

“Enemies of the People”: Judges, the media, and the mythic Lord Chancellor

Patrick O’Brien*

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 -- *Daily Mail*, 4 November 2016.

1. Introduction

The High Court decision in the *Miller* case¹ was significant not just for constitutional reasons, but for the trenchant response it prompted in the news media. The judges of the divisional High Court were labelled “Enemies of the People” by the *Daily Mail* in its banner headline and the *Daily Telegraph* characterised the effect of the judgment, with only slightly more circumspection, as “[t]he day democracy died”.² The judges also faced some strong criticism from prominent politicians, for example from the business secretary, Sajid Javid, who commented that “This was an attempt to frustrate the will of the British people and it is unacceptable.”³ These media and political responses in turn prompted a response from legal and judicial figures who defended the judiciary.⁴ The legal profession focussed its ire on the person of the Lord Chancellor, Liz Truss, for what was perceived to be a slow and inadequate response to the criticism: a three-line press release issued days after the judgment that did little more than note the independence of the judiciary.⁵

The instinctive assumption that media criticism of the judiciary is problematic lies deep within the legal profession. In this article I address the harm, if any, of criticism by the media of the judiciary and the role of the Lord Chancellor in response to such criticism. I argue that there is potential – albeit only in very rare cases – for genuine harm to be caused to judicial independence by inappropriate media criticism, and that the political environment surrounding the *Miller* case exemplifies one such case. However, I consider that the focus of judges and the profession on the response (or lack of it) from the Lord Chancellor is misguided. Following the reforms of the Constitutional Reform Act 2005 and the gradual diminution of the office in the decade since, the office of Lord Chancellor no longer really

* Lecturer in Law, Oxford Brookes University. Part of the research for this article was done as part of an AHRC-funded research project on ‘The Politics of Judicial Independence in Britain’s Changing Constitution’ (Judicial Independence Project; grant no. AH/H039554/1). I am grateful to my colleagues on that project, Robert Hazell, Kate Malleson and Graham Gee, to Ben Yong and to Susannah O’Brien for advice on various drafts of this article.

¹ *R. (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

² Front pages of the *Daily Mail* and the *Daily Telegraph*, 4 November 2016.

³ Sajid Javid MP, speaking on *Question Time*, BBC 1, 3 November 2016.

⁴ E.g. the Bar Council statement of 4 November 2016, “Judiciary must ensure rule of law underpins our democracy”: <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/november/bar-council-judiciary-must-ensure-rule-of-law-underpins-our-democracy/> [accessed 15 May 2017].

⁵ See e.g. “Brexit ruling: Lord Chancellor backs judiciary amid row”, BBC News, 5 November 2016: <http://www.bbc.co.uk/news/uk-politics-37883576> [accessed 15 May 2017].

exists. Contemporary Lord Chancellors are ordinary mid-ranking politicians that function as Justice Secretaries do in other countries. They lack the cultural background, constitutional authority and political incentive to defend judicial independence against a hostile media. The status of the office of Lord Chancellor as a special guardian of judicial independence is largely mythic. Judges and the wider profession must take responsibility for their own media management, even at times of crisis.

2. Criticism of judges and judicial accountability

There is a long history of robust criticism of judges in the UK. It is useful to distinguish between criticism that emanates from politicians and criticisms made by the media and the general public. There was an historic convention prohibiting personal criticism of judges by members of the government, and this taken together with considerations of institutional comity (taken in the broadest sense of ‘courtesy’) meant that it was rare for government ministers to go directly on the attack against a judge or a court decision.⁶ However, criticism of judges by serving ministers have become more common since the 1990s, and there is a particular pattern of criticism by serving Home Secretaries. In 1995, Michael Howard, speaking as Home Secretary on *The Today Programme*, commented in relation to a decision of Dyson J (as he then was) that “[t]he last time this particular judge found against me ... the Court of Appeal unanimously decided that he was wrong.” Another Home Secretary, David Blunkett, referring to a decision of Collins J, wrote an opinion piece for *The News of the World* in 2003 arguing that “[i]t’s time for the judges to learn their place.”⁷ In 2006 a sentence handed down to a sexual offender, Craig Sweeney was criticised by both the Home Secretary, John Reid, and by Vera Baird, a junior minister in the Department of Constitutional Affairs, as too lenient; with Baird in particular offering direct personal criticism of the judge’s decision-making (Baird, though not Reid, was subsequently required by the Lord Chancellor to issue an apology).⁸ The criticism directed at the Recorder of Cardiff over the Sweeney case was regarded as a particularly egregious example of bad behaviour by many judges, who felt very exposed by the combination of political and media criticism in relation to a judicial decision that had been entirely correct. David Cameron as Prime Minister complained in 2010 that a decision on the rights of prisoners to vote left him “physically ill”.⁹ As these examples highlight, political criticism of the judiciary is often intertwined with media criticism. Politicians will occasionally see political advantage in hitching their wagons to a media campaign, or in using the media as a platform to attempt to influence the judges. Andrew Le Sueur surmised in 1996 that a significant growth in hostile media and political debate about the judiciary was part of a deliberate government strategy to limit the growth of judicial review. “The gloves are off and the Queensbury Rules are to be ignored.”¹⁰ In this he appears to have been correct. Interviews for the Judicial Independence Project suggest that Howard was aware of Home Office research that suggested a correlation

⁶ Although Louis Blom-Cooper suggested in the 1960s that this convention extended far beyond ministers, and in fact precluded any media or public criticism of judges. L. Blom-Cooper, “The Judiciary in an Era of Law Reform” (1966) 37 *Political Quarterly* 378, 378.

⁷ *News of the World*, 23 February 2003.

⁸ W Woodward, ‘Minister has to apologise for criticising judge’, *The Guardian*, 20 June 2006.

