APPENDIX 8: EVIDENCE BY THE LORD CHIEF JUSTICE, 3 MAY 2006

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION

WEDNESDAY 3 MAY 2006

Present	Bledisloe, V	Holme of Cheltenham, L (Chairman)
	Carter, L	O'Cathain, B
	Elton, L	Peston, L
	Hayman, B	

Examination of Witnesses

Witness: Lord Phillips of Worth Matravers, a Member of the House, Lord Chief Justice, examined.

Q1 ***Chairman:*** Lord Phillips, welcome.
Lord Phillips of Worth Matravers: Thank you very much. Good afternoon.

Q2 ***Chairman:*** It is very good to see you here and we are grateful that you have found the time for this. I know what a busy time it must be for you. I should say that the proceedings are being televised. Therefore, if you would not mind, just for the purposes of the camera, formally identifying yourself.
Lord Phillips of Worth Matravers: Yes. I am Lord Phillips of Worth Matravers, the Lord Chief Justice.

Q3 ***Chairman:*** Perhaps I could open the batting with one or two of the larger constitutional questions which obviously particularly interest this Committee. Looking back on the passage of the Constitutional Reform Act, the Government made quite a considerable feature of the discussions that this would lead to greater separation of powers between the judiciary and those of the Executive and of Parliament. I wondered if, in your perception, the relationship has now changed. Is it changing? Either as a result of the Act or for other reasons, do you feel the relationship is changing?
Lord Phillips of Worth Matravers: I think the relationship is changing and has been changing over the last few years before the Act. The Act has really severed what you might call the Siamese triplets at the head, because the head of the judiciary, the legislature and the Executive was one person and now the judiciary can be seen to be freestanding. Perhaps the most significant change relates to judicial appointments, in that there is now an independent commission to appoint judges. That is very significant. Also important is the fact that there is now a freestanding body to deal with complaints against judges. Although, at the end of the day, decisions have to be taken jointly by myself and the Lord Chancellor, we, as judges, are now patently freestanding. The division of powers is quite clear. Now our negotiations with ministers, in particular with the Lord Chancellor, are negotiations between the judiciary and the Executive and clearly seen to be so.

Q4 ***Chairman:*** So it is more of a negotiating relationship now.
Lord Phillips of Worth Matravers: It is more of a negotiating relationship.

Q5 ***Chairman:*** What is the significance of the concordat within that? Various views have been expressed about its constitutional status and significance.
Lord Phillips of Worth Matravers: I think it is probably a unique constitutional document. It was the basis, of course, for the Act. The Act was based on what had been agreed in the concordat. There are still some important elements of the concordat which are not expressly enacted in the statute. Perhaps the most important, I think, is that it is for the Lord Chief Justice to decide how judges are deployed. I regard this as one of my most vital functions, deciding which judges do what kind of work and where they do it.

Q6 ***Chairman:*** Do you see it as a mutable piece of paper or does it have an entrenched quality about it?
Lord Phillips of Worth Matravers: I would like to think it has an entrenched quality about it. It has certainly been treated as if it were a constitutional document laying down the division of functions, now largely of course overtaken by the Act but not exclusively, and where the Act does not cover something one needs to go back to the concordat.

Q7 ***Chairman:*** The Act prescribes the Lord Chancellor's continuing role in relation to the rule of law. I think to lay members of this Committee, which includes me, it is quite puzzling to work out what the rule of law means in practice over and above the Lord Chancellor's role, if you like, as political guarantor of the independence of the judiciary. I think we all understand that very well, but what, over and above

the independence of the judiciary, do we mean by the rule of law?

Lord Phillips of Worth Matravers: I think the independence of the judiciary and the rule of law are very difficult to sever. It is the role of the judiciary, in practice, to uphold the rule of law, to apply the rule of law, to enforce the rule of law, and to do that they have to be independent of outside influence. Insofar as it is the Lord Chancellor's job to uphold the rule of law, this must be very largely a job of ensuring that our independence is observed. Equally, there must be occasions in government where a question may arise as to whether the conduct that the Government is contemplating is or is not in accordance with the rule of law, and there, I would imagine, the Lord Chancellor would have a role to play in his capacity as a minister.

Q8 ***Chairman:*** So the independence of the judiciary is necessary for the rule of law but may not be sufficient. There may be elements to what we understand by the rule of law which go beyond the independence of the judiciary.

Lord Phillips of Worth Matravers: Yes. I think the role of the judiciary is to uphold the rule of law. Ultimately society is governed by legal principles and it is for the judiciary, where those are in issue, to resolve the issue and to ensure that the rule of law is applied. The rule of law arises in relation to civil disputes between individuals. It arises as a matter of public law, increasingly; it arises in the field of the family; it arises in the criminal field, where it is the job of the judiciary to make sure that legal principles are observed in criminal trials and criminal procedure.

Q9 ***Lord Carter:*** Could I ask a question on that last point. If you take the example of the Human Rights Act, where the judiciary say there should be a remedial order to put an act right in terms of the human rights and the Executive decided not to do that, would that be a breach of the rule of law?

Lord Phillips of Worth Matravers: Provided the judiciary were correct—and of course Strasbourg is the ultimate arbiter if one is dealing with human rights—it would be open to the Government to say, "The court has ruled that this is contrary to the Human Rights Act. Notwithstanding that, we do not intend to comply with the Human Rights Act on this point" and that would be contrary to what I would call rule of law.

