

RDEC-095-18（委託研究報告）

緊急狀態法制之探討

行政院研究發展考核委員會編印
中華民國96年10月

（本報告內容及建議，純屬研究小組意見，不代表本會意見）

RDEC-095-18（委託研究報告）

緊急狀態法制之探討

研究主持人：張文貞副教授

協同主持人：葉俊榮教授

研究人員及助理：王必芳博士、梁志鳴、
陸詩薇、陳陽升、陳品潔、
朱秋杏

行政院研究發展考核委員會編印

中華民國96年10月

第一章 前言

(本報告內容及建議，純屬研究小組意見，不代表本會意見)

目 次

目 次	I
表 次	III
提 要	V
第一章 前言	1
第二章 緊急狀態之性質及法理分析	3
第一節 緊急狀態的分類	3
第二節 緊急狀態的規範模式	12
第三章 緊急狀態之制度比較	17
第一節 美國	17
第二節 法國	24
第三節 加拿大	42
第四節 其他國家	50
第五節 國際規範架構:以反恐為中心	70
第四章 我國實踐經驗的分析及檢 討	79
第一節 921震災	79
第二節 SRAS疫情	96

緊急狀態法制之探討

第三節 風災水災等重大天然災害……………102
第四節 恐怖攻擊……………111

第五章 緊急狀態的法制與制度因應……………121

第一節 憲法層次的因應……………121
第二節 法律層次的因應……………130
第三節 執行層次的因應……………137

參考文獻……………141

附錄一……………159
附錄二……………163
附錄三……………205
附錄四……………217
附錄五……………289
附錄六……………323

表 次

表1：美國在冷戰期間的規範	6
表2：美國冷戰與反恐的規範比較	7
表3：愛國者法修法重要日期與事件表	19
表4：加拿大緊急法的規範類型	44
表5：各國（排除亞洲國家）憲法有關緊急狀態之規範	56
表6：亞洲各國憲法有關緊急狀態之規範	66
表7：聯合國12個主要的反恐公約整理	71
表8：九二一震災的傷亡統計	80
表9：其他法律當中有關921震災的規定	87
表10：九二一震災處理之其他措施	92
表11：天然災害大事年表	106
表12：災害防治相關規範沿革表	108
表13：我國反恐相關規範表	116

緊急狀態法制之探討

提 要

一、研究緣起：

台灣在過去十年間曾發生規模強烈的大地震、嚴重急性呼吸道症候群（SARS）的傳染病危機，以及接二連三罕見巨幅的風災及水災，在非常短時間內即造成人民生命財產及自然環境幾近不可回復的嚴重損害。這些天然或人爲的災害，不但考驗政府的危機處理量能，也暴露出我國法制上仍欠缺一套周詳規劃的法制基礎及政策工具，可以於緊急危難發生時立即予以有效因應。

與此同時，在國際上，美國的911恐怖攻擊、重創南亞的海嘯等重大災難，也引發國際社會檢討各國或國際有效因應恐怖攻擊或其他天然災害的法制，深刻體會到必須及早有一套完整規劃的應變法制、甚至是國際或跨國的合作，才足以因應緊急狀態待給各國或國際的重大衝擊。

二、研究方法及過程：

在此一研究背景下，本計畫即擬就我國如何因應重大天災、疫情、戰爭或其他政治、經濟、社會之緊急危難等緊急狀態的法制進行探討及初步建構。

首先，本計畫從法理規範的角度，分析緊急狀態的性質、成因，並探討不同緊急狀態的類型是否影響後續制度選擇與規範設計。其次，本計畫從比較制度的面向，深入分析各國的緊急法制，美國、法國、加拿大以及新興民主國家爲因應新一波緊急狀態而有的制度設計，尤爲本計畫所重視。

此外，國際間的相關規範也是此處探討的核心。再者，本計畫回顧過去台灣在各種緊急狀態的因應，尤其側重其法制與政策工具的選

緊急狀態法制之探討

擇來分析其利弊，希望能在過去經驗的基礎上，進一步探求適合我國的緊急法制建構。

三、重要發現及主要建議意見：

基於前述之研究分析，本計畫針對我國緊急法制之建構，從憲法、法律及政策執行的層面，提出具體的規範修改或政策選擇的建議。

本計畫認為現行憲法相關規範確實不足，而有修憲的需要，不過，考量到修憲門檻過高，在修憲之前，仍可以透過憲政實踐以及制度具有準憲法位階的法律的方式，來彌補現行規範的不足。

其次，在法律層面上，本計畫建議採取整合性立法方式，仿效加拿大之緊急法設計，將各種緊急狀態之成因納入同一部法律，但對於不同緊急狀態的類型，在國會監督、授權期限以及管制內容上給予不同的規範與效果。同時、司法救濟、補償、保險都是在緊急法當中必須納入的重點。

最後，在政策執行上，本計畫主張在行政體系下整合緊急因應的機制，在平時就必須儲備量能方能於變時充分因應。同時亦必須重視民間與政府的合作，將攸關緊急因應制度的資訊系統在平時即能建立與強化。

關鍵詞：緊急、緊急憲法、天然災害、反恐、憲政危機

Keywords: emergency, emergency constitutionalism, natural disaster, anti-terrorism, constitutional crisis

第一章 前言

台灣在上個千禧年底，發生有史以來規模最強烈的921大地震。政府為有效因應此一震災，首次根據憲法增修條文第2條第3項之規定，由總統發布925緊急命令，並在三天後經立法院追認。不到幾年，嚴重急性呼吸道症候群（SARS）的大規模感染危機衝擊台灣及全球，為了在短時間內有效防制此一疾病的擴散，政府不得不採取諸如隔離、封院、關校等特殊緊急措施，但卻也引發過度侵害人權的批評，甚至導致中央與地方政府的權限衝突。

不僅如此，受到全球暖化及氣候變遷的影響，台灣近幾年接二連三發生過去非常罕見的巨幅水災及風災，在非常短時間內即造成人民生命財產及自然環境幾近不可回復的嚴重損害。尤有甚者，因為最近政治上重大紛擾的持續，衝擊國內的經濟發展及社會安定，有人竟也提出以戒嚴或緊急體制等非常手段，作為快速解決政治危機的一種因應方式。

不管是天然的震災、風災、水災，重大疫病的傳染蔓延，甚或人為因素影響的政治、經濟或社會的重大危難，不但考驗政府的危機處理量能，也暴露出目前欠缺一套周詳規劃的法制基礎及政策工具，可以於緊急危難發生時立即予以有效因應。尤其我國憲法及增修條文僅以簡單二個條文規範戒嚴及緊急命令，對應於台灣這些年來屢次經歷之重大天然災害、疫病或政治經濟危機，明顯看出法制不足的困窘，也給予我們一個全盤檢討、研擬因應對策的契機。

其實，面對巨幅天然或人為災難的挑戰而必須積極省思調整相關之憲法、法律及政策基礎，並非台灣所獨有，更是這幾年全球各國所積極進行的一項重大工程。尤其是在2001年的911恐怖攻擊、2004年重創南亞的海嘯等重大人為或天然的災難之後，不但先進國家積極建制詳盡的緊急法制，新興民主國家更是深刻體會到必須事先有一套完整規劃的應變法制，才不致因巨大災難的衝擊，而進一步引發軍事政變、

