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The *Civil Contingencies Bill*

Bill 14 of 2003-04

This Bill would provide a new legislative basis for handling emergencies, including major terrorist incidents. Part 1 of the Bill imposes duties on a wide range of bodies to plan for dealing with possible emergencies. Part 2 would allow the Government to take extensive powers in an emergency, defined as a serious threat to human welfare, the environment or security. The Bill covers the whole of the UK.

Christopher Barclay

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Summary of main points

The Civil Contingencies Bill would update emergency legislation, including the *Emergency Powers Act 1920*. Part 1 of the Bill would impose duties on a wide range of organisations for tackling emergencies. Major terrorist incidents would be covered, but so too might major natural disasters such as serious flooding. The organisations in category 1 (including local authorities) would have a duty to prepare and publish plans to combat emergencies. Those in category 2 (including energy utilities and rail companies) would be statutorily obliged to co-operate with the emergency planners in category 1 and to share information with them. Part 2 of the Bill would provide for the Government to take extensive powers in the event of an emergency.

The Bill was published in draft in June 2003, along with a consultation document. Responses to the consultation document mostly considered that the proposed duties in part 1 of the Bill were reasonable. However, overwhelmingly they argued that the finance was insufficient to carry out their new duties.

Reaction to Part 2 of the draft Bill from the committees scrutinising the Bill, including a Joint Committee of the House of Commons and House of Lords, concentrated upon the proposed emergency powers. The draft Bill suffered major criticism for an excessively broad definition of "emergency" which would have allowed the taking of extensive emergency powers in a wide range of situations that did not warrant them. In addition, critics felt that parts of the draft Bill aimed to circumvent the European Convention on Human Rights.

The Bill has taken account of the criticisms of Part 2 of the draft Bill. The definition of "emergency" has been amended. The so-called "triple lock" preventing the taking of excessive emergency powers has been strengthened and inserted in the Bill. Some clauses with human rights implications have been removed. However, the Bill would still allow the Government to take very broad powers in an emergency, and its definition of "emergency" is still broad.

Response to the Bill is divided between organisations such as JUSTICE arguing that the changes from the draft Bill remove their main concerns, and those like Statewatch, which argue that their serious concerns about emergency powers have not been alleviated. LIBERTY can be categorised as falling between these two points of view.

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I Emergency powers in a democracy

A. The problem

The treatment of emergency powers is one of the most serious problems for a democracy. On the one hand, in a serious emergency it is natural to expect the Government to act swiftly to protect its citizens, without being held back by some abstruse legal nicety. On the other hand, if it is made too easy for a Government to take extensive emergency powers, then some future Government might abuse that option, in order to avoid democratic scrutiny.

Since 9/11, concern has increased dramatically about unprecedented terrorist actions. That was not the only reason for updating the legislation currently in force, some of which dates back to 1920. However, it has almost certainly affected the focus of the Bill. From a parliamentary point of view, it is unsatisfactory if powers are derived from legislation drafted so long ago, with completely different concerns from those of today. The *Emergency Powers Act 1920* was drafted at a time of concern about increasing trade union militancy (leading to the General Strike of 1926), along with the fear of Bolshevik agitators inciting unemployed ex-soldiers.

Emergency powers were extensively used in wartime, with dramatic restrictions on civil liberty largely unconstrained by the judiciary. Emergency powers have also been chosen as a solution of choice to certain peacetime problems. States of emergency were declared several times in the early 1970s to deal with the effects of strikes in essential services. No state of emergency has been declared in the UK since 1974. The powers are now being revised in the context of fears about extremely serious terrorism.

The Bill would not contain powers to detain subjects without trial, but some of the same issues arise as in powers of detention. How far does the possibility of appalling terrorism justify the suspension of normal democratic safeguards? What rights do the courts have to intervene in actions considered necessary by the Government to tackle an emergency? There is no simple answer to these questions.

B. The way the Bill deals with the problem

One important aspect of the Government's approach is its attempt to bring together different possibilities that can be classified as emergencies and dealt with by the same piece of legislation. For example, although nowadays one naturally associates the idea of "emergency" with terrorism, in some circumstances the Bill could also cover animal diseases, flooding and disruption of essential services.

The broad scope of the Bill represents a definite choice. It would be possible to have particular emergency powers made available as a result of particular types of emergency. It would be possible to have a *Flooding Act* to provide appropriate powers for tackling flooding, a *Supply of Essential Services Act*, and so on. *The Animal Health Act 2002* already provides those powers considered to have been lacking in the epidemic of Foot

and Mouth Disease in 2001. The problem with that approach would be that certain events might not quite be covered by the various categories in the individual Bills. A Government might either feel itself unable to act in an emergency or simply stretch the definitions in legislation in order to justify its actions.

However, the use of a single Bill to cover so many eventualities also presents problems. The draft Bill was criticised for allowing a wide range of events potentially to trigger the declaration of a state of emergency. The Government could then bring in emergency regulations for tackling it. Critics of the draft Bill doubted whether it would allow either sufficient Parliamentary scrutiny of potentially major powers or judicial review in the courts to prevent the powers from being used improperly.

The Bill retains a similar basic approach, but offers more safeguards. The definition of "emergency" has been amended. The protection against the taking of inappropriate powers, perhaps after a relatively minor emergency, has been greatly strengthened. In addition, the Government has removed a clause in the draft Bill that would have treated regulations made under the Bill as primary legislation from the point of view of the *Human Rights Act 1998*.

C. Other powers available to the Government

Even without this legislation, the Government would have powers available to it to act in emergencies. Existing emergency powers, including the *Emergency Powers Act 1920*, have enabled Governments to take a wide range of emergency action when needed.

In the absence of legislation granting emergency powers, the Government might take action under the royal prerogative. In that case, there would be less scrutiny and fewer safeguards than under the Bill. This is a complex area, currently under investigation by the Public Administration Select Committee. Their issues and questions paper about ministerial power and the prerogative notes that the prerogative covers not just powers relating to the Queen or the Crown but also to powers used by ministers:

> 3.3 **Ministerial prerogative or executive powers** form the category of prerogatives which is the main subject-matter of the Committee's current inquiry. Historically, the Monarch by constitutional convention came to act on ministerial advice, so that prerogative powers came to be used by Ministers on the Monarch's behalf. As Ministers took responsibility for actions done in the name of the Crown, so these prerogative powers were, in effect, delegated to responsible Ministers. But Parliament was not directly involved in that transfer of power. This constitutional position means that these prerogative powers are, in effect though not in strict law, in the hands of Ministers, and so more realistically could be dubbed 'Ministers' executive powers'. Without these ancient powers Governments would have to take equivalent authority through primary legislation. As with the legal prerogatives just outlined, the connection between these powers and the Crown, or the Queen, is now tenuous and technical, and therefore the label 'royal prerogative' is apt to mislead. Indeed, MPs have been prevented from raising certain matters in the House (such as honours) on the

> ground that these matters involve a royal connection, even though it may now be merely formal.[1]

Included among these powers is:

> The use of the armed forces within the United Kingdom to maintain the peace in support of the police;

The Anti-terrorism, Crime and Security Act 2001 also provides extensive powers in relation to terrorism. These powers were reviewed by a Privy Counsellor Review Committee, whose report in December 2003 summarised what that Act does:

> The Act was wide in scope, including additional powers for the police, and measures relating to information sharing, and to the security of airports and laboratories. Amongst the most controversial measures were those contained in Part 4 which permit the potentially indefinite detention without charge of foreign nationals suspected of involvement with al Qaeda, and associated terrorist networks, but who cannot be prosecuted or deported; and those in part 3 which allow public bodies to disclose information in pursuit of their own functions to assist criminal investigations and proceedings, here and abroad. The tax collection departments can also disclose information to the intelligence services. The enactment of part 4 required a derogation from the right to liberty under the European Convention on Human Rights…In common with previous emergency legislation, the Act provided for independent review.[2]

II Publication and scrutiny of the draft Bill

A. Publication

The draft Civil Contingencies Bill was published on 19 June 2003, along with Explanatory Notes, a Consultation Document and Regulatory Impact Assessments. Further information on the draft Bill is posted on the Civil Contingencies area of the UK Resilience website: http://www.ukresilience.info/ccbill/index.htm

The draft Bill was scrutinised by a Joint Select Committee of the House of Commons and the House of Lords, under the chairmanship of Lewis Moonie.[3] While that represents by far the most extensive scrutiny, the draft Bill was also scrutinised by two other select committees. The Defence Committee had already written reports on planning for civil

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1 http://mirror.parliament.uk/parliamentary_committees/public_adminstration_select_committee/pasc_no_12.cfm

2 Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, 18 December 2003, HC 100 2003-4

3 Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill*, 28 November 2003, HC 1074 2002-3

emergencies, pressing for a Bill in the 2002/3 session. Although the committee was not given the job of pre-legislative scrutiny, it produced a short report in July 2003.[4] The Joint Committee on Human Rights also reported briefly on the draft Bill in its regular scrutiny of legislation.[5]

The briefest summary of the results of the scrutiny might be that the idea of the draft Bill was generally welcomed, but that considerable concerns were expressed about the human rights implications and the potential lack of democratic scrutiny over the new powers.

B. The report of the Joint Committee, November 2003

The Joint Committee Report contained the following introduction and summary:

> **The Purpose of the Bill**
> 4. The draft Bill is "enabling" legislation, seeking (a) to create a statutory duty on the part of local bodies to develop contingency plans for dealing with a range of emergencies, and (b) to provide powers for the Government to make regulations to deal with proclaimed emergencies. It is in three parts and contains two schedules:
>
> - Part 1 (clauses 1 to 16) would apply only in England and Wales and sets out local arrangements for civil protection. It imposes on certain local bodies, described as Category 1 Responders, a statutory obligation to prepare plans for dealing with the wide range of civil emergencies defined in clause 1. Their duties will be outlined in more detail by regulations still to be published. Organisations listed as Category 2 Responders would be statutorily obliged to cooperate with the emergency planning and response processes and to share information with Category 1 Responders.
> - Part 2 (clauses 17 to 30) would apply to the whole of the United Kingdom and replace the Emergency Powers Act 1920 and the Emergency Powers Act (Northern Ireland) 1926. Under the draft Bill, a declaration of emergency can be made either by proclamation by Her Majesty or by a Secretary of State if he or she believes that a proclamation may occasion "serious delay". Clause 20 confers the power on Her Majesty or the Secretary of State to make regulations to control, prevent or mitigate the effects of an emergency, while clause 21 outlines their scope. A declaration of emergency can be made at a regional rather than national level.
> - Part 3 deals with repeals, commencement and the short title.
> - Schedule 1 lists what are described in Part 1 as Category 1 and 2 Responders.