Q10 ***Lord Carter:*** That is the end of the argument.

Lord Phillips of Worth Matravers: That is the end of the argument, yes, because Parliament is in that field supreme.

Q11 ***Chairman:*** Referring to the independence of the judiciary, you are now head of the judiciary, and, as you said a moment or two ago, the process of the appointment of judges is now entirely independent of the Government. What would you expect of the Lord Chancellor, in the event that you felt that the independence of the judiciary, even with these two pillars of independence in place, were thrown in some way? What would then be the appropriate role of the Lord Chancellor?

Lord Phillips of Worth Matravers: The role of the Lord Chancellor would be to stand up for the judiciary. If their independence is threatened, one has to try to envisage the nature of the threat before one can really address what one would expect the Lord Chancellor to do. But, to take an example, imagine that a government minister were to launch a virulent personal attack on an individual judge, not merely saying that he did not accept the decision he had reached but suggesting that the judge had not been acting judicially, in that situation one would hope and expect that the Lord Chancellor would stand up for the judge, and, if the nature of the attack were not appropriate, that he would make that plain.

Q12 ***Chairman:*** And stand up for them in Cabinet? In public?

Lord Phillips of Worth Matravers: Wherever it was appropriate to do so, yes. Sometimes in public. Sometimes privately.

Q13 ***Baroness O'Cathain:*** From a practical point of view, how could that happen? If the Lord Chancellor, being a Cabinet member, in charge of the Department of Constitutional Affairs, had one of his colleagues, he would have to stand up for the judges against one of his ministerial colleagues. Would that actually happen?

Lord Phillips of Worth Matravers: I think it might well happen. I would not be surprised if it has happened in the past. One does not know what goes on in the Cabinet.

Q14 ***Baroness O'Cathain:*** That is true.

Lord Phillips of Worth Matravers: I would certainly hope, if an issue arose in Cabinet where the independence of the judiciary were under threat, that the Lord Chancellor would stand up and say, "Hey, come on. You are crossing the line. You have got to leave the judges to do their own job."

Baroness O'Cathain: The Lord Chancellor's first loyalty is to the judges rather than his Cabinet colleagues.

Q15 ***Chairman:*** Is that quite right? I think his loyalty is to what he is prescribed to do under the Act.

Lord Phillips of Worth Matravers: Yes.

Q16 ***Baroness O'Cathain:*** And he is prescribed to do that, to stand up for the judges.
Lord Phillips of Worth Matravers: The Act now places him under a statutory duty. I think it would be a sorry day if we had to rely upon an Act of Parliament to say that ministers must have regard to the independence of the judiciary, but if you are enacting constitutional principles it is not a bad place to start.

Q17 ***Chairman:*** Of course the Act, interestingly, does in that respect draw on the past and not simply on the Act, by talking about the existing constitutional role of the Lord Chancellor.
Lord Phillips of Worth Matravers: Yes.

Q18 ***Chairman:*** In other words, the Act is supposed to enshrine what we hope would always have happened, which was that the Lord Chancellor would be standing up for the rule of law, part of which, as you have explained, the indispensable precondition of which, is the independence of the judiciary.
Lord Phillips of Worth Matravers: Yes. In my time in the law, that, in my experience, has been the case. We have been well served by Lord Chancellors.

Q19 ***Lord Peston:*** I may have missed something you have said. You are now the head of the judiciary.
Lord Phillips of Worth Matravers: Of England and Wales—if I may just qualify it.

Q20 ***Lord Peston:*** You did not say that you rejected the idea that it would be included in your job description to speak up for the judiciary.
Lord Phillips of Worth Matravers: No, I did not.

Q21 ***Lord Peston:*** If a particular judge were being attacked.
Lord Phillips of Worth Matravers: It certainly is my job.

Q22 ***Lord Peston:*** You would speak out.
Lord Phillips of Worth Matravers: Yes.

Q23 ***Lord Peston:*** But in the sort of terms: "I am not standing for this"?
Lord Phillips of Worth Matravers: I do not think I would commit myself necessarily to the terms or to the way in which I would put this.

Q24 ***Lord Peston:*** But it is certainly something that you would feel is clearly within your remit, and your judges—if I may call them your judges—would rely on you to do that because they wish to show their independence and operate the rule of law.
Lord Phillips of Worth Matravers: They certainly would. I would hope that if there was somebody acting inappropriately, he might come under a two-pronged attack: one from me and one from the Lord Chancellor.

Q25 ***Lord Elton:*** Forgive my ignorance, but I do not think the Lord Chancellor and the Secretary of State for Constitutional Affairs are necessarily the same person. In which case, with which person does the defence of the judiciary belong and how do you secure sufficient weight for his representation in Cabinet?
Lord Phillips of Worth Matravers: The weight that he or she carries in Cabinet is not something we can control obviously. The title of the Lord Chancellor has been preserved and is presently a title that the Minister of State for Constitutional Affairs also has. I think we judges tend to refer to him as the Lord Chancellor. If one divorced the two, one would have to see what function the Lord Chancellor was left with.
Lord Elton: Is it part of the concordat that they should be the same person? It does not seem to be in the Act that they should be.