緊急狀態法制之探討

政治動亂或其他外來侵襲，連帶影響其好不容易才建立並鞏固的民主憲政體制。

因此，本計畫擬就我國如何因應重大天災、疫情、戰爭或其他政治、經濟、社會之緊急危難等非常態時期的相關法制進行探討及初步建構。在制度上，本計畫亦將思考進一步緊急應變法制化的相關問題，法制化的可能選項包括政策研擬、修改法律、制定法律、甚或修改憲法。本計畫將對這些選項預作評估，以進一步提供將來政策規劃與落實之參考。

第二章 緊急狀態之性質及法理分析

任何國家都難免遭逢特殊之緊急狀態，然而，如何之狀態才能稱為緊急狀態？要如何認定？天災如地震、風災、水災？人禍如戰爭？重大疫病？我國憲法增修條文第2條第3項授權總統為避免國家或人民遭逢緊急危難或應付財政經濟上重大變故，得經行政院會議之決議發布緊急命令，並於事後交立法院追認。此一條文雖然規定緊急命令發布之條件（即：國家或人民之緊急危難、財政經濟重大變故），然對究為緊急危難或重大變故，仍缺乏明確定義或判斷標準。

同樣地，憲法第34條僅規定總統得依法宣布戒嚴，並未詳細規定何種情況方得予以戒嚴。根據目前之戒嚴法規定，戰爭或叛亂為宣告戒嚴之原因，然而這並非來自憲法上的直接規範，在理論上立法者仍可透過修法來擴大或限縮戒嚴之原因及情狀。憲法對於緊急狀態的規範愈不精確，相關決策機關（總統及行政院）及制衡機關（立法院）在緊急狀態的宣告及各項措施的採行上就愈有裁量的空間。¹

儘管目前憲法對於緊急狀態未能給予明確之詳細規範，但我們仍然可以從學理上探討緊急狀態各種可能不同之成因及類型，進而就其性質來分析衍生之規範法理。

第一節 緊急狀態的分類

一、傳統二元分類：天然/人爲 v. 內在/外在

緊急狀態從其成因來看，可以分為天然(natural)與人爲(man-made)、外在(exogenous)與內在(endogenous)。不過，這些二元

¹ 法院對政治部門在緊急狀態之相關決定的審查空間，在學理上及制度上亦有相當之爭議與論辯，容後再述。

式的分類難免會面臨中間類型的挑戰。例如戰爭雖然是人爲，地震當然是天然，但利用病毒或生物物質而引起重大疫情的現代恐怖戰爭，就很難絕對劃爲天然或人爲。

危機分爲外在(exogenous)與內在(endogenous)，外在的例如戰爭(war)與入侵(invasion)，內在的包括內戰(civil war)與恐怖攻擊(terrorism)。而國際恐怖攻擊(international terrorism)介於兩者之間。²

二、新興類型：恐怖攻擊

傳統的法律概念無法有效含括恐怖攻擊，恐怖攻擊不能被界定爲戰爭，戰爭的對象是明確的（例如德國軍人），然而任何人都可能被懷疑與恐怖攻擊共謀。戰爭也會有結束的一天，但恐怖攻擊卻沒有明確的終止日期。透過戰爭來理解會使得人民的基本自由權利陷入被無止盡侵犯的可能性中。

恐怖攻擊也不能單單被界定爲如同幫派般的犯罪。有人認爲恐怖戰爭與「向犯罪宣戰」、「向毒品宣戰」一樣都只是宣傳手法，既然瀕臨毀滅性戰爭邊緣的冷戰時期都沒有凍結人身保護的適用，更沒有理由在面對恐怖攻擊時作這樣的限制。但是兩者還是有所差異，黑道常常安於在政府權威下度日，但恐怖攻擊卻是對政治權威的挑戰，而對其唯一回應的有效方式就是向受到驚嚇的人民顯示政府正採取有效的措施來對抗敵人。這就是重建信心的功能，當恐怖攻擊衝擊國家主權的有效統治時，政府必須快速地向人民展現其處理危機的能力，向人民顯示破壞只是短暫的，並且政府正採取積極的措施來避免接下來的危機。³

² Ferejohn, John & Pasquino, Pasquale (2004) "The Law of the Exception: A Typology of Emergency Powers," 2 *Int'l J. Const. L.* 210.

³ Ackerman, Bruce (2004) "The Emergency Constitution," 113 *Yale L.J.* 1029.

三、恐怖攻擊 v. 冷戰？

當今最大威脅之恐怖攻擊究竟屬於何種型態的威脅？與過去之冷戰(Cold War)又有何區別？此一議題引起美國憲法二位大師Ackerman及Tribe的精彩論辯。

(一)恐怖戰爭與冷戰的性質

Ackerman認為冷戰與恐怖戰爭有所差異：冷戰是一種不確定的威脅，但恐怖攻擊是可以預見必然會一再發生的具體危險；並且，冷戰所欲避免的危機一旦爆發，帶來的是人類文明的存亡與毀滅，這和恐怖戰爭的影響範圍不同，恐怖攻擊不會使國家面臨存亡，而是著重在打擊人民對政府的信心，因而政府需要採取措施重建人民的信心。Ackerman也指出，戰爭與犯罪的概念都不能處理恐怖戰爭，對視死如歸的攻擊者祭出刑罰是沒有用的，也沒有具體的對象可以發動戰爭。

Tribe則回應認為，冷戰與恐怖戰爭其實在很多面相上十分相似，兩個時代同樣盛行懷疑論，擔憂美國社會存在許多敵人的細胞，或是願與敵共謀者。而兩個時代的政府也都投注很多心力試圖找出這些敵人的共謀者。並且冷戰同樣不符合戰爭或刑罰的概念，其不是傳統定義的戰爭，檢察體系、行政程序、立法調查所採取的相關措施，也都與平常不同（Tribe沒有提到司法）。當然冷戰與恐怖戰爭還是有差異，冷戰是一段長期且持續的國際相互競爭狀態，而不像如恐怖戰爭是由一系列的具體事件構成，然而如果換個角度來想，這些具體事件其實也構成了一段長期且持續的衝突狀態，從這個角度出發，恐怖戰爭參考冷戰經驗的意義就增加了。⁴

⁴ Tribe, Laurence H., & Gudridge, Patrick O. (2004) "The Anti-Emergency Constitution," 113 *Yale L.J.* 1801.

