticism and as a result, subject to much less accountability than their political counterparts. Yet the possible consequences from unbridled, politically driven criticism are great: it can undermine the legitimacy of judges, the judiciary as an institution and associated decision-making. This strategy is particularly dangerous if deployed in a time when the legitimacy of the rule of law and of democracy are themselves under significant pressure. In practice, judges are subject to accountability mechanisms which are necessarily different from those of politicians in order to respect the need for their continued independence.¹⁵ For example, a judgment in which bias is suspected can be appealed.¹⁶ Indeed, even at the highest level of the judiciary, there is accountability of decision making. This might come via publicity but a more constitutionally appropriate process is by way of the judiciary and the courts themselves. One might think back to the case(s) of *Pinochet No 1* and *No 2* and the recusal process which provided a recalibration of the independence in that litigation.¹⁷ What is needed – and

¹²Joe McIntyre, ‘The Six Myths of Judicial Independence’ (2025) 52(2) University of Western Australia Law Review 159.

¹³HL Constitution Committee, ‘Corrected Oral Evidence: The Rule of Law’ <<https://committees.parliament.uk/oralevidence/16401/pdf/>> accessed 31 March 2026.

¹⁴Monidipa Fouzder, ‘Questioning Judges’ Integrity is Dangerous, Mahmood Tells Peers’ *The Law Society Gazette* (4 September 2025) <<https://www.lawgazette.co.uk/news/questioning-judges-integrity-is-dangerous-mahmood-tells-peers/5124345.article>> accessed 31 March 2026.

¹⁵Robert Hazell, ‘Judicial Independence and Accountability in the UK Have Both Emerged Stronger as a Result of the Constitutional Reform Act 2005’ [2015] Public Law 198.

¹⁶See the case of *Emerald Supplies Ltd v British Airways* [2015] EWHC 2201 (Ch) as an example.

¹⁷*R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet* [2000] 1 AC 61 and [2000] 1 AC 119.

sometimes lost – is subtlety and care in how the independence of the judiciary is balanced against notions of accountability within public office or, more specifically, how the justifications for that position are conveyed. This responsibility falls to those with a voice: to the Head of the Judiciary, to the Lord Chancellor, to the press but also to all those involved in matters of justice including those in opposition.

Whose responsibility is it, anyway?

11. This article was prompted by the former Shadow Lord Chancellor's, Robert Jenrick MP, speech at the Conservative Party conference in October 2025. Jenrick's speech, in which he reiterated respect for the judiciary before then attacking activist judges, proved to be controversial. Jenrick, holding a judge's wig as a prop, told the audience that:

For those of you at the back of the room who can't see, I have here a judge's wig. It's something we should respect and revere. When a judge dons their wig, it signifies a transition from their everyday personality and identity to that of a legal arbiter. It's a visual representation of the judge's role as an unbiased mediator, focused solely on upholding the law and delivering justice. An unbiased mediator: that is what a judge should be. That is what the vast majority of judges in our legal system do. They wear the wig. They respect and revere it ... But we've got a problem, Conference.

Today, I've uncovered dozens of judges with ties to open-borders charities, who take to social media to broadcast their open-border views, who've spent their careers fighting to keep illegal migrants in this country. Some even continue to do so while, astonishingly, serving as judges. It's like finding out halfway through a football match that the referee is a season ticket holder for the other side. The public rightly ask, how independent are they? They dishonour generations of independent jurists who came before them and undermine the British people's trust in the law itself. Judges who blur the line between adjudication and activism can have no place in our justice system.¹⁸

12. Jenrick's speech received considerable criticism, with the President of the Law Society of Scotland, Patricia Thom, declaring that, 'Robert Jenrick's comments about so-called "activist" judges are dangerous and unacceptable. We strongly condemn such rhetoric, which appears designed to undermine the independence of the judiciary and its fundamental role in safeguarding our constitution'.¹⁹ A joint statement from the Law Society of England and Wales, the Bar Society of England and Wales, and others, pulled no punches in their criticism:

Politicians have a responsibility to respect the role of judges in upholding the rule of law and interpreting legislation that has been agreed by parliament ... Politically motivated attacks on the legal profession are irresponsible and dangerous. They weaken public trust and

¹⁸See Paul Seddon and Joshua Nevett, 'Jenrick Attacks "Activist" Judges in Conference Speech' *BBC News* (6 October 2025) <<https://www.bbc.co.uk/news/articles/cn95w5jqyz0o>> accessed 31 March 2026.