Q26 ***Baroness O'Cathain:*** I thought it was.
Lord Phillips of Worth Matravers: The answer to that is I am not sure. One has proceeded on this basis that this title would be that.
Chairman: I think the Act does prescribe they are the same person
Baroness O'Cathain: Yes, I think it does.

Q27 ***Chairman:*** But, since this is the Constitutional Committee, perhaps we should find out! Could I ask one other question before I pass the bat to one or two of my colleagues. As we have now arrived with the concordat—just on the broad constitutional topic still—how would you define the constitutional relationship between the Lord Chief Justice and the Lord Chancellor? With the concordat, in the new dispensation, how would you define that?
Lord Phillips of Worth Matravers: I would say that we have independent roles in trying to achieve the same end, which is the application of the rule of law. I, as head of the judiciary, am the leader of a very large team, which now includes magistrates: about 40,000 people. Each individual judge is independent. I cannot tell my colleagues how they should decide cases but I am their leader. I will do my best to represent their views, their anxieties to ministers, in particular to the Lord Chancellor, and it is our job to administer the law. It is the Lord Chancellor's job to provide the resources we need to do so and the administrative staff that we need to do so. So the judiciary have to work in very close partnership with the Executive, headed by the Lord Chancellor, in

making sure that the two go together, so that we are providing the judges and I am deploying the judges but there are courts in the right places in which I can deploy my judges. His role is essentially an executive role; my role is leading for the judges and communicating the needs and wishes of the judges to the Executive. There are some roles in which we come together. We each have an input to make to the appointment of the judiciary, informing the judiciary of the judges we need, what types of judge we need, where we need them, and we each have a role to play in relation to discipline, because, at the end of the day, we have to decide between us what action, if any, it is appropriate to take in relation to a complaint against a judge.

Q28 ***Chairman:*** In practice, you and the Lord Chancellor together are the hinge. On the one hand the heavy door of the independent judiciary and on the other hand the door jamb of the Government, and the two of you, between you, are the hinge.
Lord Phillips of Worth Matravers: Yes.

Q29 ***Chairman:*** I suppose, just as the concordat was arrived at effectively by negotiation, it means that within this notion of greater separation, greater independence, there nevertheless is going to be, practically, a fairly continuing negotiation between the two parties who represent the partnership you have just described.
Lord Phillips of Worth Matravers: Yes. It is very important that there should be and that there should be negotiation or working together at all levels. If you change the police areas, you immediately have to ask: What implications is this going to have for the administration of justice? How are the magistrates going to function? How is justice in the community going to function within new areas? That is just an example of somewhere where judges and the Executive need to work together.

Q30 ***Chairman:*** Do you expect that over time you will be developing processes? Clearly it is helpful if you have good personal relationships, but, since that cannot always be assumed, and sometimes there are points of tension and disagreement, then it matters that there are processes for dealing with that so it is not simply two people eye-balling each other across the table. Do you see the development of a precedent and process operation?
Lord Phillips of Worth Matravers: I do see the development of processes. There are some areas which we are considering very carefully at the moment. There are some very difficult areas that one has to deal with, such as: How does the Lord Chief Justice express the views of the judges to ministers? With the statutory provision for my putting before Parliament any matter of importance, in what circumstances should I avail myself of that right? What other avenues are there for communicating to ministers matters of importance? How do we deal with parliamentary questions? If it is a parliamentary question which relates to the judges' field of activity, how should that be dealt with? These are examples of quite complex areas that we are looking at the moment.
Chairman: Perhaps we could come back to the parliamentary issue.

Q31 ***Viscount Bledisloe:*** It is absolutely plain from what you have been saying that there remain a large number of areas where you and the Lord Chancellor have to act in cooperation, either by both agreeing something or by one of you consulting the other or vice-versa. There are also areas in which you have to negotiate on matters which affect the way judges work and are paid and so on and so forth. How do you feel about the possibility, which we are told is a real possibility, that one day you might find yourself dealing with a Lord Chancellor who was not a lawyer at all and had no experience of the law?
Lord Phillips of Worth Matravers: Experience in the field is obviously a valuable attribute of any minister. It is difficult to answer your question in the air. I do not view it as essential that the person with whom I am dealing should be a lawyer, but obviously the person with whom I am dealing is going to have to have a grip of the particular area in which we are most concerned. If that person happens to come into office as a lawyer who already has experience in the field, that is obviously going to be an advantage for him or her and probably an advantage for me. But one would hope that anyone who is appointed to this important office will have the qualities necessary to do the job, whether or not they are qualified lawyers.

Q32 ***Viscount Bledisloe:*** I would like to turn to a different topic, which is the administrative burden upon you under the new regime, which I understand, of course, has only been in force completely for a short period.
Lord Phillips of Worth Matravers: Yes.

Q33 ***Viscount Bledisloe:*** And how that conflicts with your judicial activities. First of all, do you enjoy more judicial work or administrative work?
Lord Phillips of Worth Matravers: I enjoy judicial work more than administrative work, but I have found—somewhat to my surprise, I must confess—that I am quite enjoying the administrative side as well.