表1：美國在冷戰期間的規範

Alien Registration Act (Smith Act)		將「鼓吹、煽動、支持武力顛覆政府」之行爲入罪化。
		將犯上述罪行之外國人驅逐出境（Deportation）。
		外國人入境需註冊並按壓指紋（registered & fingerprinted）。
Internal Security Act	TITLE I	禁止建立極權獨裁政體、獲取交流機密資訊之行爲。
	Subversive Activities Control Act (McCarran Act)	對共黨成員任職之機會加以限制。
		共黨組織及其成員應進行註冊，並定期報告其活動。
		設置顛覆活動監控委員會、規範其組成、職權、及不遵守其決定之罰則。
		加強入出境管制、將危險人士驅逐出境，並嚴格限制歸化要件。
	TITLE II	賦予總統宣告進入國內安全的緊急狀態（internal security emergency）
	Emergency Detention Act	授權檢查總長逮捕、拘禁任何其有合理理由認爲正從事陰謀或破壞之人（本法律未被實際適用，但CIA等情報機關爲準備實行本法，進行大規模的國內監聽與蒐證）。

來源：作者製表整理

表2：美國冷戰與反恐的規範比較

	Cold War		War on Terror	
設立專責組織	SACA	設立顛覆活動監控委員會（Subversive Activities Control Board）管理共黨團體的註冊事宜。	HAS	設立國土安全部（Department of Homeland Security），防止恐怖份子攻擊美國本土，減輕受到恐怖攻擊所造成的傷亡損害，並負責災後重建等工作。
			MCA	設立軍事委員會（Military Commissions），負責與恐怖主義相關案件的審判。
			RIA	建立國家情報總監（National Intelligence Director），負責管理並監控美國政府的情報活動，包括反間諜活動以及國外間諜活動。
強化資訊流通與管制	SACA	僅將獲取或流通機密資訊之行爲予以入罪化。	Patriot	促進隱私資訊的公開；強調相關部門間的資訊流動與公開；強化外國與本國的情報工作。
			HAS	規範政府機關取得資訊（包括敏感性資訊）的權利，以及自願提供資訊的相關規範。

緊急狀態法制之探討

			RIA	NID之任務在管理並監控美國政府的情報活動,包括反間諜活動以及國外間諜活動。
			IRTPA	總統應建立資訊分享環境,並設置主管資訊分享的官員,以使聯邦、州、地方、各種族的政府單位以及其他非政府單位間,能夠流通有關反恐的資訊。
嚴格入 出境管 制	SACA	加強入出境管制、將危險人士驅逐出境,並嚴格限制歸化要件。	Patriot	對邊境與入境的控管更加嚴格。
			IRTPA	規範邊境/入境控管與簽證相關事項,尤其規定北方國境的控管
	Smith	將犯本法所列罪行之外國人驅逐出境;外國人入境並需註冊並按壓指紋(registered & fingerprinted)	HAS	防範恐怖份子透過陸路、水路、空路等不同方式進入美國,嚴格控管發給簽證的程序(例如擔保)以及加強對非法居留者的查核等
對敵人之處遇	Smith	將共黨顛覆政府之行為予以入罪化,並驅逐出境	Patriot	賦予政府更大的權限及範圍以調查犯罪;拘束人身自由,並構成人身保護令狀制度的例外。
			DTA	禁止關達納摩灣監獄(Guantanamo Bay)的囚犯獲得人身保護令,或對

第二章 緊急狀態之性質及法理分析

	EDA	授權檢查總長逮捕、拘禁任何其有合理理由認為正從事陰謀或破壞之人（本法律未被實際適用，但CIA等情報機關為準備實行本法，進行大規模的國內監聽與蒐證）。		拘禁的情況或條件提出異議。
			MCA	規範特殊刑事程序，例如授權戰犯以及與恐怖主義相關的審判得由軍事委員會進行、減輕證據法則對囚犯的保護、或限制被告或囚犯接見律師的權利受等等。
預防國際洗錢及金融犯罪	無對應法律		Patriot	<ol style="list-style-type: none"> 1 強化對金融機構的監控。 2 課與金融機構公開敏感性隱私資訊或紀錄的義務。 3 懲罰貨幣走私與偽幣製造。 4 對於不配合反恐的外國進行貿易制裁。
面臨攻擊時之因應	無對應法律		HAS	規範對化學性、生物性、放射性及核能攻擊的反制。除了研擬對人民生命財產的保障之外，也應支持相關的科學技術研究，並且規範與其他單位或機構間的權限分配與移轉；國土安全部並應和聯邦、州及地方政府的其他相關單位一起合作因應緊急狀態。
受害者	無對應法律		Patriot	特別提供因為恐怖攻擊而受傷、失能、喪生者，以及

緊急狀態法制之探討

保護			因執行反恐職務而受傷或致死的人員或其家屬補償與照顧。
風險因應	無對應法律	TRIA	建立一套再保險的機制，由政府的力量介入發生恐怖攻擊時的保險市場以分擔風險。

SACA : Subversive Activities Control Act (McCarran Act)

EDA : Emergency Detention Act Smith : Alien Registration Act (Smith Act)

HAS : Homeland Security Act Patriot : The PATRIOT act

DTA : Detainee Treatment Act MCA : Military Commissions Act

IRTPA : Intelligence Reform and Terrorism Prevention Act

RIA : 9/11 Recommendations Implementation Act

來源：作者製表整理

(二)冷戰的司法結構

冷戰的經驗是：司法仍然如一如往常的運作，透過常態的憲法架構來處理冷戰所面臨的問題。這和Ackerman排斥司法的角色相反，Ackerman認為司法權的行使在緊急狀態時容易落入法律形式主義（legalism）或是普通法的迷霧（the common law fog）中，甚至與一般大眾一樣陷入恐慌狀態，而做出遺害後世的判決，因此Ackerman強調政治部門的功能。

冷戰的經驗當然無法盡善盡美，判決有時國家利益佔優，有時個人權利出頭。但這正是常態司法運作的自然結果。法官在此過程中擺

盪在「人權保障/國家安全」的不同立場間，其往往對權利或國家利益何者為重意見相左，也對權利的具體內涵充滿歧見。但法官其實清楚知道彼此立場的不一致，因此在彼此意見的衝突中，必須提供足以整合上述不同立場的論理：因為，必須將彼此的立場整合在一起，才能夠比較出彼此意見之間的優劣。而也就在這不斷彼此論辯的過程中，法官不斷回到憲法的深層結構尋找論點的依據，憲法的深層結構也因而一再地被彰顯。此一深層結構不但是美國長久以來累積的成果，也是其與其他國家足以區分的差異（換言之，常態司法的運作雖不完美，但會走向呈現既有憲法的深層結構，因而可稱之為反緊急狀態的法制）。具體個案結論的搖擺正顯示司法與憲法的運作在緊急時期與常態無異，這正是Tribe認為美國在面臨恐怖攻擊時所應該學習的。這樣的功​​能只有法院積極面對危機才能彰顯，而不是像Ackerman所主張的全部丟給政治部門去解決。冷戰時期的法官能夠扮演這樣的角色，最後達到拆解冷戰法制的目的，沒有理由認為今日的法官無法發揮同樣的功能。

四、類型化的問題

世界各國的憲法在處理緊急狀態時，往往不區分各種不同的危機。例如南非憲法就透過單一的條文規範緊急狀態的啟動，其發生在「國家的生存受到戰爭、入侵、大規模叛亂、失序、自然災害或是其公共急難之時」。Ackerman認為這種藉由單一一套制度面對所有危機的設計（one fits for all），是一種錯誤的法制。以恐怖攻擊為例，就不是傳統以國家存亡為思考出發點的法制所能處理，而需要不同的制度設計。因此，比較進步的作法是針對不同的危機作區分，例如加拿大的緊急法律就是很好的突破，其區分四種狀況，並針對不同的狀況作不同的制度設計，包括天然災害、對公共秩序的威脅、國際局勢緊張（International emergencies）、以及戰爭狀態。其中，公共秩序的威脅需要國會每30天重新授權，但戰爭狀態則是每120天。