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4 Defence Committee, *Draft Civil Contingencies Bill*, 10 July 2003, HC 557 2002-3

5 Joint Committee on Human Rights, *Scrutiny of Bills and Draft Bills; Further Progress Report*, 12 July 2003, HC 1005 2002-3

- Schedule 2 is a comprehensive list of repeals, including the Emergency Powers Act 1920 and the Civil Defence Act 1948.

5. We agree with the large majority of stakeholders who have shown general acceptance of the principle set out in Part 1, namely that local bodies should have a statutory duty to make contingency plans for dealing with a wide range of emergencies and Government should have a role in ensuring national consistency. We have concerns, however, that the draft Bill lacks sufficient detail or provides adequate safeguards against potential misuse. In the absence of publication of the regulations and guidance, we agree that the draft Bill is something of "a 'leap of faith' … because we cannot judge the legislation until we see the content of the regulations and also the funding".

6. Our consideration of the draft Bill has been undertaken in the knowledge that it is an enabling measure which may not be invoked for a generation or more. Our concern, particularly in respect of Part 2, is to ensure that the Bill does not provide any exploitable opportunity to misuse emergency powers and potentially, in a worst case scenario, allow for the dismantling of democracy. In the course of his evidence, the Minister in charge of the draft Bill referred several times to the need to achieve "balance" in the provisions. In our view, given the nature of the legislation, the emphasis should be on precision and clarity, to ensure that the principles of democracy cannot easily be undermined.

Definitions of Emergency

7. Both Parts 1 and 2 of the draft Bill provide very similar definitions of an emergency, the main difference being that Part 2 refers to a threat to "welfare", rather than "human welfare" as in Part 1, and a threat to human welfare under Part 2 is not inclusively defined, as it is under Part 1. The draft Bill defines an emergency as an event which presents a "serious" threat to: human welfare; the environment; political, administrative, or economic stability; and the security of the UK or part of it. These are then defined in further generalised terms.

8. An exceptionally wide range of events or situations may give rise to a threat within the meaning of the draft Bill, including political protests, computer hacking, a campaign against banking practices, interference with the statutory functions of any person or body, an outbreak of communicable disease, or protests against genetically modified crops, among many others. We believe that the definition is drawn too widely in both Parts, especially in Part 2, where it could trigger substantial emergency powers. We suggest that key terms, such as "serious", "essential" and "stability" must be defined within the Bill and that there needs to be a clear and objective trigger for action under Part 1 and 2. (Chapter 2)

Category 1 and 2 Responders

9. The Bill's Schedule 1 lists the organisations to be included as Category 1 and 2 Responders. Category 1 Responders will have a statutory duty to assess and plan for an emergency, with further details to be laid out in regulations made under the Bill. At present, they include local authorities, emergency services, ambulance trusts, the Environment Agency and the Secretary of State in relation to maritime and coastal matters. Category 2 Responders include utility companies, railways, airports and harbour authorities and the Health and Safety Executive. They will

be required, through regulations to be published under the Bill, to join with Category 1 Responders to establish arrangements for better communication, cooperation and information sharing.

10. The Government's Consultation Document asked stakeholders whether they thought the list was appropriate and we sent a separate letter to key NHS bodies and organisations in the energy, food and media sectors, asking whether they believed they should be included as a Category 1 or 2 Responder. We agree with a significant number of consultation responses, who questioned the role and statutory responsibilities of central, regional and devolved government. We believe that their status should be clarified and be subject to the same statutory duty as that imposed on Category 1 Responders. We recommend that key bodies within the NHS should be included in Category 1 and 2 and that Category 1 Responders should be given a statutory power to include voluntary sector organisations in planning for an emergency. We also suggest that Category 1 Responders should have the flexibility to select the most appropriate local voluntary organisations in planning and training exercises. (Chapter 3)

Human Rights

11. The draft Bill itself does not appear to contain any specific encroachment on human rights, but it is an enabling Bill under which regulations could be made which do breach such rights. Clause 25 for instance, would allow for regulations to "be treated as if it were an Act of Parliament" for the purposes of the Human Rights Act. We do not believe that the Government has demonstrated a clear and compelling need for clause 25 and agree with the Joint Committee on Human Rights that it "would, if enacted, give rise to a significant risk that regulations could be made which would violate, or authorise a violation of, Convention rights, without any judicial remedy being available for a victim of the violation".

12. We are concerned that regulations should not be able to contravene any of the inalienable rights protected under the European Convention on Human Rights. We recommend that the Bill prohibit regulations which would breach any of the Convention rights from which it is not possible to derogate or any provision in the Geneva Conventions. (Chapter 4)

Constitutional Issues

13. The list of possible constitutional issues raised by the draft Bill is extensive. Clause 21(3)(j) allows regulations to disapply or modify any Act of Parliament. In the wrong hands, this could be used to remove all past legislation which makes up the statutory patchwork of the British constitution. We believe that the Bill should list a number of fundamental parts of constitutional law that should be exempt from modification or disapplication. We suggest that regulations under Part 2 should be published from time to time and be subject to the same safeguards as primary legislation. One feature of some past emergency legislation is that it lapses after a set time unless renewed. We recommend that the powers in Part 2 should expire every five years from Royal Assent unless renewed beforehand by an order subject to the affirmative procedure. (Chapter 5)

Funding

14. At present, the top tier local authorities (Counties, Unitaries, Metropolitan Boroughs and London Boroughs) receive annual ring-fenced funding for emergency planning of just over £19 million through the Civil Defence Grant. It has been estimated that this is only 50 percent in real terms of 10 years ago and that local authorities currently contribute an additional £17 million from their own local resources over and above the £19 million they receive from Government.

15. The Government claims that the new statutory duties will impose negligible additional costs (after allowing for the "voluntary" expenditure local authorities already make), but we have heard from many local authorities that the new statutory duties cannot be undertaken without further drains on their budgets. Without knowing the detail of the regulations governing those duties, we are not in a position to develop an informed view, but the balance of probabilities is that there will indeed be a requirement for new money. We have heard unanimity that Government should meet the costs of emergency planning.

16. While we believe that there is a good case for central government to meet all emergency planning costs, the debate and the final decision need to be informed by facts, not assumptions. We believe that the Government should initiate, as a matter of urgency, a comprehensive review of the funding provision once the detail of the regulations is known. (Chapter 6)

Audit and Management

17. The Government considers that existing mechanisms are sufficient to ensure robust performance management, and has concluded that there is no need to establish an inspectorate to ensure operational effectiveness and financial efficiency. We share the view of the Association of Chief Police Officers (ACPO) that a dedicated civil contingencies inspectorate would better manage an inter-disciplinary environment, and enhance the profile of the process as a whole.

18. There is also some concern about crisis management in general. We recognise the merits of the "lead department" concept in terms of providing advice, but believe that the critical role of the Regional Nominated Coordinator in England (Emergency Coordinator in Scotland, Wales and Northern Ireland) should be allocated to an individual with proven management skills, preferably in crisis management. We also believe that the planning process would be enhanced through the creation of a Civil Contingencies Agency, which would incorporate the dedicated inspectorate. This would act as a source of advice on a range of contingency planning issues and should report annually to Parliament through the Home Secretary. (Chapter 7)

The Regional Tier

19. The proposed regional tier will be based, in England, on the Government Offices of the Regions, but at national level in Scotland, Wales and Northern Ireland. The Government suggests that the regional tier will have a coordinating role between central government and the region, and between regions and their local Responders.

> 20. There is no mention of the regional tier on the face of the draft Bill, apart from clauses outlining the appointment and duties of Regional Nominated Coordinators. We are concerned by the absence, in England, of a statutory basis for regional governance by appointees. We believe that the role of the regional tier should be detailed in statute on the face of the Bill; that it should be subject to the same range of performance criteria as local Responders; and that the role of democratically elected members on the regional bodies should be consistent across all regions.
>
> 21. The Bill allows for proclamation of an emergency to be made at a regional level. We question the wisdom of the intention, in England, to use the Government Office regions as its basis. These regions have been created for administrative convenience, are often very large and do not have a separate legal personality. We suggest that Part 2 should include the flexibility to proclaim emergencies in geographical rather than administrative areas in circumstances which so dictate.[6]

C. Other Scrutiny of the Draft Bill

a. The Defence Committee

The Committee welcomed the draft bill and called for prompt introduction of a Bill into Parliament. Amongst other things, the Committee:

- called for publication of illustrative regulations that might be made;
- was concerned about the proposal for regional nominated co-ordinators;
- called for a substantial increase in the membership of category 2;
- was concerned that the level of funding proposed for London in the consultation document was inadequate.
- called for the inclusion of the triple lock in the Bill;[7]
- concluded that the provision to treat specialist legislative measures as primary legislation for the purposes of the Human Rights Act should not be included in the bill unless the Government could demonstrate a clear and compelling need for the additional powers which it provided;
- believed that regulations made under Clause 2 of the bill should be subject to affirmative resolution by both Houses of Parliament

b. The Human Rights Committee

The Committee drew two major conclusions:

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6 Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill*, 28 November 2003, HC 1074 2002-3

7 This is explained in section E

> 3.4 In our view, the provisions of Part 1 are likely to enable public authorities to act more effectively to protect the human rights of people in their areas in an emergency. We do not consider that they give rise to a significant threat of a violation of human rights.
>
> 3.26 We strongly disapprove of any attempt to extend the range of instruments which have to be treated as primary legislation so as to make them exempt from the need to comply with Convention rights. It provides a way of allowing the executive to legislate, before seeking parliamentary approval, in ways which are known or believed to be incompatible with Convention rights, while denying victims of violations the right to obtain an effective remedy from a court or tribunal. In our view, regardless of the context, the effect of this legislative technique is objectionable on human rights grounds.
>
> 3.35 We conclude that the provisions of Part 2 of the Draft Bill would, if enacted, give rise to a significant risk that regulations could be made which would violate, or authorise a violation of, Convention rights, without any judicial remedy being available for a victim of the violation. As the Bill makes no provision for any other effective remedy before a national authority, it would also be likely to lead to a violation of the right to an effective remedy before a national authority for any violation of a Convention right, under ECHR Article 13 (which does not form part of national law, but binds the United Kingdom in international law and is enforceable before the European Court of Human Rights).

