

Should judges be elected by the people?

Commenting on judicial independence and accountability, Lord Crickhowell remarked, ‘the gulf is not just between the judiciary and [Parliament]. The real danger is the gulf between the view of the public and the judiciary’.¹ His words point to an ongoing debate about the democratic legitimacy of the courts, which are increasingly making decisions on matters of social importance in ways that may diverge from popular opinion.^{2 3} In response to these events, proponents have called for increased accountability of the judiciary through direct elections. Indeed, in Kansas, after voters rejected measures to limit state-level abortion following the reversal of *Roe v Wade*, there have been proposals to move to an election system for state Supreme Court justices.⁴

However, in this essay, I argue that these proposals are misguided. I argue that judicial elections would compromise the very essence of what it means to be a judge and the purpose of the judiciary: to uphold the rule of law. While accountability of the judiciary may be enticing, particularly when judgments are made in ways that are divisive or do not favour public opinion, seeking accountability misunderstands the role of the judge as a ‘mouth of the law’.⁵ Yet, what may be missing is public confidence in the judiciary (especially the Supreme Court as the highest court of the UK). I argue that proposals for judicial elections may be a distraction from seeking meaningful public confidence in the judiciary and instead suggest that better public awareness brought on by transparency, education, and increased lay-person representation. Due to the limited scope of this paper, the focus will be placed on the Supreme Court of the UK, accompanied by examples from the United States (US).

¹ Lord Crickhowell, as cited in Erin Delaney, Searching for constitutional meaning in institutional design: The debate over judicial appointments in the United Kingdom, *International Journal of Constitutional Law*, Volume 14, Issue 3, July 2016, Pages 752–768.

² *For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)* [2025] UKSC 16.

³ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5.

⁴ Kelly, Matthew, Kansas amendment would overhaul Supreme Court justice selection. What’s at stake?, 2026. <https://www.kansas.com/news/politics-government/election/article316499554.html> [Accessed 15 July 2025]

⁵ Montesquieu, *Spirit of Laws*, C.17 Constitutional Government, 6 – Of the Constitution of England, 1748.

The current judicial appointment process in the UK

Before embarking on my argument, it is necessary to briefly outline alternatives to judicial elections, for example, the current independent judicial appointment system in the UK. Justices of the Supreme Court of the UK are suggested for appointment by an independent Judicial Appointments Commission (JAC), which is governed by the Constitutional Reform Act 2005 and The Supreme Court (Judicial Appointments) Regulations 2013.⁶ The commission includes at least ‘one non-legally qualified person’ as well as at least one judge and other judicial representatives who are convened by the Lord Chancellor. Despite the involvement of the Lord Chancellor in overseeing the JAC, it is generally agreed that the process maintains independence. The Lord Chancellor can reject a recommendation, but it can only be on the grounds of lack of sufficient evidence on their merit, belief of them not being the best suited candidate or lack of sufficient evidence that, as a judge, they would be able to perform their duties.⁷ The remainder of this essay will argue that the judicial appointment process should remain as the status quo since this enables the judiciary to uphold the rule of law. Elections, on the other hand, would compromise the very function and value of the UK judge.

Judicial elections undermine the rule of law

While the rule of law is a contested concept,⁸ Lord Bingham’s definition refers to the need for legal questions to be resolved by the application of law and not the exercise of discretion; equality before the law; and the adequate protection of fundamental human rights.⁹ In the UK, the judges are assigned a particular responsibility to uphold the rule of law and ensure that the state conforms to the law in all of its operations. Indeed, in *Miller I*, the UK Supreme Court stated that ‘the role of the judiciary is to uphold and further the rule of law’.¹⁰ As such, the role of the judge is not to represent the personal will of the public, but instead, as Montesquieu said,

⁶ Constitutional Reform Act 2005, s27(1b).

⁷ The Supreme Court (Judicial Appointments) Regulations 2013, s20(1)-(3), s21(2).

⁸ 1. Waldron J. The Rule of Law as an Essentially Contested Concept. In: Meierhenrich J, Loughlin M, eds. *The Cambridge Companion to the Rule of Law*. Cambridge Companions to Law. Cambridge University Press; 2021:121-136.

⁹ Lord Bingham of Cornhill, Speech on the Rule of Law at the Sixth Sir David Williams Lecture, 16 November 2006, as cited in *The roles of the Lord Chancellor and the Law Officers*, Chapter 2: The rule of law, Lord Bingham’s definition 37-38 and Box 2: Lord Bingham’s eight principles 1-8.

<https://publications.parliament.uk/pa/ld5803/ldselect/ldconst/118/11805.htm> [Accessed 15 July 2025]

¹⁰ The main issue: the 1972 Act and prerogative powers, The constitutional background, 42, *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

‘judges are no more than the mouth that pronounces the words of the law’.¹¹ When the role of the judge is properly understood to interpret and apply the law, the election of judges undermines the very essence of what it means to be a judge and the purpose of the judiciary. Below, I explore this in more depth by unpacking two elements of the rule of law (equality before the law and separation of powers), which are compromised in the face of judicial elections and better sustained by an independent judiciary.