Q34 ***Chairman:*** Secondly, under the new regime, can you give us some idea about how many hours a week you see yourself working and how much of that you

see being judicial and how much of that you see being administrative?
Lord Phillips of Worth Matravers: That is a very fair question. Over the last six months the administrative burden has been particularly great because we have been putting in place really the mini civil service that we need to help us with the new functions. I have been working out to whom I should delegate various functions, which ones I shall and which ones I shall not. The aim is that I should have sufficient time to continue to sit as a judge, which I think is absolutely essential for the Chief Justice. My plan is, at the moment, since you ask, that I will keep the first and the last week of term free completely. In the other weeks, I would hope to sit. Ideally, I would like to sit three days a week and deal with administration the other two, but, to date, one does find that there are some things which you have to do in your sitting week which impinge on the sitting.

Q35 ***Viscount Bledisloe:*** That is, of course, going to prevent you taking long cases.
Lord Phillips of Worth Matravers: I think it would be very difficult for me to take a long case. But that, I think, has been the case for some while as far as the Lord Chief Justice is concerned.

Q36 ***Viscount Bledisloe:*** In my view, at least—and I think most people would agree—it is vital to attract to your job top quality lawyers like Lord Bingham and yourself. Do you see the administrative burden being a real discouragement to getting successors of the same quality?
Lord Phillips of Worth Matravers: I hope not. I do not think so. Obviously people differ in their attitude to their job. In the immediate future, certainly, anyone who would be considering the job will be somebody who became a judge on the basis that what they wanted to do was judging, not administration. Having said that, quite a few of my colleagues now are quite heavily engaged in administration. I think most of them are enjoying this—some are enjoying it very much—so that I would hope that it would be possible to find successors to my position of high calibre as lawyers and judges but who nonetheless are not put off by the administration.

Q37 ***Chairman:*** To follow Lord Bledisloe on this question of the balance between administration and more narrowly defined judicial functions, you mentioned a few moments ago the leadership of the judiciary. Presumably, to some extent, that depends, like leadership in other fields, on getting around and building morale and indicating strategy and all the things that leaders do, and being seen to do that. I wondered, given that we are talking about judges, how important acting as a judge is in demonstrating leadership of the judiciary.
Lord Phillips of Worth Matravers: I would think it is essential. I do not think the Lord Chief Justice can hope to keep the respect of the judges if they do not see him sitting and deciding important cases. My intention is to sit in all the jurisdictions, so that I will sit on criminal appeals, on civil appeals and on family appeals, and that is what I have set out to do. I have been sitting today in crime. I am taking the Criminal Division of the Court of Appeal next week to sit in crime in Oxford. I have done that already in Manchester. Apart from sitting, I have been going around the country, meeting as many people as possible and talking to them, just so that I get to know them and listen to their concerns. I intend to continue to take the Criminal Division of the Court of Appeal out on circuit, but later on this term I shall be sitting in civil for a few weeks.

Q38 ***Baroness O'Cathain:*** Section 5 of the Constitutional Reform Act 2005 states that: "The Chief Justice may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise the administration of justice in that part of the United Kingdom" How do you think you would exercise that power?
Lord Phillips of Worth Matravers: I have not finally reached conclusions on this because it interrelates with a lot of other things. My current reaction is that this is a power to be exercised when I really want to draw attention to something that is really important, not something to be done as a matter of routine. I see this really as a substitute for what the Lord Chief Justice has been able to do and has done in the past, which is to address the House on a matter which is considered sufficiently important to justify that step. As it happens, in theory that is still open to me, but it will not be in the future and I personally have not taken any part in the business of the House as a matter of personal choice.

Q39 ***Baroness O'Cathain:*** Would you envisage making an annual report?
Lord Phillips of Worth Matravers: It is something we are considering, as to whether this would be appropriate. There are various alternatives. One could maybe appear before a committee once a year on a rather general discussion in relation to matters of concern that I wanted to raise on behalf of the judges. There are different ways of doing this.

Q40 ***Lord Carter:*** If there were a written report—this is to Parliament, not to the Executive—how would you expect Parliament to respond? You have just mentioned an appearance before this Committee. How do you see the relationship between a formal right to lay a written representation before Parliament and a more informal invitation to appear

before the parliamentary select committees? There was a recommendation in the Select Committee's Report on the Constitutional Reform Bill that there should be a joint select committee of Parliament to relate to the judiciary. Would you see that as being over-burdensome? What would that do, other than you appearing before the Constitutional Committee once a year, for example?
Lord Phillips of Worth Matravers: It would depend to some extent on the terms of reference of the committee. It is certainly an option that merits consideration. In looking ahead at the relationship between the judiciary and Parliament, one needs to be very careful that one is preserving the independence of the judiciary. At the same time, Parliament is certainly justified in expecting some way of communicating with the judiciary.

Q41 ***Lord Carter:*** Are there areas which you regard as off limits in dialogue between senior members of the judiciary and parliamentary select committees such as this one?
Lord Phillips of Worth Matravers: There certainly are. Again, we are at the moment considering whether there is some form of guidance I have to give to all the judges as to how they should react if invited to come and appear before a committee of Parliament. It would not be appropriate—this is quite obvious—for you to be asking me or me answering questions about the case I have been sitting on this afternoon. There are a number of other no-go areas where, if a judge should say, "I do not think it is really appropriate that I should comment on that," I would hope that this would be respected. Essentially, you would not expect judges to comment on political policy.