⁹ *Hansard*, HC Deb. vol. 517 col. 921, 3rd November 2010.

¹⁰ A. Le Sueur, “The Judicial Review Debate: From Partnership to Friction” (1996) 31 *Government and Opposition* 8, 11.

between critical comments by Home Secretaries and upward trends in sentencing, and was in fact deliberately seeking to exercise some influence over the judges. Lord Dyson, in a speech in 2014, concluded that the convention precluding criticism of judges by government ministers no longer exists.¹¹

The constitutional considerations of comity and convention do not apply to the media. Although the common law crime of scandalising the court did theoretically exercise a form of control over media comment, it was in abeyance for much of the twentieth century. In 1900 the unfortunate Mr. Gray, a journalist who described Mr Justice Darling as “an impudent little man in horsehair, a microcosm of deceit and empty-headedness” was fined £100 for his trouble. The crime of scandalising the court was defined in that case by Lord Russell, the Lord Chief Justice as “[a]ny act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority...”¹² Mr. Gray was doubly unfortunate, as the crime had been pronounced extinct in England by the Privy Council only a year previously and was resurrected to protect the dubious reputation of Mr Justice Darling.¹³ Other than *Gray*, however, there were only five successful prosecutions for *scandalising* in the twentieth century, the last being *R v. Colsey* in 1931.¹⁴ After *Colsey* the judicial trend was, for the most part, to define the offence very narrowly and to emphasise the freedom of the citizen to criticise the judiciary. Lord Atkin’s *dictum* for the Privy Council in *Ambard* was typical:

[N]o wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. ... Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.¹⁵

The Court of Appeal did not find Quintin Hogg, as Shadow Home Secretary, to be in contempt in relation to his comments that the court was suffering from ‘blindness’ and should apologise to the police for causing trouble. Salmon LJ insisted that “... no criticism of a judgment, however, vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith.”¹⁶ Over time criticism became more robust. Bernard Levin’s almost legendary obituary of Lord Goddard was a well-deserved character assassination that excoriated the late Lord Chief Justice’s ‘unrelievedly malign’ influence on the development of criminal justice.¹⁷ The decision of the Law Lords to prohibit publication of *Spycatcher*¹⁸ famously prompted the *Daily Mirror*’s simple banner headline ‘YOU FOOLS!’, accompanied for good measure by pictures of three of the Law Lords displayed

¹¹ Lord Dyson, “Criticising Judges: fair game or off limits?”, Third Annual BAILII Lecture, 27 November 2014.

¹² *R. v Gray* [1900] 2 Q.B. 36. See D. Pannick, “‘We do not fear criticism, nor do we resent it.’: abolition of the offence of scandalising the judiciary.” [2014] P.L. 5, 6.

¹³ *McLeod v St. Aubyn* [1899] A.C. 549.

¹⁴ Pannick, “‘We do not fear criticism, nor do we resent it.’: abolition of the offence of scandalising the judiciary.” [2014] P.L. 5.

¹⁵ *Ambard v AG Trinidad & Tobago* [1936] A.C. 322, 335.

¹⁶ *R. v Commissioner of the Metropolitan Police, ex parte Blackburn* [1968] 2 QB 150, 155.

¹⁷ B. Levin, ‘Judgment on Lord Goddard’, *The Times* 8 June 1971.

¹⁸ *Attorney General v Guardian Newspapers* [1987] 1 WLR 1248. See the case comment by S. Lee [1987] P.L. 506.

upside down.¹⁹ That headline, and many other highly critical comments in newspapers on the same topic, went unpunished.

Levin's obituary of Goddard marked something of a turning point in media discourse about judges. Since the 1970s media criticism has become an important aspect of judicial accountability. Judicial independence and accountability are often described as "two sides of the same coin",²⁰ which is true if not particularly illuminating. Part of the point of judicial independence is of course to protect judges from forms of accountability that are otherwise a normal part of good governance. Too much accountability is "troublesome, because it conflicts with the independence we seek in judges."²¹ For this reason judges are often wary of the term 'accountability', but it has become an important aspect of public discourse in the last 40 years, alongside the rise of New Public Management models of public administration;²² one that judges have not been able to ignore.²³ Criticism – "passing judgement upon the qualities or merits of anything"²⁴ – is the very core of accountability. At its best, media criticism of the judiciary can be an important vehicle for achieving judicial accountability and is defensible as such. The litany of miscarriages of justice that occurred in the 1970s and 1980s arose at a time when the judiciary found itself unwilling or unable to challenge the authority of the state and the security services. This was epitomised by Lord Denning's now notorious statement that to allow the Birmingham Six to sue the police would open the "appalling vista" that the police had lied.²⁵ It was Levin, once again, who criticised the refusal of an appeal to the Birmingham Six in scathing and highly personal terms, attacking Lord Lane's "narcissistic arrogance" and "worthless certainty" and describing Lord Bridge as a judge who "is simply not fit for a position in which he has the power to put human beings in prison". Both judges, Levin argued, "have got to go".²⁶ No prosecution for *scandalising* was forthcoming, although the judiciary were undoubtedly discomfited by the personal nature of Levin's criticisms. More recently, the misuse of expert statistical evidence on the probability of cot death exposed the scientific limitations of the court process and led to the wrongful convictions of a number of women for the murder of their own children.²⁷ These errors in the criminal justice system were unearthed and resolved not by the system itself but by investigative journalism that created political pressure for a resolution. This is something that the courts, to their credit, have latterly acknowledged and encouraged.²⁸ Beyond the high profile examples of miscarriages of justice, judges also acknowledge that

¹⁹ *The Daily Mirror*, 14 October 1988.

²⁰ S. Burbank, "The Architecture of Judicial Independence" (1998) 72 *Southern California L. Rev.* 315, 339.