D. The Bill and accompanying documents, January 2004

The Government published the Bill on 7 January 2004, along with several other documents on the UK resilience website:[8]

- The Government's Response to the Public Consultation on the Draft Civil Contingencies Bill;
- The Government's Response to the Report of the Joint Committee on the Draft Civil Contingencies Bill;
- The Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005
- Full Regulatory Impact for Part 1 of the Bill

The Government response to the scrutiny of the draft Bill was published alongside the present Bill.[9] Very briefly, the Government accepted many of the points made by the Select Committees. While the Bill is in the same format as the draft Bill, it differs from the draft Bill in several ways designed to answer criticism by Select Committees and others. The main points are covered in the following sections, under subject headings.

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8 http://www.ukresilience.info/ccbill/index.htm

9 Cabinet Office, *The Government's Response to the Report of the Joint Committee on the draft Civil Contingencies Bill*, January 2004, Cm 6078

III Definition of emergency and a state of emergency

A. How the definition of emergency has changed since the draft Bill

The Bill contains two, very similar, definitions of emergency. Part 1 of the Bill concerns planning for protection against an emergency. Part 2 provides for emergency powers to be taken in an emergency. The difference in wording comes in clauses 1(1) and 18(1), with clause 1 covering more localised events.

Clause 1(1)

> In this Part "emergency" means an event or situation which threatens serious damage to-
> (a) human welfare in a place in the United Kingdom,
> (b) the environment of a place in the United Kingdom, or
> (c) the security of the united Kingdom or of a place in the United Kingdom.

Clause 18(1)

> In this part "emergency" means an event or situation which threatens serious damage to-
> (a) human welfare in the United Kingdom or in a part or region,
> (b) the environment of the United Kingdom or of a Part or region, or
> (c) the security of the United Kingdom or a part or region.

The scale of events constituting an emergency is different. The Government intends that clause 1 (and therefore the whole of part 1) should apply in relation to more localised events or situations whereas the scale of an event or situation must be greater before emergency powers may be used. The rest of the definition is the same in clause 1 and clause 18. The texts quoted below apply equally to each of the two clauses.

The definition of emergency is important for two separate reasons. In the first part of the Bill, duties are laid on certain bodies such as local authorities to plan to deal with an emergency. The definition tells them what to prepare for. The second part of the Bill grants powers to the Government to assume special powers in an emergency. A broad definition of emergency has two effects. It provides a wide range of events or situations for which certain bodies have to prepare. It also means that in a wide range of circumstances, the Government can take emergency powers, potentially raising civil liberties concerns.

Clause 18 (1) represents a change from the draft Bill, which also contained the category of an event or situation which threatens serious damage to:
the political, administrative or economic stability of the United Kingdom or of a part or region.

That category was widely criticised in the consultation over the draft Bill, for several reasons. It was not clear what planning could be undertaken to protect the country from such events; it was felt that the category duplicated other categories. Most important, perhaps, in the context of Part 2 of the Bill, it would have allowed emergency powers to

be assumed in a wide range of situations where they might not be appropriate. For example, the International Bar Association asked whether a stock market crash or a vote of no confidence in the Prime Minister would amount to a serious threat to the political, administrative or economic stability of the country.[10]

Clause 18 (2) of the Bill explains the meaning of 18 (1) (a) and presents slightly stricter criteria than in the draft Bill. In the Bill, an event or situation threatens damage to human welfare only if it involves, causes or may cause (followed by a list). The draft Bill had the phrase "if, in particular, it involves, causes or may cause". Thus under the draft Bill, something outside the list could still count as a threat to human welfare. The categories have also been slightly altered. Several are common to both: loss of human life; human illness or injury; homelessness; damage to property; disruption of an electronic or other system of communication; disruption of facilities for transport.

The draft Bill phrase: "disruption of a supply of food, water, energy, fuel or another essential commodity" has become "disruption of supply of money, food, water, energy or fuel". That brings the banking system back into the definition of emergency, but it also limits the scope by leaving out "another essential commodity".

The draft Bill phrase "disruption of medical, educational or other essential services" has become "disruption of services relating to health", in line with criticism from the Joint Committee that disruption of educational services did not justify emergency powers.

However, the restrictions on the definition of an emergency are slight and they are, perhaps, outweighed by a new sub-clause (5) in the clause 1 of the Bill stating that a Minister of the Crown, or, in relation to Scotland, the Scottish ministers, may by order-

(a) provide that a specified event or situation, or class of event or situation, is to be treated as falling, or as not falling, within any of paragraphs (a) to (c) of subsection (1);
(b) amend subsection (2) so as to provide that involving or causing disruption of a specified supply, system, facility or service- (i) is to be treated as threatening damage to human welfare.

This sub-clause does not require that reasons be given or that the Minister is satisfied that such action is necessary. It simply states that he may do it.

In other words, the definition of emergency still contains a catch-all element. If what can be done by order is included, the new definition may even increase the scope of the definition relative to that in the draft Bill.

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[10] Cabinet Office, *The Government's Response to the Public Consultation on the Draft Civil Contingencies Bill*, January 2004, p 3

B. A State of Emergency

The draft Bill followed earlier legislation in requiring the proclamation of a state of emergency before the use of emergency powers. The Bill drops that requirement. Clause 19 in the Bill brings together two items that were separate in the draft Bill: the declaration of the state of emergency and the power to make emergency regulations. The procedure in the draft bill was that the Queen would declare herself satisfied that an emergency had occurred and that it was necessary to make regulations for preventing, controlling or mitigating an aspect of the emergency. Alternatively, if the matter were too urgent for a Royal Proclamation, then the Secretary of State could declare the state of emergency. Then, while a Proclamation (or a declaration from the Secretary of State) was in force, Her Majesty could make regulations by an order in Council or, if the matter was too urgent the Secretary of State could make the regulations.

The Bill has completely dropped the idea of a state of emergency. At first sight, that might seem to make it easier for a Government to make emergency regulations in inappropriate situations, but that is not necessarily the case. The notion of declaring a state of emergency seems to be common across the world. Whenever one hears of a natural disaster abroad, the news seems is often followed by a statement that the President/Mayor/Governor/King has declared a state of emergency. There may, of course, be good reasons for such a declaration in some legal systems, particularly under a federal constitution where a region may have access to particular powers or particular state funds after an emergency has been declared. In the UK, however, it is far from clear that the need to declare a state of emergency offers any particular safeguards. It appears to have been politically acceptable to declare states of emergency in some periods, notably 1970 to 1974. Different solutions were found in other periods, even for similar problems, and no states of emergency have been declared in the UK since then. The notion that a state of emergency exists does not appear to be an objective measure of some quality of the country at that time. The following section discusses how current legislation was used to provide emergency powers in the period 1966-74, particularly 1973/4.

C. States of Emergency, 1966-1974

a. States of Emergency 1966 – 1974

During this period, states of emergency were used to combat industrial disputes considered to be seriously disruptive to the country. The emergency powers had to be renewed each month.

In May 1966 a state of emergency was declared because of the strike by the National Union of Seamen. The powers were renewed in June 1966.[11] Between 1970 and 1974

[11] 1966 SI 600; 1966 SI 740

emergency powers were frequently used. In July 1970 a state of emergency was declared in relation to the threat of a dock strike.[12] In December 1970 another state of emergency was declared in relation to a dispute in the electricity industry.[13] Neither was renewed. In February 1972 a state of emergency was declared in relation to a strike in the coal industry.[14] In August 1972 another state of emergency was declared in relation to a dock strike.[15]

In November 1973 a state of emergency was declared in relation to a dispute in the coal industry. This time the powers were renewed each month four times. The state of emergency lasted until the general election and resulting change of Government. Further primary legislation was passed to increase the emergency powers available.

b. The State of Emergency in 1973/4

Proclamation of State of Emergency

The states of emergency were proclaimed by messages from the Queen. The wording was similar in each case. This is the one in November 1973:

> **The Message from the Queen -**
> The Emergency Powers Act 1920, as amended by the Emergency Powers Act 1964, having enacted that if it appears to Her Majesty that there have occurred or are about to occur events of such nature as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, they deprive the community, or any substantial portion of the community, of the essentials of life, Her Majesty may, by Proclamation, declare that a state of emergency exists: and the present industrial dispute affecting persons employed in the coal mines and the electricity supply industry having, in Her Majesty's opinion constituted a state of emergency within the said Act of 1920 as so amended:
> Her Majesty has deemed it proper, by Proclamation dated the 13th day of November 1973, and made in pursuance of the said Act of 1920, as so amended, to declare that a state of emergency exists.[16]

The speech by the Home Secretary, moving a motion two days later on the state of emergency, showed how the powers were handled:

> It has been the practice of successive Governments – I am sure that it is a wise one – to make a complete set of emergency regulations at the outset. No Government can forecast precisely the course of any emergency, and this emergency is no exception.

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12 1970 SI 1042
13 1970 SI 1864
14 1972 SI 157
15 1972 SI 1164
16 HC Deb 13 November 1973 c 257

> The first substantive regulations are Nos 3, 4 and 5 which are concerned with the regulation of ports…Regulations 6 to 15 give power to relax restrictions governing the use of road vehicles…Regulations 16 to 20 are concerned with various public services and public utilities. Regulations 17 and 18 in particular are concerned with the supply of electricity and gas respectively…Regulations 21 to 29 deal with consumption and supply. my right Hon Friend has already made orders under regulation 21 restricting the consumption of electricity for certain purposes in connection with space heating and display and advertising lighting…Regulation 22 gives the Government power to regulate solid or liquid fuel or refiner products…The remaining regulations – 30 to 40 – are in the normal standard forms..[17]

He also stressed that there was no intention to use many of the powers "in the immediately foreseeable future".

In other words, at that time there was a standard set of regulations, which could be approved together and which would then provide the powers to act in a variety of situations. The Regulations were aimed at enabling the Government to keep essential supplies moving, while maintaining electricity and gas supply. There is no particular suggestion that those regulations were the only ones possible under the 1920 Act, as amended. It is simply that the states of emergency were declared in order to deal with strikes perceived to threaten such continuity.

Regulation 30 provided the power to requisition chattels. Ministers could requisition any chattel in Great Britain (including any vehicle, vessel or aircraft). Regulation 30(4) stated:

> Where a chattel is requisitioned under this Regulation, the competent authority shall pay to the owner of the chattel and to any other person interested in the chattel who suffers damage owing to the requisition such compensation as may be agreed or as may, in default of agreement, be determined by arbitration to be just having regard to all the circumstances of the particular case, so, however, that in assessing the compensation no account shall be taken of any appreciation of the value of the chattel due to the emergency.