Q42 ***Lord Carter:*** Could we take the example of today, where the Home Secretary has made a statement on this business of foreign nationals and deportation. If a parliamentary select committee asked you for your views on the policy, would you regard that as off-limit?
Lord Phillips of Worth Matravers: Yes, I think I would. If you are asking me what the implications are for my judges, that would be a different matter.
Lord Carter: Of course. Thank you.

Q43 ***Viscount Bledisloe:*** You have said, in my view understandably, that you would only want to exercise the section 5 power to lay representations in a case about which you felt very strongly. Is it not the case that, if you did have regular appearances, once a year, say, before committees such as this, that would give you an opportunity to indicate topics on which you were less than 100% happy but which in your view were not so ghastly that you felt the need to lay written representations.
Lord Phillips of Worth Matravers: It would, and I am not rejecting the idea that this might be a good way of conveying these matters but would it necessarily have to be an annual appearance? Might there not be a machinery, if there were a particular topic that I thought it desirable to ventilate, whereby I could let the appropriate committee know that if they were interested in hearing about this I would be happy to discuss it?

Q44 ***Viscount Bledisloe:*** I am certainly not setting annual as being a maximum but maybe setting it as being a minimum.
Lord Phillips of Worth Matravers: Yes.

Q45 ***Lord Peston:*** Would you regard it as reasonable, if you were appearing before a parliamentary committee, to answer questions about the way the judiciary conduct themselves? I entirely accept what you have said on specific cases. We know there would be no argument but that what you have said is right. May I give you two examples—and I do not want you to comment on them, but they indicate what I have in mind. If we take the judge in the *Da Vinci Code* case and also the recent Court Martial case, I do not want you to comment at all on what the decisions were but, in both cases, as a layman I would put it to you that I was rather puzzled that that was the way the judiciary thought it was okay to behave. As I have said, I do not want you to comment on them, but, if you were to see examples of the sort where you felt the judiciary were not acting with appropriate gravitas and courtesy, would you feel it was your duty to do something about it? And, if asked by a parliamentary committee, "Did you take note of that?" to answer, "Yes, I did."
Lord Phillips of Worth Matravers: I would certainly regard it as appropriate for me to take action personally with a judge who behaved in a way in which I felt called for some form of admonition; falling short, obviously, of any kind of disciplinary process. But it might equally be the case where I would think this is something that could be better done by the head of his division rather than by myself. If I then came before this Committee and you asked me what I thought about the way this judge had behaved, I think I would probably say I would prefer not to comment on that.

Q46 ***Lord Elton:*** If I may take a little further what you said about the interface between yourself and your successors in Parliament. At present we have in this House a copious supply of very experienced judicial brains. That is going to dry up unless it is artificially remedied. That being so, do you think the remedy should be the return of the Law Lords into this House—judges of appeal or whatever? If not, does your contemplated annual meeting with a

committee or whatever constitute the only way in which you can influence the development of legislation itself? What worries me is that we have a lot of people at the moment who can hold our hands when we laymen rush ahead to do something foolish in a statute and we will be told how it went wrong in 1948 or whatever. How is that loss going to be made up through the system you have in mind?
Lord Phillips of Worth Matravers: The first thing I would say is that there is going to be a jolly good reservoir of legal brains. My retirement age is 75, but for those who were appointed more recently they have to retire at the age of 70. A lot of those still have a lot to contribute and I would hope that reservoir will be used to replace those available to the House at the moment. So far as legislation is concerned, there are ways in which judges can properly assist with legislation, as, for instance, by protesting that we have much too much of it.
Viscount Bledisloe: Hear, hear.

Q47 ***Lord Elton:*** I quite agree.
Lord Phillips of Worth Matravers: We can perfectly properly comment on the implications for the running of the judicial system of proposed legislation. There is already a committee in existence, the Rose Committee, named after Sir Christopher Rose, which does this in the criminal field.

Q48 ***Lord Elton:*** Do you see a relationship here between the formal right to lay written representations, which I think you have already said you regard as for grand occasions only, and the more informal invitation to appear before a parliamentary committee. Is there another vehicle for the sort of concern I am asking you about.
Lord Phillips of Worth Matravers: So far as laying things before Parliament, I feel I need a nuclear option, so that when I adopt it everyone sits up and says, "This must be important." It is difficult and delicate for judges to be involved in the legislative process. It would not be appropriate for a judge to appear before a committee to discuss proposed legislation because it would be very difficult to keep this within the proper boundary. The proper boundary is really saying, "If you are going to do this, you are going to double the number of appeals coming up to the Court of Appeal. We are going to need another 10 judges to deal with it." Or possibly: "If you are thinking of doing that, you want to give careful consideration to the following legal implications it will have."
Chairman: The point of nuclear options is not to use them but to threaten them, I believe!

Q49 ***Baroness Hayman:*** I could continue the metaphor, but I think it may get very tangled. You gave a very clear answer that it would be inappropriate to comment on policy development; for example, in the case we are concerned about at the moment. But could I go back to the issue of the responsibility of upholding the rule of law and whether there is any circumstance where the division seemed in a way, from what you have said earlier, to be the responsibility of the Lord Chancellor to uphold the rule of law in policy development and of the judiciary to ensure it in adjudicating after the event on legislation.
Lord Phillips of Worth Matravers: Yes.