²¹ M. Tushnet, "Judicial Accountability in Comparative Perspective" in N. Bamforth & P. Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford: OUP, 2013), p. 57.

²² N. Bamforth & P. Leyland in the introduction to their *Accountability in the Contemporary Constitution*, *ibid*, p. 3.

²³ See also A. Le Sueur, "Developing Mechanisms for Judicial Accountability in the UK" (2004) 24 *Legal Studies* 73, 75.

²⁴ *OED Online*, March 2017 (OUP): <http://www.oed.com/view/Entry/44598> [accessed 15 May 2017].

²⁵ *McIlkenny v Chief Constable of the West Midlands* [1980] Q.B. 283, 323.

²⁶ B. Levin, 'Hoist by their own arrogance', *The Times*, 18 March 1991.

²⁷ S. Shetreet and S. Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary*, 2nd edn (Cambridge: CUP, 2013), p. 383.

²⁸ *R. v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115.

they require a degree of sensitivity to the public mood to do the job and that, in this respect, media comment and criticism is valuable. A Court of Appeal judge commented that

[If] the public have a concern that sentences of some kind or other are too low or as the case may be too high do you shut it out of your mind? No, I think you don't. I mean I think you take account of it in a way that you take account of everything.²⁹

Another judge interviewed pointed to the role played by press comment in changing the perception of the crime of death by dangerous driving. “[F]rom time to time we have to say ‘public pressure is such that you should really go to prison for this’. So we need the press to inform us about that.”³⁰ The possibility of press influence for the good needs to be acknowledged in this discussion, perhaps even in the grey areas when it amounts to – as a barrister interviewed memorably put it – doing to judges “what Alex Ferguson tries to do to referees”.

By the mid-1980s *scandalising* was once again regarded as “virtually obsolescent”³¹ although in 1999 the Lord Chancellor’s Department used its influence to persuade an internet service provider to remove websites that contained offensive material referring to judges³² and in 2000 there was an attempt to hold a vexatious litigant in contempt for alleging corruption and malfeasance against judges.³³ Despite its quiescence, the offence was revived once again in 2012. The Attorney General for Northern Ireland (who is independent from politics), initiated a prosecution against Peter Hain, the former Northern Ireland Secretary, over a passage in his memoirs that described Mr. Justice Girvan as “off his rocker” and “going out of his way legally to damage me”. Following a public outcry, and a rather equivocal apology by Mr. Hain to the court, the prosecution was dropped. This incident led to abolition of the offence in England and Wales³⁴ and in Northern Ireland.³⁵

Speaking in the Lords debate on abolishing *scandalising* in England and Wales, Lord Carswell (a former Law Lord and Lord Chief Justice of Northern Ireland) took the line that many in the judiciary do in relation to these matters:

Judges have to be hardy enough to shrug off criticism, even if it is intemperate or abusive, which has happened; even if it is unfair and ill-informed, which has certainly happened; and even if it is downright and deliberately misleading, the same applies.³⁶

²⁹ Interview conducted as part of the Judicial Independence Project.

³⁰ This point is also made by Sir Mark Potter in a briefing paper: *Do the Media Influence the Judiciary?*, Foundation for Justice Law and Society, 18 August 2011, at p.3: <http://www.fljs.org/content/do-media-influence-judiciary> [accessed 15 May 2017].

³¹ *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] A.C. 339, 347 *per* Lord Diplock.

³² I. Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Oxford: Hart Publishing, 2002), p. 209 (fn. 1) and p. 217.

³³ *R. v Scriven*, Unreported case of the Divisional Court, 4 February 2000. Simon Brown LJ, for the court, refused to do so, commenting that a ‘wry smile’ was a preferable response to outrageous allegations by a vexatious litigant.

³⁴ Crime and Courts Act 2013, s. 33.

³⁵ Criminal Justice (Northern Ireland) Act 2013, s.12.

³⁶ HL Deb vol. 741, col. 874, 10 December 2012.

Justice Frankfurter of the US Supreme Court put the point more strongly when he said that “[w]eak characters ought not to be judges”.³⁷ Nonetheless, whilst judges in general appear to take a sensible view that media criticism of judges should for the most part be ignored, and certainly ought not to be legally censored, there is a clear feeling that there has been a growth in harsh, unfair or misleading criticism of judges. Sir Stephen Sedley, for example, worries that “what politicians and the media can do, and do do, is make life extremely uncomfortable for judges whom they perceive as ‘activist’ or soft on crime.”³⁸ Shetreet and Turenne comment that they were struck “by how many judges interviewed thought that their public image had never been worse, and criticism had been more forthcoming than ever before, notwithstanding that [judges] still compare well with most other professionals in England.”³⁹

3. The harm to judicial independence of judicial criticism

Does criticism of judges cause a special kind of harm? There is certainly a widespread impression that it does, both in the legal profession and in international documents on the topic; and many countries have had special protections for the authority of the judiciary against insulting or demeaning speech. The Mount Scopus Standards on Judicial Independence say, for example, that “judicial independence does not render judges free from public accountability, however, the media and other institutions should show respect for judicial independence and exercise restraint in criticism of judicial decisions.”⁴⁰ Similarly, Art. 10 of the European Convention on Human Rights, guaranteeing freedom of expression, specifically refers to the need to protect judges and allows restrictions on freedom of expression “for maintaining the authority and impartiality of the judiciary”. The jurisprudence of the Strasbourg court consequently allows greater protection from criticism for judges than for other public figures, although this has narrowed over time.⁴¹

Judicial independence is a tool of governance. Much like independence in other spheres (for example, central bank independence) it is designed to achieve a particular kind of decision-making process, although how and why it does so is not always that clear, at least in theoretical terms. Accounts of judicial independence tend to draw on constitutional concepts – such as the separation of powers or the rule of law, or indeed both⁴² – that are in themselves conceptually opaque, which can make answering these kinds of questions difficult. The difficulty in articulating a coherent theoretical or general understanding of judicial independence arises in part because of cultural fragmentation of the concept. In the United States, for example, the concept and the literature on judicial independence are closely linked to judicial review and the powers of the courts. In the United Kingdom, by contrast, judicial independence is understood largely in terms of culture and the power and status of the

³⁷ *Pennekamp v Florida* (1946) 328 US 331, 357.