第二節 緊急狀態的規範模式

對於緊急狀態的規範，傳統看法認為必要性凌駕一切(Necessity knows no law)，對法秩序是否能有效規範緊急狀態採取質疑態度。不過，近代法治之演變逐漸由此種懷疑論轉為積極立場。不過，法秩序如何規範緊急狀態，仍有不同看法。

一、一元論 v. 二元論

一元論者認為法制沒有假期，不論在regular government或exceptional government都適用同一套法律；二元論者則認為緊急時期應採取緊急法制。二元論者的假定是確實存在緊急狀態，而在統治結構上，二元論往往會產生多元統治結構與獨裁統治的區分，亦即平時強調權力分立，緊急時刻則轉為獨裁（不過此一區分有例外，例如強調議會主權的國家，在平時或緊急時刻都是一元的統治結構）。二元論又可區分為新羅馬模式（強調憲法化）與立法模式（用立法手段賦予行政權限）。⁵

二、憲法模式 v. 立法模式

(一)憲法模式

憲法模式的基本觀點認為：「例外體制應受憲法條文事前監督」(exceptional government has to be regulated ex ante by constitutional ad hoc provisions)，其基本精神在於彰顯人民與政府對緊急權力濫用的警戒。⁶

⁵ Ferejohn, John & Pasquino, Pasquale (2004) "The Law of the Exception: A Typology of Emergency Powers," 2 *Int'l J. Const. L.* 210.

⁶ *Id.*

憲法對緊急權力的控制有兩種可能，一種是學習古羅馬之緊急法制，將宣告進入緊急狀態（憲法或最高法院）的機關與行使緊急權之機關（總統或總理）予以分離，使得行使緊急權的機關在政治上或法律上不負任何責任。另一種則是將宣告及行使緊急權之機關合一，但是這些決定必須向法院或其他機制負責。第一種方案是強調事前控管，確保宣告進入緊急狀態之機關沒有私人動機（因為其非行使緊急權之機關）。第二種方案則強調事後控管。

對緊急憲法的控制涉及四個面向，宣告進入緊急狀態（羅馬為元老院）、緊急權之行使（羅馬由獨裁者行使，且不受任何限制）、緊急狀態之終結（羅馬規定在憲法本身）、對緊急權行使的期中干預或事後審查（羅馬未提供任何管道）。當代憲法對這四個面相各有不同設計，例如德國針對緊急權的行使規定某些基本權利不得取消，法國則規定緊急權的行使不得制定「法律」，而只能採取措施（measures）。

（二）立法模式

並不是每個國家都有緊急權的憲法條文，英國就沒有，而只能透過立法來處理緊急危機。然而，不管有沒有緊急權的憲法規定，當代憲政民主國家常常傾向於不使用憲法的緊急權機制，而透過一般性的立法或行政措施來面對緊急危機。其可能的理由有二：一是政治人物對於緊急權的行使趨於謹慎；二是現代科技的進步使得政府在常態法制下處理危機的能力獲得增強。因此，只有法國訴諸緊急權以處理阿爾及利亞危機，其他國家在面對內國或國際恐怖主義時，都透過立法賦予行政機關處理權限來加以解決。⁷

原則上，立法模式的目的是在於回復原狀，透過立法機關制定暫時性但與一般法律地位無異的法律，藉此授與行政機關暫時性的處理權限，以面對緊急危難。立法模式的另一個特點，是決定進入緊急狀態的機關與創設緊急權力的機關合而為一（國會）。

⁷ Id. at 210-12.

立法模式建立在兩個信念上：第一，國會的立法目的是回復原狀，因而是暫時性的；第二，因為是由國會（民意機關）授權行政機關處理權限，因此行政機關的措施是受到國會、亦即人民所支持的。然而這些信念可能是有問題的，作者就認為立法模式內蘊著危險：首先，立法機關可能來不及立法因應危機；其次，國會立法在緊急狀態下可能會缺乏足夠的行政監控；最後，尤其重要的一點是，處理暫時性危機的法律可能會變成常態法律體系的一部份，就像英國不斷延長 Defense Against Terrorism Acts 的日落期限。如果美國的 PATRIOT Act 獲得延長，也會產生一樣的效應。

三、短暫偏離 v. 暫時廢棄

偏離（derogation）是與既有的法制狀態產生部分或暫時性的差異，這種暫時性的差異會衍生出正當化的需求。廢棄（abrogation）則是全面的推翻。而在緊急狀態時，基於回復原狀的目的，可以允許對既有法制狀態做出一些暫時性的偏離，以達到回復先前法制狀態的目的。就像 Schmitt 區分 *Verfassung* (the constitution) 和 *Verfassungsgesetze* (constitutional norms)，爲了確保政體憲政秩序（憲章—前者），某些個別的憲法規範（憲律—後者）可以被暫時性的懸置。這可以用以下的結構說明：⁸

- A. 存在有既有的規範狀態（Norm）
- B. 緊急狀態是對既有規範狀態的偏離（derogation）
- C. 緊急狀態對既有狀態的偏離必須具有足以正當化的理由（The justification of the derogation）

緊急狀態必須足以正當化對既有狀態的偏離，而這種對既有狀態的偏離又必須是爲了追求一些更高，值得保護的憲政秩序或原則。換

⁸ Id. at 215.

言之，也就是必須以追求回復原狀為目的，如果國會在緊急時期的立法卻產生永久持續的效果，那就超越了緊急權的界限而進入了制憲權威的行使。

緊急狀態法制之探討

第三章 緊急狀態之制度比較

第一節 美國

一、憲法相關規定

美國聯邦憲法對於緊急狀態並未有詳細規定，其中唯一的相關條文是第1條第9項第2款關於人身保護令(writ of habeas corpus)的規定。該款規定請求人身保護令的憲法上權利，除在國家遭遇叛亂或入侵且基於公共安全需要外，不得予以限制。⁹ 針對「叛亂」或「入侵」這兩個概念的詳細內容，制憲者原意難以探究。如果就憲法的文本來看，「入侵」的概念不等同於「戰爭」，而是強調對「政府維持秩序之能力的挑戰」，當主權的有效行使被挑戰，此時人身保護的暫緩就得以正當化。叛亂概念的核心要素則在於透過暴力試圖推翻或公開挑戰政府的統治權威，上述兩個概念的界定都符合恐怖攻擊的目的，亦即對國家捍衛領土及有效統治能力的挑戰。當然，任何概念界定都會有灰色地帶，而最高法院仍是最後仲裁者。

二、國家緊急法(National Emergency Act, NEA)

由於美國聯邦憲法對於緊急狀態並未有詳細規定，緊急狀態之權力運作以及對於基本權利的保護或限制，就有賴法律進一步的規定。國家緊急法(National Emergency Act, NEA)就承擔此一重要的規範功能。不過，NEA卻也存在著許多問題。

首先，NEA賦予總統單方宣告緊急狀態的權利，但卻對相應的諮詢或報告程序規定不清。其雖規定國會「應該」每六個月集會商議是否

⁹ 原文為：“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it.”