Similarly, Regulation 31 provides for taking possession of land, but requires the payment of compensation. The emergency regulations were renewed every month.[18]

Use of the emergency powers

Orders were made under those powers, as soon as the state of emergency was declared. One order prohibited the consumption of electricity for space heating, except under a

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[17] HC Deb 15 November 1973 cc 680-3

[18] 13 November SI 1881; 12 December 1973 SI 2089; 9 January 1974 SI 33; 7 February 1974 SI 175; 7 March 1974 SI 350.

licence granted by the Secretary of State, in specified premises. These included offices, showrooms, shops, banks, petrol stations, restaurants, bars, studios, public halls, schools, churches and places recreation, entertainment or sport.[19] The other order prohibited the consumption of electricity for purposes of advertising or display, or lighting any area in the open air for the purpose of recreation, entertainment or sport, except under a licence granted by the Secretary of State or for certain specified purposes.[20] On 20 November, an order restricted the acquisition of petrol or diesel by requiring it to be supplied directly into a fuel tank.[21] There were numerous minor amendments to the various orders.

On 20 November the Government introduced the *Fuel and Electricity (Control) Bill*, which became an Act *o*n 6 December. Extra powers were required because the coal crisis had been complemented by the oil crisis in the Middle East. This Act gave the Secretary of State the legislative basis that could have brought in petrol rationing, along with further powers over the electricity industry. S.5 brought into force certain sections of the *Emergency Laws (Re-enactments and Repeals) 1964*.

Later orders were made partly under these pieces of legislation as well as under the original emergency powers. On 7 December a further order prohibited the heating above a temperature of 63 degrees Fahrenheit of the premises listed above.[22] Yet more restrictions on heating these premises were in another order, coming into operation on 13 December.[23] The previous motor fuel order was repealed and replaced by an order to restrict the maximum retail prices of motor fuel.[24]

According to Edward Heath's biographer:

> Behind the scenes…the Civil Contingencies Unit…prepared a complete emergency structure of regional government in the event of a large-scale breakdown of energy supplies…Across the country a network of regional commissioners was ready to maintain basic services, as in a nuclear alert.[25]

On 13 December 1973, the Prime Minister announced the "three day week", with industry restricted to using power on three days of the week. Orders were made under the *Fuel and Electricity (Control) Act 1973*. One order prohibited the use of electricity, except under a licence granted by the Secretary of State, on any industrial or commercial premises, for more than five days during the following two weeks.[26]

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19 *The Electricity (Heating) (Restriction) Order 1973* SI 1900
20 *The Electricity (Advertising, Display etc) (Restriction) Order 1973* (SI 1901)
21 *The Motor Fuel (Restriction of Supplies) Order 1973* SI 1943
22 *The Fuel and Electricity (Heating) (Control) Order 1973* (SI 2068)
23 *The Electricity (Heating) (Control) Order 1973* (SI 2092)
24 *The Motor Fuel (Maximum Retail Prices) Order 1973* (SI 2119)
25 J. Campbell, *Edward Heath: a biography*, p 571
26 *The Electricity (Industrial and Commercial Use) (Control) Order 1973* (SI 2120)

c. Northern Ireland, May 1974

A separate state of emergency was declared in Northern Ireland in May 1974. The fall of the Heath Government had been badly timed for Northern Ireland where a power-sharing executive had only been installed on 1 January 1974. In May, the Ulster Workers Council called a general strike to protest against Northern Ireland Assembly support for the Executive's policy. A state of emergency in Northern Ireland was declared on Sunday 19 May. The position was very unlike that in Great Britain in that the army was already deeply involved. Extra troops were sent out, to keep main roads clear from obstruction. There was a progressive interruption of essential services. A speech by the Secretary of State for Northern Ireland, Merlyn Rees, described how the leaders of the Executive had asked for a further limited operation;

> This request was considered by the Cabinet, and authority was given for it. It consisted of a plan to operate 21 petrol stations and two oil storage depots and to supply petrol and oil to essential users and chemicals to the Londonderry gasworks…The Army moved into the petrol depots at 5 a.m on Monday 27th May…[27]

However, the electricity situation worsened and the power sharing executive resigned shortly afterwards.

IV The duties in part 1 of the Bill

A. The suitability of the duties

As noted above, the Bill's Schedule 1 lists the organisations to be included as Category 1 and 2 Responders. Category 1 Responders will have a statutory duty to assess and plan for an emergency, with further details to be laid out in regulations made under the Bill. Category 2 Responders will be required, through regulations to be published under the Bill, to join with Category 1 Responders to establish arrangements for better communication, cooperation and information sharing.

The Government reported a basically positive response in the consultation exercise, while noting that many respondents commented that it was difficult to assess how effective and efficient the new statutory procedures would be, before seeing the detailed requirements contained in regulations. The Government then summarised what it is trying to achieve:

> Generally, the Bill is not prescriptive and will permit local responder bodies to carry out their civil protection duties in accordance with the exercise of their underlying functions. However, the Government's aim of achieving greater

[27] HC Deb 3 June 1974 c 881

consistency in civil protection arrangements across the country has led to a few standard requirements, including:

- The main civil protection duties under the Bill
- Differentiation between how the duties fall on two categories of local responder
- The formation of Local Resilience Forums on a standard basis
- Standard requirements for attendance at these meetings.

The achievement of a standard framework for delivery of civil protection across the UK will give Government greater confidence that the duties are being carried out in a similar manner and to a similar level in all parts of the country, with a greater ability to make comparisons as necessary and a better understanding, in the context of regional and national emergencies, of what local capabilities are. It will facilitate groups organised on a regional or national level (such as the utilities) when they engage in civil protection work at the local level because they will find a much greater consistency of approach between areas. Arrangements in shire areas will require further consideration in guidance. Because key local government functions, such as housing and environmental health, are located at the shire district level, and shire districts frequently are the local authority bodies first at the scene of an incident, it is right that the statutory duty should fall on them. Liaison arrangements with the shire County Councils and other local responder bodies will have to be handled carefully to avoid wasteful duplication.

The draft Regulations have been published at the same time as the Bill – *The Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005*.[28] Although they contain more detail than Clause 2 of the Bill, they are still at a very high level of generality. Further guidance on risk and risk assessments are likely to be issued by the Government.

Part 4 of the regulations, *Duty to plan for response to an emergency*, gives some idea of what the category 1 responders will have to do:

Duty to plan for response to an emergency

Risk assessment

11. In performing its duty under section 2(1)(c) and (d) (duty to plan to continue to perform functions or to respond, should an emergency occur), a Category 1 responder must have regard to any relevant assessment of risk which it has carried out under section 2(1)(a) or (b).

General and specific plans

12. In performing its duties under section 2(1)(c) and (d), a Category 1 responder –

(a) must maintain a single plan which relates to any emergency in relation to which a plan is required under those provisions; and

(b) may in addition maintain plans which relate to a particular emergency or a particular kind of emergency.

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[28] http://www.ukresilience.info/ccbill/draftregulations.pdf

Compulsory plans
13. Each Category 1 responder must maintain a plan under section 2(1)(c) and (d) in relation to [].
Procedure for determining whether an emergency has occurred
14.—(1) Any plan maintained by a Category 1 responder by virtue of section 2(1)(c) must include a procedure for determining whether an emergency has occurred which affects the ability of the Category 1 responder to continue to perform its functions.
(2) Any plan maintained by a Category 1 responder by virtue of section 2(1)(d) must include a procedure for determining whether an emergency has occurred which makes it necessary or desirable for it to perform its functions for the purpose of preventing the emergency, reducing,
controlling or mitigating its effects or taking any other action in connection with the emergency.
(3) The procedure required under paragraph (1) or (2) must–
(a) identify the person who should determine whether an emergency of the kind specified in
paragraph (1) or (2) (as appropriate) has occurred;
(b) specify the procedure which that person should adopt in taking that decision;
(c) specify the persons who should be consulted before such a decision is taken;
(d) specify the persons who should be informed once such a decision is taken.
Training and exercises
15. Every plan maintained by a Category 1 responder by virtue of section 2(1)(c) or (d) must include –
(a) arrangements for the carrying out of exercises for the purpose of ensuring that the plan is effective;
(b) arrangements for the provision of training of–
(i) an appropriate number of suitable staff of the Category 1 responder,
(ii) such other persons as that Category 1 responder considers necessary,
for the purposes of carrying out plans maintained under section 2(1)(c) or (d).
Plan revision
16. If a Minister of the Crown issues guidance or an assessment under regulation 9 to a Category 1 responder, that responder must consider whether that guidance or assessment makes it necessary or expedient to add to or modify plans maintained under section 2(1)(c) or (d).

B. Category 1 and category 2 responders

The Government noted that the consultation exercise had produced many responses relating to the inclusion of particular organisations in one or other category of responder. The Government explained the principles of its choice in its comments on p 11 of its response:

> The Government's aim in identifying specific organisations which should be included in the two categories is to consolidate civil protection activity at the local level and to develop greater consistency in arrangements across the UK. This will benefit everybody at all levels.
> The proposed arrangements focus in Category 1 on those organisations which are most likely to be involved in most emergencies, that is, the "core". In addition, responder bodies are identified in Category 2, which are particularly important in

> certain types of emergency, and which can play a key role locally in a support role, and which may themselves sometimes be the source of a local emergency… The Bill is particularly focused on *local* arrangements for *responder* bodies which have an operational role in emergencies. It does not directly concern itself with national arrangements in regard to the critical national infrastructure, which are outside its local focus. The current proposals for inclusion in the two Categories broadly reflect what exists at the moment and what works.

The Joint Committee made various more detailed recommendations for altering the lists of organisations in the two categories.

Local flexibility: The Joint Committee recommended that Category 1 responders should be able to require any person or organisation to co-operate in planning or training for a response to an emergency. The Government said that they could always invite people to co-operate but decided that a statutory framework was not suitable because of the danger of the framework growing out of control, with inconsistencies between areas and too many bodies involved.

Local government arrangements: The Joint Committee recommended that the responsibilities, in England, of County Councils and Shire District councils should be explicitly set out in the face of the Bill. The Government said that their approach will be made clear in regulations made under Part 1 and in accompanying guidance.

Fire and civil defence authorities: The Joint Committee recommended that the Government should consider leaving successful existing arrangements, like fire and civil defence authorities, in place. The Government said that a local authority would be able to delegate the performance of its duty to assess, plan and advise to a fire and civil defence authority.

NHS: The Committee recommended the inclusion of certain Health Authorities and Trusts in Category 1. The government accepted the principle of including such bodies, although it decided upon a slightly different list. Amongst other things, the Health protection Agency is to be in category 1.