³⁸ S. Sedley, “The Independence of Judges? Myths and reality” (review article) (2015) 86 *Political Quarterly* 573, 573.

³⁹ Shetreet and Turenne, above fn.27, pp.389-390.

⁴⁰ Article 6.1 of the *Mount Scopus International Standards of Judicial Independence*, International Association of Judicial Independence and World Peace, 19 March 2008 (version of 2015).

⁴¹ See e.g. *Prager & Oberschlick v Austria* (1996) 21 EHRR 1, *Nikula v. Finland* (2004) 38 EHRR 45 and *Morice v. France*, Grand Chamber judgment of 24 April 2015.

⁴² See e.g. *British Railways Board v National Union of Railwaymen*, [1989] I.C.R. 678, 680 *per* Lord Donaldson; *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 168 *per* Lord Scarman.

individual judge, and it is protected “significantly by tradition”.⁴³ More concrete rule-based understandings of the idea also differ, so that in the US and UK it is relatively common for judges to appear before legislative committees, whereas in most other common law countries this practice is rare or regarded as unacceptable.⁴⁴

An answer – albeit one that has an unsatisfying circularity about it – to the question of whether critical comment harms judicial independence might simply be that judicial independence is highly culturally determined. This was certainly the view that the Privy Council took in the Mauritian case of *Dhoocharika v. DPP* in 2014, when it held that an analysis of the offence of scandalising requires sensitivity to local conditions, and so that abolition would have to be a matter for the Mauritian legislature.⁴⁵ Cultural factors may also have been relevant to the decision by the Northern Ireland Attorney General to prosecute Peter Hain for *scandalising* in 2012. Interviews for the Judicial Independence Project conducted at around the same time suggested a degree of local political support for the prosecution that was certainly not present at Westminster, and which perhaps reflects the enduring political divide in Northern Ireland.⁴⁶ When we examine the history of criticism discussed above, we can see an ebb and flow of the *scandalising* offence in England and Wales over time, which is of a piece both with changing attitudes about the judicial role but also with changing social attitudes about issues like deference to authority and openness. Perhaps increased criticism of judges owes something to the increased willingness of judges to criticise governments. In 1950 the Attorney General, Hartley Shawcross, argued that if judges start to criticise the policy of Parliament it would be “quite impossible to maintain the rule that the conduct of judges is not open to criticism or question.”⁴⁷ The Kilmuir Rules have been abandoned since the late 1980s and there is acceptance that judges may engage with the media, within limits.⁴⁸ Judges can and do also offer criticisms of governments⁴⁹ and it is not unreasonable that governments might – within the limits of respect for comity and independence – do the same in respect of judges.

The most relevant and convincing approach to judicial independence in the theoretical literature points to the obvious close linkage between independence and impartiality. Judges need independence so that they can function as mutually acceptable impartial adjudicators. Without the appearance of impartiality the loser in a debate will feel that the adjudicator has simply aligned herself with the winning party against her rather than making a reasoned judgment on the merits of the case.⁵⁰ Court-based adjudication requires ‘outcome

⁴³ R. Stephens, “A Loss of Innocence? Judicial Independence and the Separation of Powers” (1999) 19 O.J.L.S. 365, 376.

⁴⁴ See R Hazell & P O’Brien, ‘Meaningful Dialogue: Judicial Engagement with Parliamentary Committees at Westminster [2016] P.L. 54.

⁴⁵ [2014] UKPC 11 (para 14).

⁴⁶ See G. Gee *et al*, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge: CUP, 2015), pp.229-230.

⁴⁷ HC Deb. vol. 474, col. 1762-1763, 3 May 1950.

⁴⁸ See A. Bradley, “Judges and the media – the Kilmuir Rules” [1986] P.L. 383; N. Duxbury, *Lord Kilmuir: A Vignette* (Oxford: Hart Publishing, 2015), pp.67-73.

⁴⁹ E.g. Baroness Hale, ‘Equal Access to Justice in the Big Society: Sir Henry Hodge Memorial Lecture’ The Law Society, 27 June 2011.

⁵⁰ P. Russell, “Towards a General Theory of Judicial Independence” in P. Russell & D. O’Brien (eds), *Judicial Independence in the Age of Democracy* (Virginia University Press: Virginia, 2001).

impartiality’: the judge decides the case on the basis of the law and the facts, regardless of the needs, status or identity of the parties.⁵¹ The elision of independence and impartiality, though they are clearly overlapping concepts, requires some unpacking. The concepts are best understood as, on the one hand, a mental attitude that we require from judges in their work (impartiality) and, on the other, the set of rules, conventions and cultural practices that have built up around judges to support them in preserving that attitude (independence). Impartiality primarily describes a mental state. Judges must have a personal psychological commitment to impartiality; it must be something they are aware of in their reasoning process. Judicial independence does not address the inner life of the judge. Rules governing protection of salary, funding of the court system and relations between the Government and the judiciary can be seen in this light: as direct supports to judges in maintaining their attitude of impartiality. But there is also a fuzzier, more symbolic interrelationship between independence and impartiality. The culture, the rules, that make up judicial independence also come to stand symbolically for an impartiality that is otherwise almost intangible. Rules about judicial tenure, for example, are at the same time both practical protections of impartiality and its symbolic proxies. We cannot normally detect if judges are failing in their duty of impartiality, so we concern ourselves with the external – with respect for the rules and practices of judicial independence – as the next best thing. Another way to think of this relationship is that this relationship between impartiality and independence mirrors the relationship between actual bias and apparent bias in the law. Whilst actual bias refers to a genuine psychological predisposition on the part of the judge to decide a case in a particular way, the wider and more precautionary jurisprudence on apparent bias does not address the inner feelings of the judge but instead whether the reasonable person would believe on the facts that there was a risk that the judge might be biased in some way.⁵²