¹⁹Law Society of Scotland, 'Law Society Calls Out Comments Undermining Judicial Independence' (8 October 2025) <<https://www.lawscot.org.uk/news-and-events/law-society-news/law-society-calls-out-comments-undermining-judicial-independence/>> accessed 31 March 2026.

confidence in the rule of law and erode the very foundations of justice that underpin fairness and democracy.²⁰

13. Returning to Lord Hailsham's view as to the role of the Lord Chancellor, Hailsham noted that when politicians attacked the judiciary, the role of Lord Chancellor was to be the 'heart and soul in support of the judiciary against the politician. That, of course, is fully in accordance with the duty of a Lord Chancellor'.²¹ It is not a new phenomenon that judges will attract public criticism, either through their judgments or involvement in other duties. However, whilst this criticism may chime with the views of politicians, it is nonetheless in some ways a form of reaching for low hanging fruit to attack judges.
14. What we propose is that given the importance of judicial independence and the recognised need for this in order to secure the rule of law, there is merit in extending the obligation to uphold judicial independence to the shadow Lord Chancellor. Whilst s 3 of the Constitutional Reform Act 2005 imposes a statutory duty on the Lord Chancellor, which can be read alongside the Lord Chancellor's oath of office established in s 17(1) to defend judicial independence, we argue that a constitutional convention ought to be created that replicates and reinforces this obligation through political means. Unlike that of the Lord Chancellor and Secretary of State for Justice, a shadow Lord Chancellor has no real power in terms of the executive function of government, but they do have the ability – by their actions – to defend (or conversely, weaken) judicial independence and influence those around them.
15. Within the drafting of the Constitutional Reform Act 2005 was the novel inclusion of the principle within s 3 and a 'guarantee of continued judicial independence'. Section 3(1) requires:

The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.
16. And more specifically, s 3(5) states:

The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
17. Part of our aim here is to revisit, in light of ever-changing contexts, the nature, scope and application of s 3 of the Constitutional Reform Act 2005. What we conclude at this point is that while s 3 of the Constitutional Reform Act 2005 was a powerful legislative statement of the importance of judicial independence, experience since suggests that its power may be limited to the realm of symbolism. This is a point

²⁰The Law Society, 'Joint Statement on Attacks on the Legal Profession' (13 October 2025) <<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/joint-statement-on-attacks-on-the-legal-profession>> accessed 31 March 2026.

²¹Lord Hailsham of St Marylebone (n 8) 48.

recently made by Scott Stephenson, who argued that ‘even if section 3 of the Constitutional Reform Act 2005 (UK) amounts to a codification of the convention, it has thus far not significantly altered the operation of the duty’.²² Thus, a convention has been to some extent codified (notwithstanding the reality that the provision is legally unenforceable), which begs the question as to whether this has made a difference to how the Lord Chancellor approaches their traditional constitutional role. In light of Liz Truss’ tenure as Lord Chancellor and her failure to execute her statutory duty in 2016, this is a moot point. Whilst Truss’ allies may have defended her slow response to the *Daily Mail*’s ‘Enemies of the People’²³ headline, it is telling that several high-profile judges have, in their retirement, been scathing about Truss’ failure.²⁴

The duty of the Lord Chancellor, the curious case of the shadow Lord Chancellor and limitations of safeguards for judicial independence

18. The Constitutional Reform Act 2005 offers some enhanced articulation relating to the ‘new-style’ office of Lord Chancellor and these reforms are fairly well-trodden ground in terms of academic commentary. The new-style Lord Chancellor, as Secretary of State for Justice, is ‘now a conventional ministerial office with a heavyweight portfolio’.²⁵ Here, we are making the case that the limits of the legislative approach under s 3 can be addressed through the careful identification or creation of new political norms and expectations. In particular, we are asking: what of the *shadow* Lord Chancellor? There is no mention of the office of shadow ministers in the Explanatory Notes for the 2005 Act nor within wider debate about the Lord Chancellor. There are relatively clear reasons for this in one sense, with those individuals not actually holding the office of Lord Chancellor. However, shadow ministers can, at times, wield substantial political weight and without doubt, can be active players in the wider public discourse on current events.
19. In terms of constitutional rules, *Erskine May* makes clear that all parliamentarians are expected to follow sub-judice rule. There are of course expectations when the rule

²²Scott Stephenson, ‘Constitutional Conventions and the Judiciary’ (2021) 41(3) *Oxford Journal of Legal Studies* 750.