Voluntary sector: The Committee recommended that a statutory duty be placed upon Category 1 responders to consult with and involve voluntary organisations in civil contingency planning. The Government felt that the imposition of statutory obligations upon voluntary organisations would be unrealistic and unwelcome, but welcomed the idea that they should be consulted.

Nuclear and chemical sites: The Committee recommended that Category 2 should include all operators of establishments subject to the control of Major Accident Hazards (COMAH) regulations. The Government considered the case for bringing the COMAH regulations under the umbrella of the Bill, but decided that integration across the two complementary frameworks was best done on a voluntary basis.

Private sector industries: The Committee recommended that the highways Agency, transport enterprises, fuel suppliers, the food sector and private security firms should be included as Category 1 or 2 responders. The Government accepted the Highways Agency, but considered it would be unreasonable to oblige private firms to attend local forums on a statutory basis. They could be invited when necessary.

V Funding

This is a major issue. Bodies on which duties have been placed are concerned that they will not be able to afford to carry them out. The consultation exercise made this clear. Two funding questions were asked. The first question found 56% agreeing that funding for Category 1 local authorities should be transferred from specific grant (Civil Defence Grant) to Revenue Support Grant. The second question asked "Do you agree that the level of funding to support the Bill is sufficient?" 90% disagreed and only 2% agreed.

Taken together with the proposed transfer into the Revenue Support Grant, the potential implications of underfunding are serious. Local authorities generally are under financial pressure, and they have limited flexibility to increase spending. Therefore underfunding of a statutory obligation to plan for emergencies is likely to lead to either inadequate performance of the statutory duty or funds transferred from other services, such as education, if the authorities were previously spending more than they were statutorily obliged to do.

The Government comments on this response were non-committal (p 22):

> The Government believes that all responsibilities of local government should be properly funded. Funding arrangements in the area of civil protection are kept under constant review. We have substantially increased the level of funding available for local civil protection over the last few years: 35 per cent increase for local authorities; investment in fire capabilities; additional funding for the police.
>
> There must be a clear and robust case for any additional commitment of resources. Resources must be carefully targeted where need is greatest. Any pressure for additional resources will be considered as part of the established public expenditure processes, which will be addressed in the 2004 Spending Review. This is an approach supported by the Local Government Association.

That reply does not tell the whole story, and the 35% increase comes from a very low base. Civil defence grant was only £14.4 million in each of 1998-99, 1999-200 and 2000-01. Since then the figure has been raised to around £19 million a year.[29]

[29] HC Deb 12 December 2002 c 405W

Funding is by far the area in which the respondents to the consultation exercise express most disagreement with the Government proposals. On question after question between 70% and 98% of respondents agree with duties and arrangements that the Government is suggesting. However, 90% of respondents believe that they are not being given enough money adequately to carry out their duties.

However, the £19 million civil defence grant figure is only one of the sources of Government funding available for the broad area of counter terrorism. The Consultation Document accompanying the draft Civil Contingencies Bill lists several other examples:

> 12. For example:
> • Under a £5 million programme, the Department of Health has provided 360 mobile decontamination units and 7,250 national specification Personal Protection Equipment (PPE) suits around the country, which will enable the Ambulance Service and A&E Departments to treat people contaminated with Chemical, Biological, Radiological, Nuclear (CBRN) material.
> • The CBRN Police Training Centre has been established at Winterbourne Gunner and has already delivered command training to at least four Commanders from each force.
> • The police now have over 2,350 officers trained and equipped in CBRN response, and this training roll-out is continuing.
> • The Office of the Deputy Prime Minister (HM Fire Service Inspectorate) has signed a Memorandum of Understanding with the Department of Health which provides for Fire Fighters to support the Ambulance Service by decontaminating people at a CBRN incident.
> • Fire brigades have all been involved in work to prepare for this role and an interim decontamination methodology has been disseminated to all brigades.
> • £43 million from the Capital Modernisation Fund, plus an extra £13 million from ODPM has been provided for the Fire Service to provide a national mass decontamination capability. Procurement of equipment (response vehicles, portable contamination facilities and specialist protective clothing) is underway, supported by development of training.
> • The Department of Health, in conjunction with Health Departments in devolved administrations, is funding measures to counter bio-terrorism:
> – A UK Reserve National Stock of vaccines and antibiotics suitable for the treatment of infectious diseases and specialist equipment has been built up over the past year and now stands ready for deployment. Guidance on handling infectious diseases was disseminated throughout the NHS in October 2001.
> – As the Minister of State for Health announced on 2 December 2002, 12 Regional Smallpox Response Groups are being established around the UK. Vaccine will be offered to volunteer healthcare personnel who will be able to react quickly and work safely with patients of actual or suspected smallpox. A similar group of specialist military personnel will also receive vaccination against smallpox. The Government has also identified reference laboratory centres capable of rapid diagnosis of the disease.
> – £16 million was allocated by the Department of Health in 2001-02 to provide healthcare countermeasures against CBRN agents and a further £80 million has been allocated for 2002-03, including spending on extra vaccines and antibiotics.

• All the emergency services have specific protocols for dealing with chemical or biological attack. These are regularly practised and refined. On 3 February 2003 the Home Office published Strategic National Guidance on the Decontamination of People exposed to Chemical, Biological, Radiological or Nuclear Substances or Materials for use by emergency services and other responders.
• Action has been taken to improve communications with local and regional responders through face to face briefings at senior level, presentations by the Civil Contingencies Secretariat at Emergency Planning College courses and a series of workshops in January and February 2003 in each of the Government Offices of the Regions to brief responders, including Emergency Planning Officers and the emergency services, on plans to enhance the regional resilience capability.
• Local authorities have seen specific Civil Defence grant rise by more than a third over the last two years to £19 million for 2002-03. The grant is central government's contribution to civil protection work undertaken by local authorities and is just part of what local authorities spend on resilience.
• In 2002-03, an additional £49 million of counter-terrorism funding has been given to the Metropolitan Police.
• Detailed work by London Underground has been carried out with the emergency services and Security Services to ensure systems are in place to deter or deal with an attack.
• The UK is now better able to anticipate and prepare for the potential impact of terrorist threats through a new capability within the Cabinet Office to identify potential challenges to the smooth operation of Government or the life of the nation. This complements the work of the Joint Intelligence Committee which provides strategic assessments on domestic and overseas terrorist threats.
• An important element of resilience is the confidence that plans will be effective on the day. A prioritised programme of exercises is being drawn up that will reflect and test effectively the Lead Government Department responsibilities, the involvement of devolved administrations, regional and local authorities and other responders. Under this new programme of co-ordinated exercises, it will be possible to test whether all key stakeholders are appropriately engaged and working together.
Future planned exercises will cover a catastrophic incident in central London, disruption to the national gas supply and flood defences. The programme is expected to cover key capabilities such as mass evacuation and decontamination.
• The April 2003 Budget awarded £330 million over three years for counter-terrorism projects in the Office for the Deputy Prime Minister and the Cabinet Office, as well as the Home Office.[30]

[30] Cabinet Office, *Draft Civil Contingencies Bill Consultation Document*, June 2003, pp 13-14

VI The Triple Lock in Part 2 of the Bill

A. The Government explanation of the original triple lock

The so-called "triple lock" is at the centre of the constitutional issues raised by the Bill. The Bill contains a very broad definition of emergency (in clause 18) and it also contains a wide range of powers that might be assumed in an emergency (in clause 21). The problem is how to be sure that the Bill is not used by a Government to take excessive powers on the basis of a relatively minor event that nevertheless falls within the definition of an emergency. The Government answer to this is the triple lock. The triple lock in the Bill is very different from the triple lock in the draft Bill.

The June 2003 Consultation document explained the original triple lock:

> 19. The definition [of emergency] is a starting point only, it is not intended that all incidents that fit the definitions will result in the use of Emergency Powers. The decision to use them in the event of an incident falling within the definition should be based on the following three guiding principles which represent a "triple lock" against possible misuse.
>
> - Seriousness - the situation must be serious enough in nature to warrant the use of Emergency Powers.
> - The need for special legislative measures - Emergency Powers allow the making of Emergency Regulations and should only ever be used if there is a genuine need to take such special legislative measures.
> - Relevant geographical extent - A need for special legislative measures should be declared on the minimum geographical extent required. A UK emergency should not be declared where the declaration of a regional emergency will be sufficient.
>
> 20. Many emergencies will fulfil one or two of the criteria, without achieving the triple lock. This reflects reality - many national emergencies can be dealt with within the existing legal framework. And any local emergency will not be serious enough to warrant special legislative measures - an event of that seriousness would be likely to have a regional or national impact even if it was a single point incident (for example, an attack on a nuclear power plant). The triple lock would restrict the circumstances in which special legislative measures could be instigated, to prevent calls for their use in inappropriate circumstances. Whether the three tests are met will be a matter for the Government to determine and to advise The Queen who will then normally make the formal declaration.

B. The Joint Committee criticism of the original triple lock

The problem, as the Joint Committee noted, was that the triple lock did not appear in the draft Bill. The Committee noted the Government response that it was reflected in various clauses of the draft Bill. The Joint Committee report explained:

33. The Government has sought to outline certain conditions that must be met before a state of regional or national emergency can be declared. These are described as the "triple lock" of seriousness, necessity, and geographical proportionality. We believe that in order for this to be an effective safeguard against potential misuse, the triple lock must be significantly strengthened.

34. A number of consultation responses and the Defence Committee's report echo our own concern that the triple lock is not readily identifiable within the draft Bill and that Ministers are not statutorily obliged to assess a situation against the triple lock criteria before declaring an emergency.

35. The Government has told us that the triple lock is reflected in various clauses in Part 2, including clauses 17, 18, 19 and 21. Given the confused and hurried circumstances in which an emergency is likely to be declared, when the only guidance to the Government of the day may be the legislation itself, it is vital that safeguards against misuse are made as clear on the face of the Bill as possible. We do not believe that scattering the three issues across the Bill gives it the clarity, visibility or importance necessary for a major safeguard against misuse.

36. In the light of the above, we welcome the Minister's statement when he gave evidence on 16 October. Although he declared himself satisfied that the triple lock was as robust in its present form as it would be in a single clause, he nevertheless agreed:

> "there is no reason why the triple lock cannot be gathered together from the various clauses of the draft Bill and presented in a single clause and if the Committee were so minded to recommend it, that would be something that would weigh heavily in the Government's deliberations about translating this from a draft Bill into a Bill that would be introduced in due course".

37. We recommend that the triple lock should be explicitly stated in a single or adjoining clauses on the face of the Bill, rather than mentioned in discrete sections. It should be a statutory condition that the triple lock test is applied before a declaration of emergency can be made.