Potential harms to judicial independence might thus be to judicial impartiality: they might create a real risk of bias in the judge. Or they might be harms to the broader and vaguer sense of judicial independence as a set of protections for impartiality rooted in legal rules and cultural norms, damaging important symbolic and practical protections for impartiality. Included in this second category might be the kinds of worries judges tend to raise about public support for the judiciary leading to an overall diminishing of the authority and legitimacy of judges. These twin concerns were captured well by Lord Judge in a speech he gave on the topic as Lord Chief Justice.

The problem with direct personal criticism which is unfair is, first of course, that it is unfair; second, that it is difficult if not impossible for the judge to answer, because inevitably it would mean commenting on a case which he had tried or decided ... and finally ... because of its corrosive long term effect on the public’s view of the judiciary and the exercise of its functions.⁵³

The last point is a very long-standing one. Wilmot J, in the eighteenth century *R. v Almon* noted that criticism of judges “excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them.”⁵⁴ Given the long history of critical comments about judges, without apparent detriment to the authority or legitimacy of the judiciary, one would have to be cautious about a claim that the

⁵¹ W. Lucy, “The Possibility of Impartiality” (2005) 25 O.J.L.S. 3, 7-8.

⁵² See e.g. *Locabail v Bayfield Properties* [1999] EWCA Civ 3004.

⁵³ Lord Judge, ‘The Judiciary and the Media’, 28 March 2011, p.6.

⁵⁴ (1765) 97 ER.

administration of justice is seriously undermined by criticism alone.⁵⁵ Nonetheless as an apparent result of the *Daily Mail*'s "Enemies of the people" headline was that some litigants in person began to refer to circuit judges in court as "enemies of the people", it is not something that should be completely discounted.⁵⁶ This is not an entirely new phenomenon and is of a piece with contemporary phenomena like the 'freemen of the land' conspiracy theory. As a systemic threat– to the rule of law or to the authority of judiciary – "enemies of the people" is a genuine worry but a minor one; a short-lived problem that will pass and has probably already done so.

Criticism will be of more concern if it plausibly threatens the impartiality of the judiciary. There are two issues here. Lord Judge in the extract above refers to "unfair" criticism and this mirrors concerns expressed in interviews. Judges and the legal profession more broadly generally accept and acknowledge media scrutiny as a form of accountability, but express particular concern about "unfair" or "uninformed" criticism. "The reason that criticism is so destructive is because judges are human and will want to respond, who wouldn't want to respond to that? ... That I think would be very bad for judicial independence."⁵⁷ At this level the concern is about something like ego. Frustration about criticism that is particularly personal, unfair, uninformed or otherwise wrong may drive judges to imperil their own independence – their appearance of impartiality – by speaking to the media in circumstances where it is inappropriate for them to do so. It may actually induce in them a bias against certain groups or points of view if over time they nurse silent resentment over their treatment in public discourse. The second concern about impartiality, which is more straightforward and more serious, arises if judges feel genuinely threatened. Criticism that is highly personalised, that incites hatred of a particular judge or of judges as a profession, may lead judges to feel unable to do the job "without fear or favour" as the judicial oath puts it. There is a good case for saying that the "enemies of the people" headline falls into this category. In evidence to the Lords Constitution Committee in March 2017, the Lord Chief justice cited fears arising out of the headline and the surrounding media and public atmosphere.

It is not understood [] how absolutely essential it is that we are protected, because we have to act, as our oath requires us, without fear or favour, affection or ill will. It is clear in relation to the first part of the Article 50 case that the claimant had been subjected to quite a considerable number of threats, and it is the only time in my judicial career that I have had to ask the police to give us a measure of advice and protection in relation to the emotions that were stirred up. It is very wrong that judges should feel it. ... I have never had that problem before.⁵⁸

One strain of response to this is to echo Justice Frankfurter of the US Supreme Court: "[w]eak characters ought not to be judges."⁵⁹ Janan Ganesh, for the *Financial Times*, argued (rightly) that "[y]ou do not become a High Court judge by quaking before a profession as

⁵⁵ A point made by the Law Commission in its report on scandalising: 'Contempt of Court: Scandalising the Court', 18 December 2012, 23.

⁵⁶ As the Lord Chief Justice, Lord Thomas, disclosed in his evidence to the House of Lords Constitution Committee in March 2017: House of Lords Constitution Committee, *Corrected oral evidence: Oral evidence session with the Lord Chief Justice*, 22 March 2017; Q.4.

⁵⁷ Barrister interviewed for the Judicial Independence Project.

⁵⁸ Evidence to the House of Lords Constitution Committee, above fn.54.