Judicial elections compromise equality before the law

Judicial elections risk undermining equality before the law, which is the constitutional principle that everyone is equally subject to the same laws, regardless of wealth, status, or background. One important law where this principle is relevant is Article 6 of the European Convention on Human Rights, given effect in UK law by the Human Rights Act 1998, which guarantees the right to a fair trial before an independent and impartial tribunal.^{12 13} To this extent, judicial elections would risk eroding this right, since it would be difficult to guarantee impartiality, particularly where conflicts of interest may arise, or there may be public backlash for certain decisions. Statistics from states in the US, where judges are elected, show that elected judges were more punitive around election times.^{14 15} This suggests elections do not allow fully impartial or fair judgments, distorting equality before the law in favour of ‘political justice’.¹⁶ It shows that elections could compromise the fundamental right to equality before the law, expressed through (for example) the right to a fair trial.

Judicial elections undermine separation of powers

The judiciary also acts as a check on the executive and legislature to prevent tyranny and uphold the rule of law. Judicial review is the process by which a judge assesses the lawfulness of legislation and state actions. An independent check on the executive and legislature would be

¹¹ Montesquieu, *Spirit of Laws*, C.17 Constitutional Government, 6 – Of the Constitution of England, 1748.

¹² European Convention on Human Rights, Article 6, ECHR.

¹³ Human Rights Act 1998, Article 6 incorporated via schedule 1.

¹⁴ Huber, Gregory A., and Gordon, Sanford C., “Accountability and Coercion: Is Justice Blind When It Runs for Office?” *American Journal of Political Science* 48.2, 2004: 247–263

¹⁵ Berdejó, Carlos, and Yuchtman, Noam, “Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing,” *Review of Economics and Statistics* 95.3, July 2013: 741–756

¹⁶ Kirchheimer, Otto, *Political Justice: The Use of Legal Procedure for Political Ends*, Princeton University Press, 1961.

undermined if the judges were elected. Indeed, in commentary on the new amendment to introduce a direct election of Kansas Supreme Court justices, campaigners argue that ‘impartial judges will become politicians for sale. Billionaires will bankroll campaigns and then push whatever laws they want’.¹⁷

This would be especially problematic in the possible event of control of all branches of government by one party, removing the essential check of overreach and tyranny from the executive and legislative. In the US, the majority of Supreme Court Justices are appointed by Republican presidents. Still, the Supreme Court has been shown to have stabilising tendencies, for example, voting in favour of continued birthright citizenship.¹⁸ This could change if these judges were directly elected by the people, pushing the judiciary to act in alignment with certain political parties (also referred to as ‘political justice’ by Kirchheimer).¹⁹ In the case of birthright citizenship, elected judges might have voted against, rather than in favour.

A need for accountability?

When looking at the question of electing judges, an argument in favour is the need for accountability. Currently, judges are held to limited accountability, barring instances of ‘bad’ behaviour, such as misusing judicial status or harassment.²⁰ Furthermore, judges have unlimited tenure,²¹ giving them a level of immunity. Judges’ decisions can determine the country’s interpretation of laws, including ones with divisive and impactful social consequences. For example, the Supreme Court’s decision on the definition of a ‘woman’.²² Additionally, as mentioned previously, unelected judges can scrutinise the lawfulness of government decisions, for example, *Miller I* examined the manner in which the government moved forward in their notice to leave the EU.²³ This level of power over the state of the judiciary should be met with some level of accountability, at least some would argue so.

¹⁷ Kansas United for Impartial Courts, as cited in Kelly, Matthew, Kansas amendment would overhaul Supreme Court justice selection. What’s at stake?, 2026. <https://www.kansas.com/news/politics-government/election/article316499554.html> [Accessed 15 July 2025]

¹⁸ Trump v. Barbara, 609 U. S. ____ (2026).

¹⁹ Kirchheimer, Otto, Political Justice: The Use of Legal Procedure for Political Ends, Princeton University Press, 1961.

²⁰ What can I complain about?, Judicial Conduct Investigation Office. https://www.complaints.judicialconduct.gov.uk/what_can_i_complaint_about/ [Accessed 15 July 2026]

²¹ Constitutional Reform Act 2005, s33.

²² *For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)* [2025] UKSC 16.

²³ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5.

Yet, judicial election is not the only way to secure accountability – nor is it necessarily the most effective. In the UK, judges are held to explanatory accountability, which means that they must give a reason for their judgment. This right to explanation is seen in *English v. Emery Reimbold & Strict Ltd*, where an appellate judge ordered a retrial due to a lack of reasoning.²⁴ While this does not hold judges to ‘sacrificial’ account, it does force judges to ‘show their work’, meaning arbitrary judgments which are made on matters other than legal principle and discretion are less likely to occur. The current system shows that accountability is possible while maintaining judicial independence. To this extent, elections could impact independence greatly while only marginally improving accountability.