Q50 ***Baroness Hayman:*** But it is possible for legislation or policy to be proposed that might be considered to go beyond what is normally considered the rule of law? We had an example of the ouster clause, but, equally, there would be Human Rights Act implications in certain of the policy proposals in our discussion at the moment. Do you consider that there is a sort of temporal divide between your responsibility and the Lord Chancellor's on the rule of law? Or might that be one of the situations in which the nuclear option came into play?
Lord Phillips of Worth Matravers: I think the nuclear option could come into play if something was proposed by way of legislation that was so contrary to the rule of law that judges would feel: "We have got to step in and make plain our objection to this"—rather the kind of situation that Lord Steyn was contemplating. You could reach a crunch situation, where fundamental constitutional principles, such as judicial review, if it was proposed, should be abrogated wholesale, I can conceive that in a situation like that the judiciary would want to make their voice heard.
Baroness Hayman: Thank you.
Chairman: Let us press on. Lord Peston, you have a question you want to ask.

Q51 ***Lord Peston:*** I think you have largely answered the question I had in mind, but, for the record, the broad measure of the question that I am putting to you is whether, if we go, as I think we will, for greater post-legislative scrutiny in due course, parliamentary inquiries will be looking much more precisely at judicial decisions. The example I have been asked to draw to your attention, although I cannot say I fully understand it myself, is the remarks the Joint Committee on Human Rights made about the judgments of the Appeal Court in the matter of functions of a public nature. I cannot tell you of the precise topic.
Lord Phillips of Worth Matravers: I think I understand .

Q52 ***Lord Peston:*** The general question is one on which I would like your view.

Lord Phillips of Worth Matravers: It is perfectly appropriate, obviously, for Parliament to consider decisions being reached by judges and to express perhaps disappointment that the judges are interpreting the law in this way, and it is open to Parliament, if judges are interpreting the law in this way, to change the law. Ultimately, of course, it is the House of Lords rather than the Court of Appeal that has the last say so far as important principles of law are concerned. It has to get up to them, but, if Parliament is disappointed with the way in which laws are being interpreted by the judiciary, of course they are entitled to say so and to consider whether the law needs to be changed. What would become less satisfactory is if the thing becomes very personalised, because the judges are actually doing their best to apply the law objectively.

Q53 ***Lord Peston:*** Assuming it was this Committee and assuming some of us had been involved in the legislation and thought we knew what the law we had passed meant—and I do not push that too strongly, but thought we knew what we were doing—who would we then call before us if we were scrutinising the legislation? Would we call you and say, "Can you at least explain to us how your judges came to this different interpretation?" I take it you are not suggesting that we should call the judge in question.
Lord Phillips of Worth Matravers: No. Nor should you call me.

Q54 ***Lord Peston:*** Then who would we ask?
Lord Phillips of Worth Matravers: It ought to be clear from the judgments in question the process of reason that has led the judge or the judges to reach their conclusions. We have to give our reasons. We do our best to explain as clearly as we can what those reasons are and it would not be appropriate for those who have given the judgment or, indeed, for me to go beyond that. I could possibly help with a bit of identification of legal principles if there was puzzlement.

Q55 ***Lord Peston:*** I am still a little bit lost. As you probably realise, on a committee like this we get a majority of people who are not lawyers but who are not stupid—if I may dare say that. Sometimes it is impossible. Certainly I take a great interest. When I read law reports, though I try, I cannot follow the logic of what is being said at all. Happily I have friends here and I say, "How in heaven's name did he ever get to that answer" and they try to explain it to me—and I cannot say that I am a very good pupil—in a way that I can understand. I do not see how we, doing pre-legislative scrutiny, could do it without some very senior legal advice as to how the logic worked in that case. As you know, I am an economist, and there are lots of unwritten things that the layman does not understand, which is how one earns a living, because we are the only ones who know what it really means. That is how lawyers earn their living as well, I imagine.
Lord Phillips of Worth Matravers: There are plenty of lawyers who are not serving judges who could perform that function, and they busily do in the universities in commenting on the important decisions and very often commenting adversely, saying, "This does not make sense at all."

Q56 ***Lord Peston:*** Your view would be that in the case of the scrutiny committee we have to have our own lawyer.
Lord Phillips of Worth Matravers: Yes.

Q57 ***Lord Carter:*** If I could give you an example of the situation that Lord Peston referred to. The report of the Joint Committee on Human Rights was critical of the judgments of the Court of Appeal in which the term "public authority" was given a narrow meaning. The Disability Discrimination Act 2005 placed a duty on public authorities to prevent discrimination against disabled people. That judgment presumably would be relied upon by a public authority if it moved just outside of the narrow definition that had been given by the Court of Appeal. Will they have to go to the House of Lords to get that sorted out?
Lord Phillips of Worth Matravers: If the facts were fairly and squarely within the decision of the Court of Appeal, and you could say, "Applying this decision of the Court of Appeal, this particular body would not be considered to be a public authority and therefore not within the scope of the Act," I think the answer probably would be yes. This is judicial precedent. But the case in question did not go to the House of Lords.

Q58 ***Lord Elton:*** An increasing amount of legislation has become justiceable as a result of European legislation and the Human Rights Act. How is that developing? How do you think it may affect relations between Parliament and the legislature in the coming years?
Lord Phillips of Worth Matravers: Parliament and the judiciary.
Lord Elton: Parliament as the legislature and the judiciary.