⁵⁹ Above at fn.35.

menial as mine.”⁶⁰ Yet this cannot be the whole story. It is not the words themselves that matter, but the circumstances in which they are spoken. The more politicised parts of the news media in the UK tend to adopt a studied indifference to their role as sculptors, and not just reporters, of the public mood. The “enemies of the people” headline, because it rhymes with historical precedents in such a troubling way, was a legitimate source of worry for the judges. The Lord Chief Justice reported concerns for his safety after the *Miller* decision. Given that an MP had been murdered – apparently for political reasons – at a particularly heated point in the EU referendum campaign not six months before the decision of the divisional court in *Miller*, it is not at all unlikely or unreasonable that amongst the 30,000 odd court judges, tribunal judges and magistrates who make up the judiciary in the UK, some might have felt some concern for themselves, or for their families at the public reaction to the *Miller* decision, at least for a short period. In this context, the reports that circuit judges were being labelled “enemies of the people” in court takes on a slightly more sinister hue. The insistence that judges should be stoic characters with ‘broad backs’ and ‘strong characters’ is also a little troubling because it conjures a particular image of the judge as a cartoonishly archetypal alpha male. Judges need a thick skin, but a diverse judiciary should be open to a wide range of backgrounds and personality types not all of whom will or should find it easy to shrug off the charge that they are “enemies of the people”. And of course a solidly alpha male judiciary, insensitive to public criticism and holding a self-image of strength and stoicism, is more likely to fall victim to the kind of security and establishment-minded groupthink that led to the miscarriages of justice of the 1970s and 1980s. It is partly because it is sometimes important that judges *do* show a measure of sensitivity to the popular mood and to press criticism that we should be concerned when such criticism is grossly unfair or characterises judges as hate figures.

4. Section 3 and the myth of the contemporary Lord Chancellor

There are good reasons to conclude, then, that in very rare cases, of which the press reaction to the *Miller* judgment was one, critical speech can cause genuine worries that the judges’ impartiality – their capacity to do the job “without fear or favour” – may be at risk. The threat in cases like this will often be very temporary, but it is real nonetheless. None of this is intended as an argument for any restriction on speech of any kind, whether legal or otherwise. Nor, I suspect, was the reaction of judges and the legal profession to the “Enemies of the people” headline and associated press commentary intended that way, although some appear to have mistaken it for precisely that.⁶¹ Those include the Lord Chancellor herself, who commented to the Lords Constitution Committee that:

In defending the judiciary, it is very important that I speak out about the valuable work it does. I want to work with the judiciary so that we have more from the judiciary explaining to the public the work that it does and the process of

⁶⁰ ‘Leadership demands a voice equal to the times’, *Financial Times*, 7 November 2016.

⁶¹ See e.g. D. Nicol, ‘“Enemies of the people”, judicial independence and free speech’, Judicial Power Project blog, 11 November 2016: <http://judicialpowerproject.org.uk/danny-nicol-enemies-of-the-people-judicial-independence-and-free-speech/> [accessed 15 May 2017].

appointment, but I draw the line in saying what is acceptable for the press to print or not. For me, that goes too far.⁶²

We have already discussed the importance of media criticism as a form of judicial accountability, and it is not necessary for me to rehearse here arguments about the value of protecting political speech, of which the “Enemies of the people” headline is a clear example notwithstanding its troubling tone and potential consequences.⁶³ The only response to this kind of criticism is to attempt to shape the story in media terms – to engage with the press and the broadcast media to explain the judges’ position and correct errors and unfair criticism. The remainder of this article addresses the role of the Lord Chancellor in leading this response. Key to the discussion about media criticism is the special guardianship function of the Lord Chancellor’s office. Most judges and lawyers appear to believe that the role should be taken up by the Lord Chancellor. I want to explain why a strong response from the Lord Chancellor – to *Miller*, but also in the future – is unlikely.

The focus for discussions of this kind is generally on s.3 of the Constitutional Reform Act 2005. Section 3 imposes duties on ministers (especially the Lord Chancellor) in relation to judicial independence but sets these at a very high level of abstraction. The Lord Chancellor, ministers and all those with responsibility for the administration of justice “must uphold the continuing independence of the judiciary” (s. 3[1]). Section 3(6) places a special duty on the Lord Chancellor to defend judicial independence, to provide support for the judiciary in exercising their functions, and to represent the public interest in matters relating to the judiciary and the administration of justice. Section 3 has received very little legal consideration.⁶⁴ This is reflected in the comments of some judges interviewed, who tended to view the s.3 duties imposed on the Lord Chancellor as actionable but only in a very extreme situation. The few cases in recent years in which judges have litigated conditions of employment have relied not on s.3 but on European law⁶⁵ and on the Equality Act 2010⁶⁶ and cases that deal with judicial independence directly tend to address problems of bias and recusal in a highly fact-specific way.⁶⁷ Treating s.3 as a formal legal obligation on the Lord Chancellor to intervene in public debate in a particular way, or using a particular form of words, seems misguided. It is highly unlikely that s.3 could be used to legally *compel* the Lord Chancellor to, for example, give an interview on *The Today Programme* if she does not wish to do so. A defence of the judiciary delivered through gritted teeth would be pointless in any case, and a legalistic insistence on it can only result in the kind of milquetoast defence-by-press-release that the Lord Chancellor ultimately engaged in.

⁶² House of Lords Constitution Committee, *Corrected oral evidence: Oral evidence session with the Lord Chancellor and Secretary of State for Justice*, 1 March 2017, Q.3.

⁶³ For a good discussion of the implications of contempt laws on freedom of expression see Cram, above fn.32, chapter 1 and generally.

⁶⁴ The provision is mentioned but given no serious consideration in *R. (Corner House Research) v Serious Fraud Office* [2009] 1 A.C. 756, 781 para. 63 *per* Sedley LJ. Recent tribunal decisions describe the provision as a protection of judicial tenure (*Gilham v Ministry of Justice* [2017] IRLR 23) and as a ‘black letter law’ requirement (*White v Ministry of Justice*, Unreported judgment of the Employment Tribunal, 20 November 2014).

⁶⁵ *O’Brien v Ministry of Justice* [2013] UKSC 6.

⁶⁶ *McCloud & others v Lord Chancellor* unreported case of the Employment Tribunal, 13 January 2017.