Nuno Garoupa and Tom Ginsburg describe a ‘dialectic tension’ between the independence and accountability of the judiciary: ‘Independence is needed to provide the benefits of judicial decision-making . . . but as more and more tasks are given to the judiciary, there is pressure for greater accountability because the judiciary takes over more functions from democratic processes.’²⁵ Yet, I argue that this pressure for accountability could also come from a fundamental misunderstanding of what the purpose of the judiciary is in the UK. As Lord Phillips explained, ‘the job of the justices of the Supreme Court is very largely one of acute intellectual analysis—clear thinking: it is not essentially a job where your politics is going to make a difference.’²⁶ When judges make decisions with social implications, their role is to decide based on legal principles – even if these are unpopular decisions. Judges should only be held to account if they err on a matter of law; otherwise, Parliament can intervene in favour of the will of the people.

Yet, accountability may serve a purpose to build public confidence in the judiciary since it forces public engagement and allows for democratic decision-making. While it could improve these factors, it assumes that, generally, people have trust in the institution they vote for. According to 2023 statistics, trust in the UK government was just over a quarter (27%) of the public.²⁷ This remains a relatively low number especially in comparison to confidence in

²⁴ *English v. Emery Reimbold & Strict Ltd* [2002] EWCA Civ 605.

²⁵ Garoupa, Nuno; Ginsburg, Tom, as cited in Erin Delaney, Searching for constitutional meaning in institutional design: The debate over judicial appointments in the United Kingdom, *International Journal of Constitutional Law*, Volume 14, Issue 3, July 2016, Pages 752–768

²⁶ Lord Phillips, as cited in Erin Delaney, Searching for constitutional meaning in institutional design: The debate over judicial appointments in the United Kingdom, *International Journal of Constitutional Law*, Volume 14, Issue 3, July 2016, Pages 752–768.

²⁷ 2.Trust in government and institutions, In Trust in government, UK: 2023, <https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/bulletins/trustinggovernmentuk/2023> [Accessed 14 July 2025]

the judiciary, which was recorded to be around 57% in 2025.²⁸ This shows that perhaps the politicisation of this branch could actually *negatively* impact public confidence in the judiciary.

Elections as a distraction from building meaningful public confidence?

Public confidence in the judiciary is important because trust upholds the rule of law. If the people do not trust judges to make fair decisions, it detracts from the legitimacy of the judiciary.²⁹ Perceptions of judicial independence by the public are influenced by the way in which judges are appointed.³⁰ This issue goes hand in hand with elections. If the public perceives judgments to be in favour of or against a certain political party, rather than being based on impartial deliberation, it erodes the trust of the public.³¹ It also changes the meaning of the court to be a source of political opinion rather than legitimate legal interpretation.

In order to improve public confidence, our attention should instead be directed to transparency, education, and diversity of the judiciary. As Lord Reed stated in an address, the inclusion of footage from the delivery of the judgment in particularly controversial cases helped viewers understand that they were deliberating on issues of law rather than controversial political questions.³² There is also a point to be made about the inclusion of additional lay members in the JAC, which could help the public feel represented in decisions about the appointment of the judiciary while ensuring that the process is not politicised.

Conclusion

The current system of judicial appointment is based on independence; judges are chosen by the JAC. This system of appointment aims to uphold the rule of law. As explained in this essay, elections would go against the very essence of what it means to be a judge. Arguments in favour

²⁸ Trust in Britain's judicial system and police has plunged. The Economist, 2025.

<https://www.economist.com/britain/2025/12/18/trust-in-britains-judicial-system-and-police-has-plunged>
[Accessed 14 July 2025]

²⁹ Lohier, Raymond J., As cited in Losing Faith: Why Public Trust in the Judiciary Matters, 2022.
<https://judicature.duke.edu/articles/losing-faith-why-public-trust-in-the-judiciary-matters/> [Accessed 15 July 2025]

³⁰ European Court of Human Rights, Judicial Seminar 2019: Strengthening the confidence in the judiciary, Background Document, A. Appointment, promotion and dismissal of judges, professional standards, 1. Judicial Appointments. https://www.echr.coe.int/documents/d/echr/seminar_background_paper_2019_eng

³¹ Lohier, Raymond J., As cited in Losing Faith: Why Public Trust in the Judiciary Matters, 2022.
<https://judicature.duke.edu/articles/losing-faith-why-public-trust-in-the-judiciary-matters/> [Accessed 14 July 2025]

³² Lord Reed, Building trust in justice: Reflections from the UK Supreme Court, Lord Reed's Speech, 2025.
<https://www.gov.uk/government/news/building-trust-in-justice-reflections-from-the-uk-supreme-court>
[Accessed 15 July 2026]

of direct election of judges do so on the basis of a need for accountability and public confidence in the judiciary. I show how accountability is not necessarily secured through election, and public confidence may actually be undermined by such. While there may be a gulf between the view of the general public and the judiciary, I think the true solution to this issue should not be reform to the judicial appointment process, but rather increased transparency, education, and lay-person representation in the JAC to enhance public confidence.