Q59 ***Baroness O'Cathain:*** And the Executive.
Lord Phillips of Worth Matravers: It is quite simple to state the judges' task, which is simply to apply the law. If there are areas of the law where the United Kingdom Parliament is no longer supreme, the court has to face that fact, and if it reaches the conclusion that an Act of Parliament is incompatible with European legislation, it has to say so. So far as the Human Rights Act is concerned, it cannot say that

the Act of Parliament is incompatible and is trumped by European law, but it simply makes a declaration that a particular Act of Parliament is not compatible with convention. That should not, in an ideal world, alter the relationship between the judiciary and Parliament. The judges are doing their job. It is a rather different job. The effect of what the judges are deciding is more dramatic. But many people make the mistake of personalising it and thinking this gives the judge *carte blanche* to overrule Parliament; it is undemocratic. It is not. The judge is just doing his job of applying the law and enforcing the rule of law. It is the law that is changed.

Q60 ***Lord Elton:*** In a perfect world, indeed. We do not live in a perfect world and I am really asking you whether this is going to throw grit into the machinery. Do you foresee this, as the volume inevitably increases, as needing some sort of palliative initiative as a result?
Lord Phillips of Worth Matravers: It risks throwing a bit of grit into the machinery. It risks provoking—and I will not give any specific examples, but I suspect everyone can think of examples where there have been reactions by ministers against judicial decisions which do not recognise that the judge was simply doing his job objectively to apply the law but suggested the judge may have had his own agenda.

Q61 ***Lord Elton:*** Then it comes to the Lord Chancellor presumably to protect the rule of law.
Lord Phillips of Worth Matravers: Then I hope the Lord Chancellor would step in.
Lord Elton: Thank you.

Q62 ***Baroness Hayman:*** As a constitution committee we have obviously been very interested in the implications of the judgments in *Jackson v Attorney General*. I wonder if you could tell us what you regard as the long-term constitutional significance of that judgment.
Lord Phillips of Worth Matravers: This is a case I was involved in in the Court of Appeal. The Court of Appeal suggested that there were implicit limitations on what would be achieved by the Parliament Act. The House of Lords disagreed and, therefore, for the constitutional implications we really need to do no more than read the speeches in the House of Lords and perhaps, particularly, Lord Steyn's analysis of the constitutional implication, which is, by the use of the Parliament Act, that Parliament can radically alter the constitutional framework. Of course, Lord Steyn suggested that, even there, there might be some explicit restriction on how far it can do so.

Q63 ***Baroness Hayman:*** You may not wish to answer this, but, in the responsibility of the judges to the rule of law, given that the Court of Appeal's view was overturned by the House of Lords and therefore there is not inherent in the statute that limiting mechanism, would you feel that constitutionally there was a limiting mechanism—an override, if you like?
Lord Phillips of Worth Matravers: I do not think I will answer that question. It is not a question it is really possible to answer. We are getting into very, very deep water when we are asking the question: Are there certain constitutional principles which are now entrenched and which Parliament is no longer in a position to change?

Q64 ***Baroness Hayman:*** Whenever I am asked how many times I will vote against the Government in the House of Lords, I say, "Well, I recognise the supremacy of the elected House, but I have an opt-out clause for the slaughter of the first-born Bill" you know.
Lord Phillips of Worth Matravers: Yes.

Q65 ***Baroness Hayman:*** I just wondered whether there was a judicial opt-out clause. But that you obviously do not want to be pressed on.
Lord Phillips of Worth Matravers: It will be a sorry day if we reach the crunch point.
Baroness Hayman: Thank you.

Q66 ***Chairman:*** Something that has interested this Committee quite a lot is the possibility of getting better post-legislative scrutiny. One of the ways of achieving that which has been suggested is that Acts of Parliament should be clearer in their purpose or, as you might call it, their objectives, and that, if that were so, it would make it easier to subsequently see whether Acts of Parliament had indeed produced the effects which had been contemplated by the Government in introducing them. I think we are very unclear what the attitude of the judiciary would be towards greater clarity of purpose, whether it is on the face of the Bill or on the explanatory notes, and what the attitude will be of those who have to interpret the legislation subsequently. I would be very interested in your views on that.
Lord Phillips of Worth Matravers: Ideally, the legislation should be so clear that the judge does not have to ask himself or herself the question: What is this trying to achieve? You can simply see what the Act says can or cannot be done and you apply it. Unfortunately, it is a fact of life that a lot of legislation lacks that clarity. The first thing I would say is that it is much better to set out to make sure your legislation is properly considered and is clear. We judges spend an awful lot of time in those kinds of situations looking behind the legislation to see what the purpose was as an aid to construction. There are quite complex technical rules as to what is and what is not legitimate to look at when trying to

see the purpose of the legislation. So I cannot simply answer the question just like that. If it made the judges' task easier, because there you have a statutory statement of the purpose, then I think judges would have no trouble with this at all and would find it made their life easier. But it all depends on how clearly this is done. If it were not done very clearly, you might then find you were in conflict between what is said to be the purpose and what the language of the Act seems to state, which could itself give rise to problems. It would involve consideration of a new approach to statutory interpretation. A lot of statutes have a preamble which tells you a bit about the purpose already.