緊急狀態法制之探討

終止緊急狀態，但此一規定從未被真正實踐，法院也沒有相應的法律基礎(legal remedy)來強制其履行。另外，就算國會試圖行使此一權利，實踐上也很困難。在NEA制定之初，國會規定兩院協同的多數同意可以終止緊急狀態，但卻被最高法院宣告違憲。國會後來規定兩院應聯合通過達三分之二的決議（因為這涉及總統的否決權），而這在國家遭遇緊急危難時根本是不可能的任務。不過即便缺點如此的多，由於NEA是憲法之外關於緊急狀態最重要的規範，仍有相當之重要性，重點是如何使其更為完善。¹⁰

三、愛國者法(USA PATRIOT ACT)

(一)本法制定背景

愛國者法(Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001)¹¹，簡稱為USA PATRIOT ACT。法案提案人為James F. Sensenbrenner，首次通過於2001年10月24日，制定當時於參眾兩院都分別獲得高票支持¹²，並由美國總統George W. Bush於2001年10月25日簽署。本法係因應九一一恐怖攻擊而制定，位階為聯邦法，本法制定的主要目的是使美國政府得以之有效對抗國內及國外的恐怖主義行動，本法主要採取的反恐手段，是賦予美國國內執法機構以及國際情報機構更大、更多的權力及資源，以防止、偵破和打擊恐怖主義活動。

¹⁰ Ackerman, Bruce (2004) "The Emergency Constitution," 113 *Yale L.J.* 1029.

¹¹ HR 3162 RDS, 107th CONGRESS, 1st Session, IN THE SENATE OF THE UNITED STATES, October 24, 2001. Citations: Public Law: 107-56, U.S. Statutes at Large: 115 Stat. 272(2001)

¹² 參議院表決票數：98:1，眾議院表決票數：357:66

依據本法224條¹³，必須於06年12月31日前由國會進行再授權 (reauthorized)，法案方能繼續生效。本法修法過程重要事件與日期整理如下表：

表3：愛國者法修法重要日期與事件表

重要日期	事件內容
2005.12.08	參眾兩院代表達成協定，同意將愛國者法中的兩項爭議條款：竊聽條款、搜查紀錄條款之有效期限延長為4年。
2005.12.14	眾議院擬將14項條款無限期延長，而另3項延長四年
2005.12.21	參議院同意將愛國者法中的幾項爭議條款有效期延長為6個月
2005.12.22第一次延期	眾議院司法委員會主席森森布倫納表示反對。隨後眾議院22日透過口頭表決方式，同意將原訂12月31日到期的愛國者法關鍵條款有效期延長1個月，並送交參議院表決通過，經總統簽署後，愛國者法之效力確定延長至2006年2月3日。
2006.01.04	布希總統於白宮會見政府高層官員和司法界人士，公開敦促國會修正愛國者法。

¹³ SEC. 224 SUNSET.

(a) IN GENERAL- Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

(b) EXCEPTION- With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect.

緊急狀態法制之探討

2006.02.02 第二次延期	再次延長至3月10日
2006.02.03	依據第一次延長條款之原訂到期日
2006.03.02	參議院以89票對10票的表決結果，通過延長愛國者法
2006.03.07	眾議院以280票對138票的表決結果，通過延長愛國者法
2006.03.09 修正案正式通過	布希總統於白宮簽署愛國者法延長修正案
2006.03.10	依據第二次延長條款之原訂到期日

來源：作者整理

(二)愛國者法的核心宗旨：強化安全，防止並制裁恐怖主義

1、強化政府對於人民的監控手段

(1)、賦予政府更大的權限、更大的範圍以調查犯罪，尤其是關於疑似恐怖活動、大規模毀滅性武器等。

(2)、賦予政府更大的權限在刑事訴訟程序以及犯罪偵防時拘束人身自由，爲了特定目的，例如防止嫌犯脫逃、湮滅證據或其他有必要的情況下，得以延後令狀之通知。

(3)、促進資訊公開，賦予政府更大的權限，竊聽電話、電報、網路等電子隱私資訊，並使得特定人員，例如銀行、商店等在反恐的需求下，必須向調查人員公開客戶資料。

(4)、在特定的情況下，司法部長有權請求軍事協助。

(5)、對於邊境安全的控管更加嚴格，採取指紋辨識系統、DNA 認證系統等控管入境者的身分，對於移民或外籍學生的調查、控管也

更嚴格，目的是要讓恐部分子或有犯罪嫌疑者無法入境美國，預防恐怖分子滲入美國本土。

2、強化政府單位的力量

(1)、強調部門間的資訊流動與公開，檢察官、警政單位（FBI）、國土安全部等與反恐相關的單位間，資訊應該互相流動，職務應進行協調，以促進反恐法律的有效實施，並且「讓左手知道右手在做什麼」。

(2)、擴張總統的權限，爲了美國的利益，保護美國人民的生命及財產，總統得在特定情況下採取特定的行動。

(3)、設立反恐基金以預防、調查、懲罰恐怖主義行動，對於反恐相關單位，例如美國聯邦調查局，提供技術支援。

(4)、強化情報工作，規定在何種情況下可以使用外國情報，以及本國單位應如何確保情報工作安全。

3、國際洗錢及金融犯罪之預防

爲了避免國際恐怖分子透過洗錢方式取得資金，強化政府對於金融單位的監控，擴張執法機構與金融管理機構之間的協調、溝通機制，要求金融單位紀錄特定資訊，並且在一定的情況下必須通報或向調查者公開客戶資料，懲罰貨幣走私及偽幣製造，並且對於不配合反恐行動的外國進行貿易制裁。

4、對於受害者的保護

特別提供因爲恐怖攻擊而受傷、失能、喪生者，以及因執行反恐職務而受傷或致死的人員或其家屬補償與照顧。

(三)恐怖攻擊保險法(Terrorism Risk Insurance Act, TRIA)

911事件對保險業造成了空前的衝擊，不只是一夕之間造成了龐大的賠償金額，傳統保險商品的區分在恐怖攻擊也無法提供風險分攤的功能，更重要的是，保險業缺乏對於恐怖攻擊的相關資訊，此資訊的黑洞使得恐怖攻擊的風險無法被適當的pricing。因此，由於風險過

高，又缺乏充足的資訊，保險業往往選擇離開保險市場，因而造成市場供給的下降，需求卻上升，保費因而不正常的上漲。

爲了回應此問題，美國政府的反應是制定Terrorism Risk Insurance Act (TRIA)。TRIA是一種再保險計畫，由政府承擔恐怖攻擊的風險，試圖藉此使保險市場的供給與需求回復正常。嗣後保險市場確實趨於穩定，但是否可以歸功於TRIA，卻有許多爭論。更重要的是，TRIA是由政府介入分攤風險，而並沒有改變保險業本身的結構，因此保險業本身回應恐怖攻擊風險的能量並沒有增強。