²³James Slack, ‘Enemies of the People: Fury Over “Out of Touch” Judges Who Have “Declared War on Democracy” by Defying 17.4m Brexit Voters and Who Could Trigger a Constitutional Crisis’ *The Daily Mail* (3 November 2016) <<https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>> accessed 1 April 2026.

²⁴See Joshua Rozenberg, *Enemies of the People? How Judges Shape Society* (Bristol University Press 2020); Lord Dyson, *A Judge’s Journey* (Hart Publishing 2019) 174, where Lord Dyson observed, ‘[Truss]’ tenure of that office, which lasted only until 11 June 2017, was to prove disastrous. Not the least of her shortcomings was her failure to discharge the statutory duty to protect the independence of the judges when the judges of the Divisional Court of the High Court were pilloried by some of the media as “enemies of the people” ... At first, Liz Truss said nothing to defend the judges from this attack. Eventually, in response to widespread criticism for her failure to say anything, she said:

I think it is dangerous for a Government minister to say “this is an acceptable and this isn’t an acceptable headline”, because I am a huge believer in the independence of the judiciary and am also a very strong believer in the free press.

I was not alone in thinking that most of her predecessors would have immediately stepped in to defend the judges far more robustly than this.’ Truss was giving evidence to the Select Committee on the Constitution on 1st March 2017. A full transcript of this is available at: <https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/lord-chancellor/oral/48223.pdf>.

²⁵Gee and others (n 1) 34.

can be waived.²⁶ Section 2 of the Constitutional Reform Act 2005 only really deals with the qualification of any Lord Chancellor (ie the need to be qualified by experience), but not about the office holder's conduct once they are appointed. This means there is space left for the further clarification on the practical requirements of the office. By contrast, s 3(6) is explicit in setting some legislative indicators of what the Lord Chancellor must have regard to when performing their role:

The Lord Chancellor must have regard to –

- (a) the need to defend that independence;
- (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
- (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.

20. The Lord Chancellor's statutory oath is set out in s 17(1) of the Constitutional Reform Act 2005, which requires the office holder to:

swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God.

21. We argue that the shadow Lord Chancellor should be under a duty to uphold judicial independence, established as a constitutional convention. Within the UK's constitution, constitutional conventions play a significant role in regulating the conduct of constitutional actors. As Sir Ivor Jennings famously wrote, back in the 1930s, constitutional conventions are 'the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas'.²⁷ Constitutional conventions have an important purpose in helping the UK's constitution to evolve and to meet the needs of a new political or social reality. Constitutional conventions are, in this regard, context-driven creatures. Whilst conventions can evolve over the course of decades from established practice by constitutional actors, for example the convention covering the monarch's role in the selection of the Prime Minister, it is possible for conventions to be created from scratch to meet the needs of a changing political environment. This was made clear by Geoffrey Marshall, when he observed that conventions could:

'[f]requently ... arise from a series of precedents that are agreed to have given rise to a binding rule of behaviour'. On the other hand, '[t]hey might arise quickly, such as a result of an agreement not to do something'. Or for the purposes of creating an expectation of upholding judicial independence a convention, 'may be formulated on the basis of some acknowledged principle of government which provides a reason or justification for it'.²⁸

²⁶See paras 25.74, 20.11, 22.21, 38.25 <<https://erskinemay.parliament.uk/>> accessed 1 April 2026.

²⁷Sir Ivor Jennings, *The Law and the Constitution* (4th edn, University of London Press 1952) 80–81.

²⁸Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press 1984) 8–9.