Q67 ***Lord Carter:*** I believe the purpose clauses were quite common sometime ago and they have dropped out of favour. I have the feeling that one of the reasons was that the public realised they were more open to judicial review, if they had a purpose clause and it was not framed exactly correctly, as you have said. Recently we had a Bill which much to my surprise had a purpose clause: the Natural England and the Rural Communities Bill. As a former chief whip, I hated any idea of a purpose clause, because I knew what would happen: it would be debated endlessly at second reading and again we would have a second reading debate on every line of the purpose clause, which is exactly what happened on the Natural England Bill. It has led me to believe that they cause more trouble than they are worth because, unless you get it absolutely right and you think of every suitable way in which it could be interpreted, you could leave the argument open then for judicial review.
Lord Phillips of Worth Matravers: I think I would agree with what you have said but the proof of the cake is in the eating. If it actually makes the judges' job easier in interpreting the statute, fine, but it can give rise to problems. Certainly, if you set out a purpose, it opens the door to arguments on judicial review that this Act was being used in a way which is not consistent with the purpose for which it was passed.
Chairman: Perhaps this is a discussion I should have with Lord Carter some other time, but it is argued that for the House at second reading to discuss what the purpose is is exactly what the House should be doing, even if chief whips do not like it very much.
Lord Carter: That is fine. Not the clause.
Chairman: Let us get on, because time, sadly, is pressing.

Q68 ***Baroness O'Cathain:*** Are there types of public inquiry which you think a judge should not be asked to chair?
Lord Phillips of Worth Matravers: Yes. I do not think a judge should be asked to chair an inquiry with a political flavour. This is something that falls within my own experience because I was invited to chair the BSE inquiry. That inquiry was, by its terms, an inquiry into the conduct of a previous administration. When considering whether to accept the invitation or not, I considered very carefully the object of the exercise: Am I satisfied this is a genuine fact-finding inquiry or is it politically motivated? I satisfied myself that it was a genuine fact-finding inquiry and therefore I accepted the invitation to chair it. But if I felt it was politically motivated, I would have declined.

Q69 ***Lord Elton:*** You told us right at the beginning that you are responsible for the deployment of the judges. Does that mean that any invitation to sit on a public inquiry under the Act must be directed to you and not to an individual judge?
Lord Phillips of Worth Matravers: It is a very nice question. It is strongly arguable that, as I am responsible for the deployment of judges, my approval should be obtained before a judge is invited to chair an inquiry. I would hope, in practice, that I would be consulted if it was intended to invite one of my judges to chair an inquiry. I would expect a judge who was given that invitation to ask me what I felt about it, so it would be quite a good idea to ask me, first of all, what my views were about it. Ultimately, it is for the judge himself or herself to decide whether to accept the invitation.

Q70 ***Baroness O'Cathain:*** Would you discuss it with the Lord Chancellor?
Lord Phillips of Worth Matravers: I would expect the request for a judge to chair an inquiry to be made either by or through the Lord Chancellor and that I would discuss it with him.

Q71 ***Chairman:*** You will recall that Lord Woolf reported during the Constitution Reform Bill that the Judges' Council had expressed a view that it should go beyond consultation to concurrence, that there should actually be a sign-off by both the Lord Chancellor and you on behalf of the judiciary when a judge was to be appointed as chairman of a public inquiry. What is your view on that?
Lord Phillips of Worth Matravers: I think I would be happier with concurrence but at the end of the day I suspect it would not make any difference because I would be surprised if a judge would accept an invitation to chair an inquiry if I were unhappy about the judge doing so.

Q72 ***Viscount Bledisloe:*** Where you have said, "no, I do not think this is a suitable topic" and the Lord Chancellor has said "nonetheless, I want the judge",

are you happy that a judge could safely say, "I am sorry, I am not doing it" without detriment to his own career prospect?
Lord Phillips of Worth Matravers: Yes, I am. The Lord Chancellor is no longer in a position to control the career or prospects of the judge in question. If promotion is being considered it would be for the Judicial Appointments Commission or the statutory machinery, depending on what area they are looking at, to decide whether the individual is or is not going to find his career advanced.

Q73 ***Baroness O'Cathain:*** If the judge was asked to chair the inquiry and you did not think it was a very good idea and he went ahead and did it, could he go ahead and do it? Could you potentially say, "no, you cannot do it".
Lord Phillips of Worth Matravers: I am not in a position as a matter of law to forbid a judge accepting that invitation. This is part of the independence of the judiciary, that an individual judge, if he or she chooses to accept such an invitation, can do so.

Q74 ***Chairman:*** What you have just enunciated is the independence of judges whereas the issue is perceived by many people to be the independence of the judiciary, not the abuse rather than use by the Government to take hot potatoes and carry them around. The independence of a judge or the independence of the judiciary may be principles somewhat in conflict or could potentially be in conflict.
Lord Phillips of Worth Matravers: An individual judge might decide to do something which would reflect adversely on the public's view of the independence of the judiciary.

Q75 ***Chairman:*** Lord Phillips, you have been extremely generous with your time and your insights, we are grateful. I have one final question. Would you think it a good idea if we, as a Committee and if you were willing to come along, were to do this from time to time? I know we would find it very useful.
Lord Phillips of Worth Matravers: I personally am very happy to accept an invitation from time to time as long as it is not too frequent.
Chairman: Thank you very much indeed.