隨著日落條款的逼近，許多人開始鼓吹TRIA的展延，以免保險市場回復911後不正常的狀態¹⁴。作者認爲由政府所從事的再保險計畫也許可以用來在國家經濟面臨緊急危機時發揮功能，但是卻不宜常態化，理由有很多，主要是在於政府對於風險的評估與移轉並不像私領域或市場一樣有效率，這是因爲：首先，政府是單一的，某個行政機關中的單一部分專門負責此項業務，不若自由競爭的民間；其次，政府決策混雜了太多非經濟的因素，而不是純然被追求利益的動機所推動¹⁵。如果不採取TRIA，那麼恐怖攻擊作爲保險業所面臨的長期經濟困境，究竟應該如何解決？政府在其中的角色又爲何？

爲什麼保險業無法處理恐怖攻擊？這必須從保險的四個條件，randomness、mutuality、accessibility、feasibility分別來看，恐怖攻擊作爲一項風險，滿足「具可保險性風險」的前三項要件¹⁶，但是第四項要件卻有所欠缺¹⁷，保費會居高不下。這與保險業者必須保有足夠的資本，以免危機發生時破產有關，另外也部分來自國家的稅制與管制結構，這些成本最後都呈現到保費上。正因如此，政府的角色就成爲問題。

¹⁴ Robert Rhee (2005), *Terrorism Risk in a Post-911 Economy: The Convergence of Capital Markets, Insurance, and Government Action*, 37 *Ariz. St. L.J.* 435. at 487-489.

¹⁵ *Id.* at 489-492.

¹⁶ *Id.* at 465-473.

¹⁷ *Id.* at 474-478.

政府的角色包括事前與事後兩種可能。政府可以採取如同TRIA一般的ex ante再保險計畫，或是採取在恐怖攻擊發生之後，對保險業者予以補助。對事前方案的批評前已論及，就事後的方案來說，其是不可預測的，也常常混雜了許多政治動機、同情、或其他經濟需求，並且常常會帶來非預期的結果，而扭曲市場的一般運作¹⁸。不過作者並非完全否定這些措施的功能，在某些緊急的情況，採取這些措施可能會發揮穩定市場的功能¹⁹，但是這些方案都沒有真正改變保險業的運作結構，並會產生一些負面的結果，因而不能予以常態化。

作者認為最好的方案是將恐怖攻擊的風險予以市場化。藉此，恐怖攻擊的風險就不再只由保險業者與保險人共同承擔，而是會與資本市場連結起來，使得此風險得以被更大的資本來分攤²⁰。不過這樣的方案可行嗎？就目前的現狀來說十分的困難，要建立一個以恐怖攻擊的風險為標的之交易市場，會面臨包括稅、政府管制、會計等相關問題，因而使得市場運作產生不確定性²¹。然而不確定也不必然使得一個活絡的證券市場無法形成。資本市場對於風險的評估與量化在過去五十年有很大的進展，只要風險能夠被適當的評估並予以量化，即便使此一市場有一定的不確定性，但是交易仍然能夠作成²²。另外，形成一個市場往往需要一段不短的時間，但是這段時間不致於長到被排除在政策選項之外。如果能夠提供例如稅的誘因，以彌補投資者所面對有關風險與資訊的不確定性，那麼將恐怖攻擊的風險市場化，將會是真正可行的政策選項²³。

¹⁸ *Id.* at 484-485.

¹⁹ *Id.* at 495.

²⁰ *Id.* at 496.

²¹ *Id.* at 507.

²² *Id.* at 508.

²³ *Id.* at 528.

不過，就現實的狀況來看，上述的政策方向短時間內無法達成。尤其在稅制與政府管制的部分，目前政府改革的方向都與所謂市場化的方向相反²⁴。

第二節 法國

自由之保障為憲法所明定，惟行政權及行政機關負責維護公共秩序，基此，其得於必要之範圍內限制人民自由。在平時，若秩序與自由之間發生衝突，依循「以自由為原則，公安之約束為例外」²⁵之法則固無問題；但在特殊的情況下，則有不得不然的調整。一般而言，在非常時期，行政權將獲得擴大，以利於回歸正常狀態、確保國家之繼續性。在現行法上，有三種不同的法律制度分別因應非常時期所需。依其對自由權利所造成的衝擊，由小而大分別為緊急狀態、戒嚴狀態以及總統之特別權力。

一、緊急狀態

法國憲法對於緊急狀態並未設相關規定，緊急狀態之規定乃見於法律。依1955年4月3日法律（Loi n° 55-385 du 3 avril 1955 instituant un état d'urgence），「緊急狀態」（état d'urgence）適用於公共秩序嚴重受侵害而引發立即的危險，或發生公共災難（如淹水，地震等等）。緊急狀態之發布應以部長會議之命令為之，若緊急狀態超過12天應有法律授權並確定期限。緊急狀態之宣告賦予行政當局（主要是省長）重要的警察權，包括禁止人員或車輛流通、以及劃定安全或保護特區以規範人員居留、禁止集會、關閉聚會場所等等。

²⁴ *Id.* at 530.

²⁵ CE 10 août 1917, *Rec.*, 638, concl. Corneille.

此外，亦得發布不分日夜搜查住宅之命令。1955年在當時的法屬阿爾及利亞各縣曾經實施緊急狀態，1958年擴及法國本土，直至1963年5月31日才結束。而較近發布緊急狀態的例子，則有1985年於新喀里多尼亞；2005年至2006年於法國本土（由2005年11月8日命令發布，經2005年11月18日法律延長三個月，最後於2006年1月4日廢止）。

二、戒嚴狀態

（一）、憲法依據

憲法第36條：（第1項）戒嚴狀態由部長會議發布。（第2項）其期限之延長若超過12日，非經國會同意不得為之。

（二）、內容分析

「戒嚴狀態」（état de siège）特別是適用於武裝叛亂所引發的立即危險。此項例外制度之實施，可追溯到1849年8月9日法律以及1878年4月3日法律（現納入國防法典第L.2121-1至L.2121-8條）。「戒嚴狀態」將造成的結果包括：將秩序之維持由民事當局移轉到軍事當局；擴大軍隊的警察權限（日夜搜查，隔離危險份子，繳交武器彈藥，禁止可造成脫序狀態的出版品）；擴大戰爭委員會（conseils de guerre）之權限至對抗國家安全、機關或公共秩序之刑事平民被告。依憲法第36條規定，戒嚴狀態由部長會議發布。其期限之延長若超過12日，非經國會同意不得為之。雖然此制度原則上並不合於傳統恐怖攻擊的情形，但對於以非傳統方式發動的大規模恐怖攻擊則可能適用。

三、總統之特別權力

（一）、憲法依據

緊急狀態法制之探討

憲法第16條規定：（第1項）當共和國制度、國家獨立、領土完整或國際義務之履行遭受嚴重且立即之威脅，而憲法公權力無法正常運作時，共和國總統於正式諮詢總理、國會兩院議長以及憲法委員會後，採取必要之措施。（第2項）總統應將此事詔告全國。（第3項）此等措施應以確保憲法公權力能在最短期間內履行其任務為目的。就此，應向憲法委員會徵詢意見。（第4項）國會自行集會。（第5項）於行使特別權力期間，不得解散國民議會。