⁶⁷ See e.g. the highly unusual sequence of events addressed in *Belgraj v. Heer Manak Solicitors* [2014] ICR 1020.

It is arguable, however, that s.3 sounds more in the political constitution than it does in the legal one. It is clear from the legislative history of s.3 and the 2005 Act more generally that the provision was intended to preserve the culture and understandings that existed around judicial independence and the old office of Lord Chancellor.⁶⁸ By far the greater part of these understandings were non-legal, and perhaps rarely articulated. It was originally proposed that the 2005 Act would abolish the office of Lord Chancellor. Judges were surprised and outraged by this, announced as it was by a press release without prior consultation.⁶⁹ The original proposal of the government to abolish the Lord Chancellor was initially stymied by the simple device of an opposition amendment, inserted in the Lords adding the office to the list of ministers referred to in what became s.3 of the Act. As Lord Kingsland, moving the amendment, put it “[t]he Lord Chancellor in the Cabinet is a great inconvenience to the executive. That is the reason he should stay there.”⁷⁰ The government eventually conceded that the Lord Chancellor’s office would remain in place, partly because the administrative complexity of abolition had become clear, but on terms that emphasised its new non-judicial character. The new office of Lord Chancellor could be a member of the Commons or the Lords, was not required to be a lawyer, and could effectively be anyone the Prime Minister saw fit to appoint.⁷¹ Crucially, the new Lord Chancellor would no longer be a judge or the speaker of the House of Lords. The title of Lord Chancellor was thus retained in the 2005 Act as enacted, but this served only to obscure the fact that on all the constitutional and administrative issues that mattered the government had won.

Writing in 2002, Diana Woodhouse predicted that ‘[o]nce the Lord Chancellor has relinquished his role as judge, the office of Lord Chancellor collapses.’⁷² Woodhouse’s point was one of constitutional logic, but it is arguably the political logic of the new Lord Chancellor’s position that has resulted in its effective abolition as a special guardian of the judiciary and judicial independence. The key functions of the Lord Chancellor were removed by the 2005 Act, and in the decade since the political prestige and cultural role of the office have been eroded too. Functionally speaking, the Lord Chancellor’s many pre-2005 responsibilities have been parcelled out between a variety of judicial figures and independent agencies, such as HM Courts and Tribunals Service and the Judicial Appointments Commission. The role of the Lord Chief Justice in England and Wales has, in particular, been greatly enhanced. As Lord Kingsland saw in the debates on the 2005 Act, part of the power of the office lay in its history. Simply to be the Lord Chancellor invested the office holder

⁶⁸ See e.g. Lord Neuberger’s reference to s.1 of the 2005 Act, which provides that nothing about the 2005 Act is intended to change the Lord Chancellor’s function in relation to the rule of law, in connection with the Lord Chancellor’s duty to speak up for the judiciary. House of Lords Constitution Committee, *Corrected oral evidence: with the President and Deputy President of the Supreme Court*, 29 March 2017, Q.7. See also Lord Windlesham, “The Constitutional Reform Act 2005: the politics of constitutional reform: Part 2” [2006] P.L. 35.

⁶⁹ See my blogpost ‘Does the Lord Chancellor Really Exist?’ UK Const. L. Blog (26 June 2013), available at <https://ukconstitutionallaw.org/2013/06/26/patrick-obrien-does-the-lord-chancellor-really-exist/> [accessed 15 May 2017].

⁷⁰ HL Deb. vol. 663 col. 1146, 13 July 2004.

⁷¹ Section 2 provides that the Lord Chancellor must be ‘qualified by experience’ but that ‘experience’ can be anything the Prime Minister considers relevant.

⁷² D. Woodhouse, “The Office of Lord Chancellor: Time to abandon the judicial role – the rest will follow” (2002) 26 Legal Studies 128, 144.

with the authority of an ancient high office, together with a writ that ran through many aspects of Parliament, government and administration quite apart from the judicial role. The contemporary Lord Chancellor can no longer carry an argument simply by virtue of rank or status. Since 2003 the office has gradually come to mean little more than the name that is given to the Secretary of State for Justice when she exercises his functions in relation to courts and the judiciary. For all the historical significance of the post, “functions of the Lord Chancellor” is only one of seven responsibilities of the Justice Secretary in the Cabinet Office’s ‘List of Ministerial Responsibilities’.⁷³

On the political side, the significance of the office has been diminished by changes made since 2005. The political status of the role has been gradually diminished. The creation of the Ministry of Justice in 2007 combined the prisons brief from the Home Office with the functions of the former Department of the Constitutional Affairs, resulting in a department with significantly more political salience than its predecessor. Current practice appears to be that the post will be held by a middle-ranking politician who is unlikely to challenge more senior colleagues. Contemporary Lord Chancellors tend to be more political, to take office earlier in their political career, and to have a higher turnover rate than old Lord Chancellors.⁷⁴ My colleague Graham Gee shrewdly characterises the “new” Lord Chancellors as “political guardians” of the judiciary and judicial independence “who defend judicial independence in ways sensitive to, and limited by, the distinctive demands of the political process”.⁷⁵ They are no longer senior Cabinet members but middle-ranking or junior members. They are no longer senior lawyers, and the three most recent office holders (Chris Grayling, Michael Gove and Liz Truss) have not been lawyers at all. They have more incentive to act with rather than against the grain of Westminster politics, and are more likely to do so than the old-style Lord Chancellors. Now that prisons are a significant part of the justice brief the office looks more like a traditional Home Office ministry rather than the Lord Chancellor’s Department ever did. From both a political and a functional perspective, the ‘Lord Chancellor-ness’ of the role is no longer of any significance. Its trajectory mirrors that of other impressive-sounding but now functionally slight offices, such as the Keeper of the Great Seal, Chancellorship of the Duchy of Lancaster or the Steward of the Chiltern Hundreds, that have been either extinguished or so thoroughly repurposed in the modern era that they are unrecognisable.