22. This is the flat pack version of a constitutional convention, which is unlike most other constitutional conventions that have been recognised based on established precedent, these quickly-established new conventions serve an important purpose. Where there appears to be a need for a rule to meet a new constitutional challenge, a constitutional convention can be intentionally created to meet this. The most famous example of this is the Sewel Convention that was created to give devolution the legislative protection, in the case of the Scottish Parliament's ability to legislate exclusively for devolved matters. This was 'a name for the self-denying ordinance' as set out by Lord Sewel in 1997 during the passage of the Scotland Act 1998.²⁹ There is a contrary view though that it is not just enough to use words, but rather the existence of a convention requires invariable practice. As Lord Norton observed, 'Conventions do not become such by the words of a particular person, be it Viscount Cranborne in 1945 or Lord Sewel in 1998. They are not created, but develop. A convention exists once there is an invariable practice'.³⁰ We will address this below.
23. Such a view reflects the need for constitutional actors to feel a sense of obligation (notwithstanding the frequency that certain conventions have breached, such as individual ministerial responsibility) and follow the rule. The classic articulation of this approach for determining the existence of a convention was articulated by Sir Ivor Jennings which required a three-step approach:

Thus, if a convention continues because it is desirable in the circumstances of the constitution, it must be created for the same reason. We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it. And then, as we have seen, the convention may be broken with impunity.³¹

24. However, this does not preclude a convention from being created from scratch where there is an important reason to do so. This is because there is a shared view at that moment that there is a good reason to create such a rule and the matter in question would benefit from some crystallisation. Jennings had emphasised the need for a reason for, rather than just the existence of, the rule. He wrote:

For neither precedents nor dicta are conclusive. Something more must be added. As in the creation of law, the creation of a convention must be due to the reason of the thing because it accords with the prevailing political philosophy.³²

²⁹David Torrance, 'The Sewel Convention and Legislative Consent', House of Commons Library, Briefing Paper, 4 August 2025 <<https://researchbriefings.files.parliament.uk/documents/CBP-8883/CBP-8883.pdf>> accessed 1 April 2026.

³⁰Lord Norton, 'The Strathclyde Recommendations are Based on a False Premise That There is a Convention That the Lords Does Not Reject Statutory Instruments' *The Constitution Unit* (14 January 2016) <<https://constitution-unit.com/2016/01/14/the-strathclyde-recommendations-are-based-on-a-false-premise-that-there-is-a-convention-that-the-lords-does-not-reject-statutory-instruments/>> accessed 1 April 2026.

³¹Sir Ivor Jennings (n 27) 136.

³²*ibid.*

25. Whether, going forward, others will share this view cannot be predicted, and it is perfectly possible that in time there will no longer be a good reason to consider the 'rule' as a convention. The proposed convention's fate will depend on invariable practice. Yet this does not prevent the creation of a new convention. Thus, as discussed by Marshall (above), there are two ways for a convention to emerge. Adam Perry and Adam Tucker have distinguished between the different ways constitutional conventions are created: top-down (created in response to an event – eg the Sewel Convention) and bottom-up (which develop through precedent, ie as evidenced through Jennings' three-step approach).³³ They note that '[n]o-one doubts the existence of bottom-up conventions, but many scholars doubt the existence of top-down conventions'.³⁴ Perry and Tucker are 'wary' of the use of top-down conventions, although they extend this critique also to bottom-up conventions and note how bottom-up conventions permit the creation of top-down conventions. Notwithstanding the sound critique of Perry and Tucker relating to the broader operation of conventions, we believe that there is a case for a new convention.
26. Following this, what we are arguing for here is that the scope of the duty to protect judicial independence should be extended. There is a valid argument that the official opposition, in particular the shadow Lord Chancellor, should also be bound by such a duty. The official opposition represents a government in waiting and it is possible that the shadow Lord Chancellor will in due course become the actual Lord Chancellor. As Lord Hailsham opined, the Lord Chancellor's role was to act as the judges' friend and protect their interests around the cabinet table. Hailsham represented the image of the traditional Lord Chancellor that was swept away by the Constitutional Reform Act 2005. Despite the 2005 Act, the Lord Chancellor (even if no longer the head of the judiciary) is still expected to promote the independence of the judiciary, and thus is still required to be the judge's friend. It is inconceivable that the person who leads the attacks on judges and undermines public confidence in the judiciary can then expect to take on the role as the judge's friend in any meaningful way. Therefore, it should be expected that the shadow Lord Chancellor conforms to the expectations of the Lord Chancellor with regards to defending judicial independence. Otherwise, there is a risk that a shadow Lord Chancellor, who does not feel bound by such an obligation and consequently undermines judicial independence, will face issues should they subsequently take office in government as Lord Chancellor. At such a point, they would then clearly be under the statutory duty.
27. With the proposed duty being a constitutional convention, we accept that such an undertaking carries no legal sanction if breached. As Lord Widgery CJ observed in *Attorney-General v Jonathan Cape Ltd*, 'it seems to me, therefore, that the Attorney-General must first show that whatever obligation of secrecy or discretion attaches to former Cabinet Ministers, that obligation is binding in law and not merely in