38. We believe that the triple lock tests, as drafted, are insufficiently objective or clear to create a robust safeguard. Clauses 17 and 21 refer to the seriousness of a threat or effect, clauses 18 and 19 require that a proclamation/declaration is necessary, and clause 21(4)(f) contains the principle of proportionality in geographic terms. We consider these tests to be defective in the following respects:

- There is no express requirement of objectivity in any of the tests. The absence of the word "reasonableness" does not rule out review, for example, by the courts. However, it would signal a more rigorous standard of the exercise of powers and *ex post facto* review if it were to be included. We do not consider it to be acceptable that the existence of these conditions is exclusively for the Government to discern at will.
- The term "necessity" is left unexplained, except in clause 21(4)(e) where it is specified that the use of legal powers and resources normally available without the invocation of the Civil Contingencies Bill will not

be sufficient to deal effectively with the emergency. These notions should apply to other appropriate clauses in the Bill.

- Proportionality is explained in purely geographical terms. However, we consider that proportionality should also apply to the exercise of powers at three key points: when an emergency is declared, when the regulations are issued and when the regulations are applied. We are concerned about a 'one size fits all' approach, which might see powers triggered that are not proportionate to the emergency occurring. The notion of proportionality has been inserted into other recent legislation dealing with the rights of the individual, including the Anti-terrorism, Crime and Security Act 2001 and the Regulation of Investigatory Powers Act 2000.

39. We recommend that the triple lock include a test which measures whether the use of powers is proportionate to the nature of the emergency, as well as providing for geographical proportionality. The test of "reasonableness" should be inserted into the triple lock. The "seriousness" test (see paragraph 58) should be made more robust, given that "serious" is not defined anywhere in the Bill. The opening phrase in clause 21(4), "without prejudice to the generality of subsection (1)(a)" should be removed. It is confusing and can only undermine what is otherwise the clear intent of clause 21(4). Unless these recommendations are followed, there is a substantial risk that the idea of the triple lock in the Consultation Document will remain little more than rhetoric.

40. Additionally, as drafted, the triple lock seems to act as a mechanism to 'weed out' non-emergency situations which the overly broad definition of an emergency has inadvertently caught. We recognise its potential value as an additional threshold that must be surmounted before a declaration of emergency can be made, but the triple lock is not a substitute for an undesirably loose definition of emergency.

41. The Minister in charge of the Bill told us that the Government was considering putting a more explicit trigger on the face of the Bill. He suggested three possibilities: including a proportionate scale of emergency, "where a threat to a portion of the community or the community itself is deemed to be one of the criteria having to be met"; better defining the notion of serious; or an additional test that could be added to the Bill, perhaps "linked to the exercise of Responders in circumstances of emergency".

C. The new triple lock in the Bill

The Government inserted a new triple lock into the Bill, with clauses including the “necessity” and “due proportion” aspects, but with “seriousness” left to the definition of emergency. It explained in its Response to the Joint Committee:

> The Government agrees that the Bill should expressly provide that the provisions of emergency regulations should be in due proportion to the aspect of the emergency at which they are targeted. Clause 22 now provides for this. the nature of the “seriousness” test has now been made clearer to demonstrate that the damage threatened (rather than merely the threat) must be serious. The

> Government has considered carefully the Committee's recommendation to provide expressly that the person making the regulations must act reasonably. As the Committee acknowledge (at paragraph 206 of its Report), the absence of this word does not mean that the decision-maker can act unreasonably or that judicial review is prevented.
>
> Both Her Majesty (in this capacity) and a senior minister of the Crown are subject to a duty to act reasonably by virtue of public law. It is therefore unnecessary to provide specifically that they must do so in the Bill. To make express provision of this kind in the bill could be positively harmful; it might imply that action might be taken under other enactments that do not specify that the decision-maker must act reasonably which is unreasonable. So while the Government wholly agrees with the sentiment of the Committee on this point, it does not agree that it is necessary or appropriate to make express provision on the face of the Bill.
>
> The new triple-lock is as follows:
>
> 1 A **serious threat of damage** to human welfare, the environment or security must have occurred, is occurring or is about to occur.
> 2 It must be **necessary** to make special provision for the purpose of preventing, controlling or mitigating the emergency as existing legislation is ineffective or risks serious delay and the need for effective provision is urgent (cl.20(3) and (4)).
> 3 The effect of the provision must be in **due proportion** to that aspect or effect of the emergency it is aimed at (cl.22).

That triple lock is not a single or adjoining clauses, as the Joint Committee recommended, but its presence in the Bill is clearer and stronger than in the draft Bill.

D. Are the tests objective?

The Bill does not completely remove the element of subjectivity in the tests. Under Clause 19 Her Majesty by Order in Council (or a senior minister of the Crown if the matter is very urgent) may make emergency regulations "if satisfied that the conditions in section 20 are satisfied". The use of "satisfied" implies that there is some justification for the view. However, a stronger phrase might be "satisfied with reasonable cause".

These conditions in Clause 20 are phrased more objectively, as follows:

> (2) The first condition is that an emergency has occurred, is occurring or is about to occur.
> (3) The second condition is that it is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency
> (4) The third condition is that the need for provision referred to in subsection (3) is urgent.

Further sub-clauses require that emergency powers are being taken because existing legislation could not be used without risking serious delay. That might potentially be an important safeguard to prevent the taking of emergency powers in an area like animal health where there is already recent legislation.

The drafting of clause 21 on the scope of emergency regulations appears to be strongly subjective in both subsections (1) and (2):

> (1) Emergency regulations may make any provision which the person making the regulations thinks is for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency in respect of which the regulations are made.
> (2) In particular, emergency regulations may make any provision which the person making the regulations thinks is for the purpose of (list follows).

Clause 22 (1) also retains a subjective element:

> (1) Emergency regulations may make provision only if and in so far as the person making the regulations thinks-
> (a) that the provision is for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency in respect of which the regulations are made, and
> (b) that the effect of the provision is in due proportion to that aspect or effect of the emergency.

A textbook on administrative law notes:

> The general approach now is for the courts to require that a minister to produce reasonable grounds for his action, even when the jurisdictional fact is subjectively framed.[31]

A concern of some commentators is that the Bill might be misused at some time in the future, to give excessive powers to a Government. In such circumstances, judicial review would be one way in which such powers might be challenged. This possibility is considered in the following section.

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[31] P.P. Craig, *Administrative Law*, 4th edition, 1999, p494

VII Judicial Review and Emergency Powers

A. Judicial Review and the Bill

It may be possible to sketch out the provisions where judicial review might feature if the Bill were to be misused to give excessive powers to a Government at some time in the future.

The person making the emergency regulations under clause 19 must be satisfied that the conditions in section 20 are satisfied. The action of making the regulations might be challenged on the grounds that the person was acting unreasonably if the conditions were not satisfied. Clause 20 has a list of conditions for making emergency powers. The first condition is that an emergency has occurred, is occurring or is about to occur. "Emergency" under clause 18 means an event or situation which threatens serious damage to human welfare, the environment or security. Here there might be a challenge if the event or situation were not believed to threaten serious damage.

The second condition in clause 20 is that it is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency. There might be a challenge that the provision was not necessary. The third condition is that the need for such provision must be urgent. There might be a challenge that the need was not urgent. On the other hand, it would appear to be almost impossible to challenge the scope of emergency regulations under clause 21 because the regulations are lawful provided that the person making them thinks they are necessary for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency.

B. Judicial Challenge to existing Emergency Powers

There do not appear to have been legal challenges to the states of emergency in the period 1966 to 1974. This may be because the concept of judicial review was under development at this time. However, there have been challenges to other types of emergency powers, both before and after. A rough summary might be that judges would be willing to prevent use by the executive of what they considered excessive powers deriving from an emergency. However, judges are willing to take account of the reasons that led to the executive's decisions. In a serious emergency, judges will not intrude on policies that would be considered infringement of liberty in normal circumstances.

A constitutional law textbook notes that the nature of emergency powers in British law has changed during the 20th century. Initially, special powers were taken to deal with the consequences of war (*Defence of the Realm Act 1914*) and then large scale industrial unrest (*Emergency Powers Act 1920*). These measures tended to authorise the making of secondary legislation for a limited period, and for a specific end. In recent years the

threat of terrorism has seen the development of standing legislation, so that we now live in a state of "permanent emergency".[32]

The Civil Contingencies Bill would mark a return to the earlier strategy of specific emergency powers for a limited period, without abandoning the standing legislation. The textbook notes the difficulties of parliamentary control of emergency powers, continuing:

> It is thus up to the courts to ensure that these wide powers are not misused. But concern about the unenviable role in which they have been cast is hardly eased by Lord Hoffman's postscript in the *Rehman* case where he said that the events of 11 September 2001 in Washington and New York were
>
> > a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[33]

Wartime emergency regulations were challenged in the case of *Anderson v Liversidge*. Robert Liversidge had been sent to prison as a threat to public safety. The Home Secretary, Sir John Anderson, gave no reasons. The House of Lords supported that action in 1942, although Lord Atkin made a famous dissenting judgement. The headnote to the House of Lords judgement opened as follows:

> When the Secretary of State, acting in good faith under reg. 18B of the Defence (General) Regulations 1939, makes an order in which he recites that he has reasonable cause to believe a person to be of hostile associations and that by reason thereof it is necessary to exercise control over him and directs that that person be detained, a court of law cannot inquire whether in fact the Secretary of State had reasonable grounds for his belief. The matter is one for the executive direction of the Secretary of State…[34]

Lord Atkin dissented, arguing that some objective evidence for that belief was required. His argument would have allowed the courts to retain control over the process of imprisonment under wartime regulations. The majority judgement meant that they did

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[32] Bradley and Ewing, *Constitutional and Administrative Law*, 13th edition, p628
[33] Bradley and Ewing, *Constitutional and Administrative Law*, 13th edition, p628
[34] *Liversidge v Anderson*, [1942] A.C. 206

not have that control. Lord Atkin's dissenting judgement has often found favour with later judges. Another textbook on constitutional law notes later disagreement with the original judgement:

> In *Nakkuda Ali v Jayaratne* a strong Privy Council held that *Liversidge v Anderson* must not be taken to lay down any general rule on the construction of the expression "has reasonable cause to believe." Subsequently *Liversidge v Anderson* was described by Lord Reid in *Ridge v Baldwin* as a "very peculiar decision." Lord Diplock in *I.R.C. v Rossminster Ltd* thought that "the time has come to acknowledge openly that the majority of this House in *Liversidge v Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right."…It should not, however, be forgotten that the House of Lords, as evidenced by *McEldowney v Forde* in construing powers for dealing with emergencies may still give greater scope to ministerial discretion than subsequent judicial criticisms of *Liversidge v Anderson* might suggest.[35]