Seen from this perspective the approach taken by Liz Truss in relation to the “Enemies of the people” headline and the related critical press comment associated with the *Miller* case was entirely predictable. The press release dealing with press criticism of the judges of the divisional High Court in *Miller* was terse and muted. In offering severe criticism of the Lord Chancellor for her failure to defend the judges, the senior judiciary and the legal profession more broadly in fact appear to have had some success in changing her behaviour. The press release issued by the Lord Chancellor after the decision of the Supreme Court in the appeal in *Miller* appeared within minutes and offered a more fulsome defence of the position of the judiciary. The newspapers, too, did not criticise the Supreme Court with the same level of vitriol. Yet the defence was, it appears, limited to these press releases. As we

⁷³ Cabinet Office, *List of Ministerial Responsibilities*, December 2016, at p.43: <https://www.gov.uk/government/publications/government-ministers-and-responsibilities> [accessed 15 May 2017]. ‘Judicial Policy’ is listed as one of the other responsibilities, but as this is a classic function of justice ministers in other countries, this does not undermine the overall point being made.

⁷⁴ G. Gee, “What are Lord Chancellors for?” [2014] P.L. 11.

⁷⁵ Gee, *ibid*, 13.

saw above in her comments to the Constitution Committee two months later, the Lord Chancellor does not believe that she has a duty to challenge inappropriate criticism of the judiciary in the media.

Criticism of the Lord Chancellor from judges and the legal profession could be taken as an attempt to shape understandings of s.3 and the role of the Lord Chancellor in the political constitution. There is, at least, some disconnect between the lawyers' and the politicians' understanding of the Lord Chancellor's role. In evidence to the Lords Constitution Committee the Lord Chief Justice expressed the view that the Lord Chancellor "has taken a position that is constitutionally absolutely wrong."⁷⁶ His predecessor, Lord Judge, argued bluntly in a newspaper interview that the Lord Chancellor's statutory duty under s.3 was not met after *Miller* case.⁷⁷ But it must be obvious that the judges do not really want a Lord Chancellor who *has* to defend judicial independence. They want a Lord Chancellor who *wants* to do so. They want one who instinctively grasps their point of view. That Lord Chancellor is gone and the gap that it has opened up must be filled by others.⁷⁸ Given that the judicial leadership functions of the old Lord Chancellor have now been mostly vested in the Lord Chief Justice and the senior judiciary, the most important defenders of the judiciary are now the judges themselves. Indeed this kind of defence can be done quite effectively and without a threat to impartiality or independence. During the Craig Sweeney controversy in 2006, the secretary of the Council of Circuit Judges, Keith Cutler, gave a radio interview defending the judges' position.⁷⁹ In 2013 the Lord Chief Justice of Northern Ireland, Sir Declan Morgan, gave a TV news interview after a spate of news reports suggesting sectarian bias in bail decisions.⁸⁰ Where, as in *Miller*, senior judges cannot comment because they have been directly involved in the case,⁸¹ it is up to others to do so: retired judges, sympathetic politicians the Law Officers, the Bar Council, the Law Society and related groups. Lord Judge, the retired Lord Chief Justice, defended the judiciary with some success (at least in terms of news coverage) after the High Court decision in *Miller*.⁸² As Gee points out, there are guardians of the judiciary throughout government and Parliament.⁸³ The courts now also possess active press and media operations that try to correct misperceptions and address difficult stories, releasing press summaries of complex or controversial cases and engaging with the press and the general public over social media. All of these forms of 'guardianship' remain intact following the gradual decline of the Lord Chancellor's guardianship role.

⁷⁶ Lord Thomas, in evidence to the Lords Constitution Committee, above fn.56.

⁷⁷ 'A great British asset: judges who won't be bribed or told what to do', *The Times*, 19 November 2016.

⁷⁸ A view also taken by Cram, above fn.32, and Shetreet and Turenne, above fn.27.

⁷⁹ 'Judges break silence on sentences', BBC News, 18 June 2006:

<http://news.bbc.co.uk/1/hi/uk/5091590.stm> [accessed 15 May 2017]

⁸⁰ V. Kearney, "Sir Declan Morgan responds to bail decisions criticisms" BBC News, 11 March 2013: <http://www.bbc.co.uk/news/uk-northern-ireland-21741329> [accessed 15 May 2017].

⁸¹ Lord Neuberger argued in his evidence to the Constitution Committee that the Lord Chancellor has a particular duty to speak out in such circumstances: above fn.68.

⁸² 'Brexit: Former top judge warns over Article 50 appeal', BBC News, 7 November 2016: <http://www.bbc.co.uk/news/uk-politics-37904160> [accessed 15 May 2017].

⁸³ Gee, above fn.74, 22.

5. Conclusion

Media criticism is an important and valuable aspect of judicial accountability. In very rare cases, of which the reaction to the divisional High Court's *Miller* judgment was one, media criticism of the judiciary can constitute a genuine threat to judicial independence and impartiality. The judiciary and the legal profession still look to the Lord Chancellor to defend judges in situations of that kind, but in fact the office has withered, politically and functionally, since the removal of its judicial and parliamentary functions in 2005. As a special guardian of judicial independence, the Lord Chancellor's existence is a myth. The office no longer holds the political or constitutional authority to play the role of guardian in the way that judges and the legal profession would wish. Criticism of Lord Chancellors for failing to perform a guardianship role that they are no longer equipped to play risks creating a silly 'he said, she said' political story, distracting from the core issue of defending judicial independence and impartiality at time of vulnerability. It is time for judges and the legal profession to be their own guardians.