³³Adam Perry and Adam Tucker, 'Top-Down Constitution Conventions' (2018) 81(5) *Modern Law Review* 765.

³⁴See *ibid* 788–789.

morals’.³⁵ Constitutional conventions are dependent on moral willingness to follow these established and accepted constitutional norms. In the absence of a legal duty there is no legal sanction. This is not to say that a failure to follow a constitutional convention will not result in any sanction – see for example the reasons for the enactment of the Parliament Act 1911 and Parliament Act 1949.

28. As we see it, even where there is a statutory duty such as that binding upon the Lord Chancellor under the Constitutional Reform Act 2005, it would be very difficult to enforce that duty where there is a belief that the Lord Chancellor has failed to uphold this duty and their statutory oath. We believe the answer to lie in the creation of a new constitutional convention placing a requirement on a shadow Lord Chancellor to take account of the duty to uphold judicial independence set out in s 3. Adhering to a convention requires, as Geoffrey Marshall once said, ‘a dash of principle’. Marshall observed that Lord Carrington (The Falklands War) and Sir Thomas Dugdale (Crichel Down) are ‘precedents and with a dash of principle may be treated as evidence of a convention’.³⁶ Diana Woodhouse described how ‘the effective operation of the convention [here of ministerial responsibility] depends upon the integrity of the minister concerned and the extent to which the acceptance of responsibility is a matter of principle rather than political pragmatism’.³⁷ In the case of Lord Carrington, as he told Jonathan Powell in a BBC Radio 4 interview in 2013, he always regretted having resigned as a junior minister over Crichel Down, having offered his resignation to the Prime Minister, Winston Churchill, who persuaded him to stay in office.³⁸ This explains Lord Carrington’s willingness to take responsibility in 1982.³⁹ It is hoped that the existence of the constitutional convention we propose may serve as a reminder for what the duties of a shadow Lord Chancellor are.

The case for a new convention

29. As the cornerstone of the rule of law, it is clear that judicial independence is something that British politicians and constitutional lawyers are proud of. For this reason, it should not be a hard sell to emphasise why there is a rationale that the shadow Lord Chancellor (or indeed the official opposition in its entirety) should feel bound to protect judicial independence.
30. We detailed above where the obligation on the incumbent Lord Chancellor is found in statute within the Constitutional Reform Act 2005. We are not proposing that the

³⁵[1976] QB 752, 767.

³⁶Geoffrey Marshall (ed), *Ministerial Responsibility* (Oxford University Press 1989) 131.

³⁷Diana Woodhouse, ‘Individual Ministerial Responsibility and a “Dash of Principle”’ in David Butler, Vernon Bogdanor and Robert Summers (eds), *The Law, Politics and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford University Press 1999) 102.

³⁸Lord Carrington interviewed by Jonathan Powell, ‘The Art of the Foreign Minister’ *BBC Radio 4* (19 May 2013).

³⁹For commentary see Chris Monaghan, *Public Law* (Routledge 2021). See also David Laws, *Coalition: The Inside Story of the Conservative-Liberal Democrat Coalition Government* (Biteback Publishing 2016) 40–41. This extract concerns David Laws’ decision to resign in 2010 from the Coalition Government.

Constitutional Reform Act 2005 be amended to extend this statutory obligation to the shadow Lord Chancellor. We would advocate instead for the creation of a new constitutional convention which could emerge from a mutual agreement by all those across different parties who hold briefs that cover justice, that they are bound to uphold judicial independence and to protect the judiciary from attacks (and certainly not launch them).