（二）、內容分析

1958年憲法第16條所規定之總統特別權力（*pouvoirs exceptionnels*），是法國第五共和制憲者為應因極端嚴重的狀態，所創設的最為例外的法律制度。此項機制的特色在於，在特定的條件以及一定的期限內，合法地賦予共和國總統所有的權限，包括憲法上的、立法上的、以及行政上的，用以確保憲法上的公權力能履行其任務。本條文僅於1961年4月23日，因阿爾及軍事叛變而由戴高樂宣告實施過一次。

1、制定之緣起

第16條是應戴高樂將軍之要求而納入1958年憲法的。其實戴高樂在1940年便觀察到行政權的衰弱無力是導致德軍入侵時法國潰敗的主因。於是在1958年8月8日向憲法諮詢委員會解釋修憲草案時，戴高樂即援引此例，認為就是缺乏條文明定元首拯救受難祖國之義務，當時的總統Albert Lebrun 才沒有移師阿爾及，反而招喚貝當元帥而通向投降之路。因此，對戴高樂而言，在特殊情勢下，總統承擔全然的權力並不是一項特權而是負擔；不是隨意行事的權能，而是絕對的義務。即便制憲當時有來自各方保留的聲音，戴高樂仍堅持特別權力之實施是屬於總統個人裁量的範圍，而不接受對此原則的任何限制，至多只能容許一些防止濫用的保障。

依憲法學者Jean Gicquel之方析，在極端危急而公權力無法駕御的時刻，為了確保國家或共和國之正當防衛，而有所謂「情勢法」(*droit*

de circonstances) 之存在，此法之特點在於關照危機之可預見性 (prévisibilité des crises) 以及反擊之合法性 (la juridicité des ripostes)。也因此，第16條就像是憲法中的一部憲法：暴風雨天的憲法，構成平時憲法中止之原由，是對於已經到達極點的危機的一種管理方式。簡言之，第16條是在尊重法治國家的前提下，爲了化解極端危機的極端解藥。而國家元首則成爲「末世的騎士」，依羅馬獨裁者之形象 (Cincinnatus 於西元前458及439年二度成爲羅馬的獨裁者，而又回歸犁田)，化身爲制度的最後防線，以期重建共和國的合法性。

因之，憲法第16條的來源同時是遙遠而當代的。遠因可溯及羅馬式的獨裁專制；近因主要與法國在1940年5至6月間所經歷的祖國分裂有關。

2、發動之要件

國家元首是行使特別權力之唯一決定者，無須經由內閣副署。但是爲實施此一憲法上的獨裁 (dictature constitutionnelle)，應首先同時滿足兩項實質條件，一是「共和國制度、國家獨立、領土完整或國際義務之履行遭受嚴重且立即之威脅」，一是「憲法公權力之正常運作中斷」。而爲了確認此二條件同時具備，國家元首應向總理、國會兩院議長以及憲法委員會徵詢意見。這些人士或機關之意見雖只是指示性的，對總統並無法律上之拘束力，但卻不無影響，除憲法委員會之意見必須刊登於官方公報外，由於一旦開始適用第16條，國民議會自行集會且不能被解散，而得以監督總統之行爲，特別是當議員認爲訴諸第16條並不正當時，更可以依憲法第68條向最高彈劾法庭提出控訴。

這些條件或限制是一體相通的，然若總統果真有意濫用第16條所提供的各種可能性，則所有的保障將流於虛幻。首先，實施第16條之要件並不明確，使得在任何時刻均可能宣告條件成就。例如何謂「嚴重且立即之威脅」？而所謂對「共和國制度」或「國家獨立」之威脅，也是可以被恣意解釋的。至於「公權力之正常運作中斷」，看似客觀，

似乎大大地限制第16條之適用，但若對其採取嚴格的解釋，很難想像在此情形下，總統如何能進行諮詢、憲法委員會如何能作成意見、國會如何能集會，也因此只能擴大解釋，將中斷之可能視為中斷本身，惟中斷可能之判斷又生困擾。再者，程序要件亦不足夠，因為僅須徵詢而無須遵從意見，總統成為至高的定奪者。將一個如此嚴重的決定交託到一個人而且是受益人手中，不免令人遺憾。此外，國會自行集會，前提必須要國會在事前未被解散。即使國會能集會，控訴總統須經國會兩院各自以公開投票而絕對多數決一致同意始得起出，面對一個已正式變成獨裁者的國家元首，恐怕國會議員也要有相當的勇氣才敢挑戰。

最後，特別要提及的是，第16條適用之期間並未受到任何條文之限制。一旦付諸實施，第16條僅規定總統應致力「確保憲法公權力能在最短期間內履行其任務」，由此雖可以導出獨裁應在實質條件之一消失後立即停止，但因條文對終止之程序未明確規範，而唯一一次實施憲法第16條的經驗顯示，總統一直到局勢早已恢復正常幾個月後才宣告終止，且在其間，有許多非保衛國家所必要卻限制自由之措施出現，此條文因此倍受批評。就此，有學者主張憲法應強制總統每隔一段時間（例如每15天）向憲法委員會請求允許延長獨裁。而由Georges Vedel所主持的修憲諮詢委員會則於1993年提議，國民議會及參議院議長可以聯合請求憲法委員會「確認適用本條所要求之條件不再兼備」。

3、權力之行使

一旦付諸實施，第16條本身構成一個新的憲法而取代正常的憲法。總統在其原有的特權之外，獲得獨裁者的權力。總統手中握有立法權及行政權，並可以基此權力來設置新的法院，藉此介入司法權。

第16條僅規定總統「採取情勢所要求之措施（mesures）」（第1項），而這些措施「應以確保憲法公權力能在最短期間內履行其任務為目的」（第3項前段）。唯一對於總統行使特別權力之限制是：就其採行之每一措施，都應向憲法委員會徵詢意見（第3項後段）。因此，總統擁有全然的權力，只要其認為適當，甚至可以自由決定中止適用

某一憲法條文以及法律。在1961年適用第16條的5個月期間，戴高樂即不顧憲法第64條之規定，在阿爾及利亞中止了對法官的終身職保障。

然而依據學說，總統之決定不應該是毫無限制的。憲法雖無明文，但既然第16條賦予總統此項任務之目的在於破解重大危機，以使制度重上軌道而回復原狀，因此進行第89條以外之修憲不應被容許。此限制修憲權力之說後經憲法委員會確立（CC 2 septembre 1992, *Traité sur l' Union européenne*, chr. n° 64, p.191）。基於同理，第16條亦不得癱瘓政黨輪替。

4、司法審查

從條文中我們無法得知在第16條的範圍內所成之決定之法律性質為何？可否受司法審查？此問題由最高行政法院在其1962年Rubin de Servens判決（CE 2 mars 1962, Rubin de Servens, Rec. P.143）中獲得解決。此判決將總統之決定區分為實施第十六條之決定以及其他跟隨而來之決定。適用第16條之決定構成一政府行爲，因涉及公權力之間的關係或是法國與其他強權之間的關係，不受任何司法審查。基於同理，國家元首拒絕結束適用第16條，亦不受司法審查。至於實施第16條後之後續決定，則不屬於政府行爲，最高行政法院進一步將其區分為具立法性質之決定與具行政性質之決定。由此認爲，當總統之措施涉及憲法第34條之領域時爲法律，若涉及憲法第37條之領域則是行政命令。基此，最高行政法院自認爲有權審理屬於命令之決定，而對於屬於法律的決定宣告無權審理。