A textbook on judicial review gives an overview of changes in the attitude of judges towards the exercise of emergency powers:

> The exercise of statutory powers directly affecting individual interests is nearly always potentially reviewable, albeit that it may be on narrow grounds, at the instance of a person having appropriate *locus standi*, and the courts at different times have shown a variable degree of enthusiasm about intervening.
>
> Wartime and immediate post-war decisions ought now to be treated with caution. The emergency legislation of the Second World War gave the Executive vast powers over persons and property. The wording of the grants of power was sufficient, on a literal interpretation, to support the validity of almost any act purporting to be done under their authority, yet not only did the courts give a strictly literal interpretation to subjectively worded formulae; in their anxiety not to impede the war effort they declined to give a literal interpretation to a formula which prima facie enabled them to review the reasonableness of the grounds for exercising a discretionary power authorising summary deprivation of personal liberty. Such a measure of judicial self-restraint it is to be hoped will not be repeated except possibly in conditions of grave emergency. But a literal construction of the subjective type of formula was to reappear in a number of immediate post-war cases having only a remote connection with national emergency. Happily, a shift in approach to judicial interpretation has taken place since these cases were decided.[36]

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35 O.Hood Phillips and Jackson, *Constitutional and Administrative Law*, 8th Edition, p406

36 De Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th edition, para 6-014

VIII The potential scope of regulations

In a sense the key question about Part 2 of the Bill is what regulations (if any) will be made under these new powers. The question is not – and perhaps cannot be – answered in the Bill. Given the breadth of potential threats, the Government has chosen to draft the Bill to provide particularly broad powers. We simply do not know what use the Government might make of them in an emergency, partly because there is such a wide range of potential emergencies.

The *Evening Standard* painted a lurid picture of what might happen:

> The army and police will be given virtually unlimited powers in the event of a terrorist attack under Government plans unveiled today. Officers would be allowed to seal off any area the Government suspects could be the focus of an attack. Exclusion zones could be enforced by shooting to kill. Permission would be given for the summary arrest of terrorist suspects and detention without charge. Authorities would also be able to order mass evacuations and take over trains, buses and airports…The Civil Contingencies Bill is one of the most sweeping pieces of legislation ever framed in Britain and will give ministers more power than ever before.
>
> By declaring a state of emergency they will be able to suspend the normal workings of Government and law in the area affected – or even across the whole of Britain. Temporary legislation could be put in place without parliamentary approval to allow ministers to order any sort of action by police, military or civil service.[37]

It is clear that some of the article is based on the draft Bill rather than the actual Bill, for example the declaration of the state of emergency, which does not form part of the Bill. It is also incorrect to say that there is no parliamentary scrutiny under clause 26, see Section IX of this paper. There is a considerable difference between what a Government can do within seven days or so of an emergency without parliamentary scrutiny and what they could do after that, when parliamentary approval would be required. The Bill would not allow a slide into a permanent emergency, in which democratic processes would be sidelined, as happened, for example at the end of the Weimar Republic.

On the other hand, the powers made available in the early period of an emergency are potentially very broad. As noted above, if the conditions in clause 20 are met, then under clause 21 emergency regulations may make any provision which the person making the regulations thinks is for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency in respect of which the regulations are made. Clause 21 (3) then lists a long and broad range of possibilities:

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[37] "Unlimited new powers for army in terror attack", *Evening Standard*, 7 January 2004

> Emergency regulations may make provision of any kind that could be made by Act of Parliament or by the exercise of the Royal Prerogative; in particular, regulations may—
>
> (a) confer a function on a Minister of the Crown, on the Scottish Ministers, on the National Assembly for Wales, on a Northern Ireland department, on a coordinator appointed under section 23 or on any other specified person (and a function conferred may, in particular, be—
>
> (i) a power, or duty, to exercise a discretion;
>
> (ii) a power to give directions or orders, whether written or oral);
>
> (b) provide for or enable the requisition or confiscation of property (with or without compensation);
>
> (c) provide for or enable the destruction of property, animal life or plant life (with or without compensation);
>
> (d) prohibit, or enable the prohibition of, movement to or from a specified place;
>
> (e) require, or enable the requirement of, movement to or from a specified place;
>
> (f) prohibit, or enable the prohibition of, assemblies of specified kinds, at specified places or at specified times;
>
> (g) prohibit, or enable the prohibition of, travel at specified times;
>
> (h) prohibit, or enable the prohibition of, other specified activities;
>
> (i) create an offence of—
>
> (i) failing to comply with a provision of the regulations;
>
> (ii) failing to comply with a direction or order given or made under the regulations;
>
> (iii) obstructing a person in the performance of a function under or by virtue of the regulations;
>
> (j) disapply or modify an enactment (other than a provision of this Part) or a provision made under or by virtue of an enactment;
>
> (k) require a person or body to act in performance of a function (whether the function is conferred by the regulations or otherwise and whether or not the regulations also make provision for remuneration or compensation);
>
> (l) enable the Defence Council to authorise the deployment of Her Majesty's armed forces;
>
> (m) make provision (which may include conferring powers in relation to property) for facilitating any deployment of Her Majesty's armed forces;
>
> (n) confer jurisdiction on a court or tribunal (which may include a tribunal established by the regulations);
>
> (o) make provision which has effect in relation to, or to anything done in—
>
> (i) an area of the territorial sea,
>
> (ii) an area within British fishery limits, or
>
> (iii) an area of the continental shelf;
>
> (p) make provision which applies generally or only in specified circumstances or for a specified purpose;
>
> (q) make different provision for different circumstances or purposes.

There is no doubt that the legislation could be used to require a mass evacuation or to exclude everybody from a particular area. It is also clear that clause 21 could be used to deploy the armed forces in an emergency. That might mean soldiers helping people out of the way of floods or building emergency barriers. As such, the powers would not

provide for a policy of "shoot to kill". Sub-clause (c) allows for the destruction of property, animal life or plant life. It does not say "human life". On the other hand, there is a possibility that some emergencies would be met by determined force from the armed forces. Several issues might be raised – including liability for orders given to soldiers, possible immunity from criminal prosecution for soldiers who had killed, and possible civil proceedings. It is not clear that such action would be taken under powers in this Bill. As noted in section IC of this paper, armed forces could be deployed under the Royal Prerogative.

The House of Lords Select Committee on Delegated Powers and Regulatory Reform submitted a Memorandum to the Joint Committee scrutinising the draft Bill. It commented on the equivalent clause in the draft Bill in terms that could equally be applied to the clause in the Bill:

> Clause 21 sets out the nature and width of the power to make regulations. It is a very wide power indeed. Clause 21(3) provides that the regulations may make provision of any kind that could be made by Act of Parliament or exercise of the Royal Prerogative, and gives a non-exhaustive list of provisions which might be included. If this were not a draft bill to make emergency provision, we would strongly question the appropriateness of a number of aspects of the power (such as, for example, sub-delegation by directions or orders (whether written or oral) ((3)(a)(ii)), confiscation of property without compensation ((3)(b)), destruction of property, etc. without compensation ((3)(c)), prohibition of movement ((3)(d) and (e)), and prohibition of assembly ((3)(f))).[38]

It is clear, too, that the Bill would allow the Government to set aside existing law under clause 21(3) (j). It is recognised that such a power may be needed for emergency legislation. The Government's response to the Joint Committee quotes the opinion of Parliamentary Counsel, arguing that it would not be appropriate to include in the Bill a clause specifically preventing such a power from amending legislation of constitutional importance:

> We have sought advice from Parliamentary Counsel as to the scope of the power to "modify or disapply an enactment", and in particular whether it would permit regulations under Part 2 of the Bill to modify an enactment which has constitutional importance – such as the Human Rights Act 1998 or the Bill of Rights Act 1689.
>
> They have advised that each proposed exercise of such a power must be assessed by reference to whether or not it is within the class of action that Parliament must have contemplated when conferring the power. There are certain rebuttable presumptions as to what Parliament must have intended in conferring a power of

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[38] Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill*, 28 November 2003, HC 1074 2002-3

> this kind. These may be presumptions of common law (for example, the presumption against the imposition of taxation) or presumptions based on statute (for example, section 2 of the European Communities Act 1972 or section 3 of the Human Rights Act 1998). These presumptions apply even where Parliament has used general language. The courts have also suggested rules in relation to provisions of particular constitutional importance, requiring statutory modification to be express.
>
> The Bill does not contain any express provision that enables regulations under Part 2 of the Bill to modify or disapply a constitutional enactment. While the specific powers listed in the Bill are very wide ranging, they are capable of being exercised without interfering with a constitutional enactment. In particular, they are capable of being exercised in accordance with the Convention rights. Nor is the permission to do anything that an Act could do sufficiently precise to displace the general approach detailed above.
>
> In light of this, Parliamentary Counsel have advised that, in exercising the power conferred under Part 2 of the Bill, in the unlikely event of needing to use this power, Parliament will not permit interference either with a general presumption or with a "constitutional" enactment. However, it may be safe to assume that Parliament intended to confer the power to interfere with such a statute if the interference is trivial in so far as it concerns the substance of the presumption or the constitutional enactment.
> Given the inherent limits on the scope of the power, Parliamentary Counsel have advised that if we wished to be able to modify or disapply a constitutional enactment, we should take an express power to do so. We do not propose to do this.
>
> Without such an express power, we cannot presently envisage circumstances in which this power would lawfully enable us to make a substantive amendment to a constitutional enactment.
>
> In light of this, the Government does not consider that it is appropriate expressly to protect the enactments cited by the Committee from modification or disapplication. The effect of the current drafting appears to achieve the right result in a less inflexible way.
>
> The Government considers that the Civil Contingencies Bill itself is unlikely to be treated as a "constitutional enactment" for these purposes. The Government does not consider that it would be appropriate for emergency regulations to modify Part 2 of the Bill itself. Clause 21 in the new draft of the Bill reflects this.

There is nothing in the Bill about detaining suspects without charge. However, one newspaper article suggested that such powers might be added in an amendment to the Bill:

> It is understood Blunkett wants existing powers to detain foreign terror suspects without trial to be extended to all British subjects. The Draconian move could result in Britons who fall under suspicion spending years in jail without charges.