31. The case we make here is far from theoretical and, indeed, in some respects not new. There is clear evidence of changing public attitudes to judges,⁴⁰ of challenges within the judiciary in relation to morale⁴¹ and of a renewed emphasis from senior judges of the ‘shared responsibility’ to secure judicial independence.⁴² The messaging relating to judicial independence matters and it is consequential. Criticism of judges, by the media or the executive, is not new. Shetreet and Turenne set out plenty of examples of ‘politicians’ attacks’ or the ‘breakdown in the relationship between the judiciary and the Cabinet’ marking institutional tensions.⁴³ In this sense, it is our hope that by making the case for a new convention we are underpinning the broader case – and duty – to uphold judicial independence and the rule of law. It can improve the narratives surrounding judges and the role they play within the constitution and foster what has been described as the ‘new politics of judicial independence’ in a post Constitutional Reform Act 2005 constitution.⁴⁴ Such an argument is not political or bipartisan; instead it is a reminder to all those in public office of the need to remember s 3 of the Constitutional Reform Act. Our case supports the sentiment of Lord Reed, President of the UK Supreme Court, who said that ‘maintaining public trust in the courts’ is important but that we ‘face different challenges’ today.⁴⁵ Those challenges are many but, in our view, those of note are the proliferation of public-facing media, increasingly populist politics and a diminution in the security of the rule of law.
32. To emphasise and uphold judicial independence ought not to be part of a game of political football. It is part of the pitch and without it, the entire structure of our constitutional arrangements alter. So much of the UK’s constitutional arrangements exist on notions of balance and equilibrium and of emerging practice. Utilising conventions as an approach to supporting the legislative provisions for the principle would add further weight to the position of judicial independence. This convention can strengthen the new politics of judicial independence which are now ‘more

⁴⁰According to the IPSOS Trust in Professionals survey 2023, public trust in judges is at its lowest for ten years: IPSOS, *Ipsos Veracity Index: Trust in professions survey* (2023).

⁴¹Courts and Tribunals Judiciary, *Judicial Attitude Survey 2024* (24 February 2025) <<https://www.judiciary.uk/judicial-attitude-survey-2024/>> accessed 1 April 2026.

⁴²See Constitution Committee Annual Evidence Session with the Lady Chief Justice (26 February 2025) 3 <<https://www.judiciary.uk/wp-content/uploads/2025/02/LCJ-Constitution-Committee-transcript-26.02.25.pdf>> accessed 1 April 2026.

⁴³Shetreet and Turenne (n 7) 401.

⁴⁴Gee and others (n 1) 5.

⁴⁵Lord Reed, ‘Trust in the Courts in an Age of Populism’, *The Peter Taylor Memorial Address 2025* (12 June 2025) <https://supremecourt.uk/uploads/speech_lord_reed_13062025_88f834d8f5.pdf> accessed 1 April 2026.

formal, institutionalised and open'.⁴⁶ As with anything new, it can often need clarification, review and ongoing negotiation especially when the dynamics in those relationships are themselves characterised by upheaval, uncertainty and ever-changing agendas.

33. Of course, such an idea might create some tension with those who are critical of judicial independence where that safeguarded independence is equated to ascendant judicial power – and, more importantly, a growth in that power. However, it is now becoming clear that critical discourse and language surrounding judicial power is undermining public trust and the clarity of understanding of what it is judges do, and why. The development of appropriate, measured and managed political practice via convention, to include those in shadow offices, can achieve this.

Conclusions

34. There is a responsibility, even when not enshrined in statute, upon *all* those in public office to uphold the integrity of political institutions, actors and processes. This includes protection of the independence of the judiciary, both in a collective, institutional sense and in terms of individual judges. The rule of law depends upon it and while individual politics may, at times, impact one's judgement on the 'moral' questions of the constitution, this is exactly why political side-rails are vital. Constitutional conventions may provide enhanced understanding of constitutional expectations, a restatement of constitutional morals and values and, above all, a legitimate political check on the use of power and the use of public office by all those with a ministerial brief whether working in the spotlight or working in the shadows.

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⁴⁶Gee and others (n 1) 9.