> Another controversial proposal is for police to be given the right to detail anyone in the "vicinity" of a terrorist attack. The new powers will be introduced as amendments to the already controversial Civil Contingencies Bill.[39]

IX Parliamentary Scrutiny

Clause 26 provides for distinctly more parliamentary scrutiny than would have been available under the draft Bill. When emergency regulations are made, a senior Minister of the Crown shall as soon as is reasonably practicable lay the regulations before Parliament. Clause 27 provides for the Queen to recall Parliament if it stands prorogued. The regulations shall lapse at the end of a period of seven days beginning with the date of laying unless during that period each House of Parliament passes a resolution approving them. If each House passes a resolution that emergency regulations shall cease to have effect, the regulations shall cease to have effect.

Clause 26(3) allows the regulations to be amended if each House of Parliament passes a resolution to that effect. This procedure, known as the super-affirmative procedure, is described as follows in the *Handbook of House of Commons Procedure*:

> A relatively new class of so-called "super-affirmative" instruments (currently encompassing regulatory reform orders, remedial orders and certain types of orders made under the northern Ireland Act 1998) which, except in certain cases of urgency (when they may be made and must be approved within a set time to remain in effect), have to be preceded by "proposals" to make such orders which, during a statutory period, are subject to various forms of consultation and parliamentary procedure which allow for amendments to be proposed by parliamentary committees or others. Ministers may choose to incorporate in the draft order such changes which follow from the consultation on the proposal to make such an order.[40]

The relatively unusual power to amend the regulations seems to be designed to improve the level of scrutiny available. If the two Houses had only the two options of approving emergency regulations or rejecting them, then it would be difficult to justify rejection if the consequence was the complete absence of emergency powers in force. However, the power to amend the regulations would allow the removal of one or more particularly objectionable regulations, while leaving the other emergency powers in force.

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[39] "Blunkett plans jail without trial", *Scotland on Sunday*, 11 January 2004

[40] Paul Evans, *Handbook of Commons Procedure*, 4th ed 2003, p 160

X Human Rights Issues

As noted above, the draft Bill was severely criticised on human rights grounds. The Government has made several concessions, as shown briefly below, in a summary from the Government Response to the Joint Committee:

Secondary legislation: The Joint Committee did not accept the need for treating secondary legislation as an Act of Parliament for the purposes of the Human Rights Act. The Government accepted the argument and decided not to include this provision in the Bill.

Protection for human rights currently mentioned within the Bill: The Committee recommended that the Bill should provide that regulations should not alter any existing procedure in criminal cases in any way which is inconsistent with Article 6 of the Human Rights Act. The Government accepted this point and has amended Clause 22 of the Bill accordingly. The Government also accepted the recommendation of the Joint Committee to ensure that the Council on Tribunals was properly consulted.

Protections for non-derogable human rights not currently mentioned in the Bill: The Government accepted that emergency regulations should be made compatible with the European Convention on Human Rights, but did not want an express provision to that effect in case it might cast doubt on the application of the Human Rights Act to other legislation where no express provision was made.

Interference with property rights without compensation: The Committee recommended that if any property was taken without compensation under the powers in the Act, then it should be specified that the action still complies with the convention and that steps are taken to ensure that insurance is available for any loss. The Government said that regulations could not infringe the Convention on Human Rights in any case. Whether the Convention rights require compensation to be paid would depend on the particular circumstances. It was not necessary to state explicitly that compensation would be paid when the Convention required it.

The Joint Committee on Human Rights will look at the Bill, but is not expected to report before the Second Reading debate.

XI Comment on the Bill

A. The Conservative Party

The Conservative Party criticised the Government for leaving the country unprepared for a terrorist attack, and called for a senior minister to have overall charge of planning for a terrorist attack:

> David Davis has called the Government to account over the long and confusing delay in gearing up for a potential terrorist attack on the United Kingdom.
>
> The Shadow Home Secretary accused ministers of failing to confront the looming threat, which was first exposed when Al Qaeda extremists launched their September 11 attacks on targets in the United States in 2001.
>
> Commenting following publication of the Civil Contingencies Bill, which provides sweeping new powers to deal with emergencies and terrorism in Britain, Mr Davis declared: "There is much in this Bill that is to be welcomed, and Conservatives will work to make the legislation as practical as possible.
>
> "However, this comes after two and a half years since September 11. The government has still not responded properly to the new threat that Britain faces. Despite the Prime Minister and others saying that we must expect terrorist attack, we have heard from countless other sources that we are not ready to deal with such an act. The government has failed to act speedily or adequately."
>
> He told conservatives.com: "The government must appoint a senior political figure - a Minister for Homeland Security - to have overall charge of preparing for any future terrorist attack. We urgently need a single, weighty and tough-minded political figure who can pursue ministers and departments to ensure that everything that needs to be done is being done."[41]

B. The Liberal Democrat Party

The Liberal Democrats concentrated on the danger of human rights abuses in the Bill:

> David Heath MP, Liberal Democrat Home Affairs spokesman, responding to the publication of the Civil Contingencies Bill, said:
>
> "Labour still appears to have a naive belief that future governments will always use extraordinary powers in good faith. That is not a sufficient guarantee for the future of our constitution or our human rights. People should be able to put their trust in the law, and especially so in times of emergency. Governments have a tendency to use emergencies as a smokescreen for draconian new laws, as we saw after September 11th. The Bill is in a better state than it was. The Government has listened to some of our concerns, but there are several sticking points to be resolved in committee."[42]

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41 Conservative Party News, *Britain unprepared for terror attack*, 7 January 2004

42 Liberal Democrat Party News, *Good Faith of Government an insufficient Guarantee – Heath*, 7 January 2004

C. LIBERTY

LIBERTY, a UK human rights and civil liberties organisation, remained concerned about the powers potentially available under the Bill:

> In reaction to the publication of the Civil Contingencies Bill today, Liberty's Director Shami Chakrabarti said:
>
> "The government has taken a step in the right direction. Their initial proposals were quite terrifying. But these present proposals remain worrisome. There needs to be absolute clarity about the definition of an emergency. Sweeping, draconian powers should not be exercised unless there is a serious and immediate threat to life and limb. Whenever the authorities try and vote themselves greater powers, there is a need to be cautious and sceptical. By reinstating the courts' powers to consider human right abuses under these laws, the government has made an important concession. I very much hope that further compromises will be possible when the Bill is debated in Parliament."[43]

D. JUSTICE

JUSTICE, an independent legal human rights organisation, considers that the changes to the draft Bill remove many of their concerns:

> JUSTICE welcomes the government's willingness to listen to criticism of its draft legislation, as shown by some significant amendments made to the Civil Contingencies Bill introduced today.
>
> In September 2003, JUSTICE gave evidence before the Draft Civil Contingencies Bill Committee in September 2003, criticizing the earlier draft Bill. Following that evidence, Cabinet Office officials met with human rights groups in October and November to discuss the criticisms.
>
> The Bill introduced today no longer prevents the courts from being able to strike down emergency regulations that breach human rights, and provides much-needed safeguards against emergency regulations that are either unnecessary or too broad in scope. At the same time, however, JUSTICE has continuing concerns over certain provisions:
>
> 1. The Bill's definition of 'emergency', while less sweeping than before, still allows for the imposition of emergency powers in certain limited circumstances which pose no obvious threat to public safety, such as disruption of the internet; and
>
> 2. The Bill still does not prevent specifically the amendment of the Human Rights Act 1998 by way of emergency regulation.

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[43] Liberty Press Release, *Response to Government's Civil Contingencies Bill*, 7 January 2004

> Eric Metcalfe, JUSTICE's Director of Human Rights Policy said:
> "We still have criticisms of the revised Bill, but it is a significant improvement on the draft Bill released in 2003. The use of pre-legislative scrutiny has made an important difference in this case and we trust the government will make greater use of it in future."[44]

E. Statewatch

On the other hand, Statewatch, a body monitoring civil liberties and the state in the European Union, remains strongly opposed to the powers that would be made available by the Bill:

> The government has published the Civil Contingencies Bill. There are a number of changes to the draft Bill presented last year and which was strongly criticised by a number of parliamentary committees. The changes to the Bill include:
> a. When defining what is an "emergency" the definition: "presents a serious threat" is replaced by "an event or situation which "threatens serious damage".
>
> b. The category in defining an emergency of "political, adminstrative or economic stability of the UK" (the protection of government and financial institutions) has been dropped. However, the government response to the parliamentary Joint Committee on the Bill says that powers would still exist for Regulations to be made which are designed "to protect or restore the activities of Her Majesty's government".
>
> c. A limitation is placed under "Conditions for making emergency regulations" (clause 20) stating that "existing legislation might be insufficiently effective"
>
> d. Responding to criticism clause 24 sets out that the Council on Tribunals must be *consulted* before a tribunal is set up under a Regulation.
>
> e. There is still no provision that parliament can vote on the declaration of an emergency - it is simply recalled. The procedure for adopting Regulations remains that of Statutory Instruments - which can, at a Minister's discretion, be approved if there are not sufficient MPs to force a vote (ie: a Regulation can be adopted by a "negative" vote, that is where no vote is successfully demanded). A new clause (26.3) says that if parliament agrees a Regulation "with a specified amendments" this shall be enacted. However, it is not at all clear that under the Statutory Instruments procedure amendments will be permitted - a precedent would have to be created to allow this.
>
> f. The extensive powers to prevent "assemblies" (protests), travel and "other specified activities" (undefined) are unchanged.

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[44] JUSTICE Press Notice, JUSTICE welcomes government rethink on emergency powers Bill, 7 January 2004

g. The contentious clause 25 in the draft draft concerning the Human Rights Act 1998 has been dropped (this would have precluded judicial review).

h. If Regulations are passed which apply to Scotland the Scottish Ministers are to be only "*consulted",* there is no reference to the Scottish Parliament. The same goes for Northern Ireland. For Wales the Welsh Assembly has to be "*consulted"* (clause 28)

i. The Schedule on "Responders" (those to act under the Regulations or at the "direction" of government Ministers) now includes a wider definition (Schedule 1, Part 3, 22.1) which extends the definition of telecommunications to cover not just phones but also expressly "the transmission of data" (e-mails, websites etc).

Tony Bunyan, Statewatch editor, comments:

"The concessions made by the government in no way change the fundamental objections to this Bill. The powers available to the government and state agencies would be truly draconian. Cities could be sealed off, travel bans introduced, all phones cut off, and websites shut down. Demonstrations could be banned and the news media be made subject to censorship. New offences against the state could be "created" by government decree. This is Britain's Patriot Act, at a stroke democracy could be replaced by totalitarianism".[45]

[45] Statewatch Press Notice, *UK Civil Contingencies Bill Published – Britain's "Patriot Act*", 7 January 2004