換言之，在 Rubin de Servens判決中，最高行政法院採用實質的標準，依條文內容之分析來決定是否有審查權。採此立場之優點在於可避免總統依第16條所爲之任何行爲均不受司法審查，但卻也不免對於人民自由權利之保護造成嚴重的後果。事實上，公共自由是屬於憲法第34條而不是第37條之範疇，因而總統之措施若涉及公共自由，依 Rubin de Servens所形成之判例，屬於法律，亦即爲最高行政法院不能審查之行爲。再加上憲法委員會認爲其所得審查之法律「僅限於國會所投票制定之法律」（CC 6 nov. 1962, *Loi référendaire*, GDCC；

CC 23 sept. 1992, Maastricht 3, R 94) , 因此無異於承認侵犯自由權利卻不受任何處罰之總統法律 (lois présidentielles) 存在。這些總統法律所呈現的危險並不完全是理論上的。在Rubin de Servens一案中，係爭「措施」為1961年5月3日設置特別軍事法庭負責審理「對抗國家安全之重罪及輕罪之正犯及共犯」之總統決定。此法庭之任務事實上是在對涉及阿爾及叛變之相關人士處以重刑，嚴重地違反法律安定性、法律不溯及既往原則之基本要求。最高行政法院在受理撤銷5月3日決定之訴時，認為該決定之目的在於設立一新類別的法庭，涉及憲法第34條所列舉之立法範疇，因而將該決定分析成法律，宣告無權審理。特別軍事法庭於是得以繼續運作下去。

此例子並非單一事件。在1961年適用第16條期間，另有前述之中止法官之終身職保障、允許廢黜特定公務人員、明文禁止某些期刊、或是限制個人自由等等決定。而這些侵害又對適用總統法律所作成之個別行政行為之司法審查造成影響，因為行政法官是以總統法律而不是平時的制度為基準來審查行政處分的合法性。我們或可質疑最高行政法院果真無法較為有效地保護自由權利？與其將第16條的總統樹立成立法者而損及自由權利，或可將總統定位為擁有擴大行政權之行政機關，如此一來，最高行政法院即可將所有總統之措施視為行政命令，而使其受司法審查。此種解決方案就法律而言，並非不可能，因為第16條僅提及「措施」而無「法律」。

5、總統特別權力與緊急狀態

第16條制定目的在於拯救國家於危難，但在本質上卻對於公共自由造成極大危害，因此應輔之以明確之保障，以使得對於自由之犧牲不致於超越保衛國家所需。然而第16條所預設之保障顯然並不足夠。不少論者因此以為應將允許總統進行獨裁之決定權交付給憲法委員會，後者兼具權力活動之管制者以及自由權利之守護者雙重身分，特別適合肩負此一重大任務。其實法國除憲法第16條外，另存在兩種危機時期之立法制度，亦即戒嚴狀態以及緊急狀態。因為情勢之理由，

現行憲法只在第35條中提及戒嚴狀態。若是廢除憲法第16條總統之特別權力，而將緊急狀態之機制入憲，亦不失為處理危機之另一種選擇。

四、反恐法制

上述制度之實施各有其特殊的歷史情境，不是專為反恐所構思的。為了應因千變萬化的恐怖主義威脅，法國近來不但設立了對抗伊斯蘭激進主義的地區性指揮中心、制定了反恐法律(Loi du 23 janvier 2006 relative à la lutte contre le terrorisme)，並於2006年公布了對抗恐怖主義的內部安全白皮書(Livre blanc sur la sécurité intérieure face au terrorisme)，這是法國第一次對於恐怖攻擊的危害，建構一份真正的安全策略，目的在於深入了解恐怖組織的運作、訂定對不同威脅的回擊與反抗策略、告知民眾切身的危險及相關的保護措施。

若要拿法國的某一部法律與美國的愛國者法相比，則涉及1986年9月9日反恐與侵害國家安全法(loi du 9 septembre 1986 relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l'Etat)。此法可謂為法國整個反恐策略之具體化，911後，陸續通過之相關法律均不脫離其建制。而新近公布的2006年1月19日反恐與安全及邊境管控法(loi du 19 janvier 2006 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers)，為既有之機制之延伸，試圖在自由與安全間求取平衡。

(一)、反恐模式之樹立

在歐洲的民主國家中，法國的反恐史最長且最複雜，其經歷了各式各樣的恐怖攻擊。其中伊斯蘭恐怖主義是隨著阿拉伯政治犯團結組織(Comité de Solidarité aux Prisonniers Politiques Arabes, CSPPA)在1985至1986年所發動的攻擊事件而出現。此威脅雖然很快地因集團瓦解、首腦被補以及兩伊爭紛結束而平息，但也反應出原先機

緊急狀態法制之探討

制之不合宜：預防面雖因1978年「小心海盜」政府計劃（plan gouvernemental Vigipirate）以及1984反恐協力局（Unité de Coordination de la Lutte Antiterrorriste, UCLAT）之設置而獲得改善，嚇阻面卻因1981年國家安全法庭（Cour de Sécurité de l'Etat）之裁撤而削弱。除了向最高法院繫屬之程序繁重外，司法調查之分散以及缺乏與情治單位接軌等等，均是無法掌握恐怖主義的原因。就此，立法者制定了1986年反恐與侵害國家安全法以爲因應。其所開啓之機制，在911前後陸續由其他法律加以補充。

1、911之前

1986年法律屬於一般的法律，但建構了一個超出普通法範圍之制度，而以下列三種方式強化公務系統之運作：

－ 司法官之特別化，以改善其對於恐怖主義集團運作之了解。

－ 土地管轄原則之違反，將可歸責於同一組織之國際恐怖主義行爲之追訴、調查以及審判集中至巴黎，以使得能在單一地點取得所有有用之資訊。

－ 司法警察與情治單位之活動接軌，司法官得依情治單位所蒐集之資料而展開調查。

此法重新定義各機關之使命以求達到更大的效率，雖然實際可動員之人力有限（例如巴黎檢察署反恐部門由四名檢察官及五各預審法官組成），但相對於盎格魯薩克遜國家在傳統上較不傾向於結合情治與刑事嚇阻行動而言，倒是樹立了一套特殊而持久的法國策略。

1995-1996間伊斯蘭恐怖主義再度侵襲法國，但與前次不同的，這次涉及的是阿爾及利亞恐怖主義，與GIA有關而侷限在法國和阿爾及利亞。就此，法國深化1986以來之策略作爲回應。立法者除將1986法律之規定擴及對於在外國之法國僑民所爲之恐怖主義行爲，並於1996年7月22日強化嚇阻恐怖主義法（loi du 22 juillet 1996 tendant à renforcer la répression du terrorisme）中引進「與從事恐怖主義有關之犯罪組織」之觀念，用以瓦解正在組成之集團，並授權得在特

定條件下進行夜間搜索。此外，反恐成爲政府之重心，而國防白皮書亦將恐怖主義行動列爲對於法國安全最主要之非軍事威脅、伊斯蘭激進主義列爲宗教及民族激進主義中最令人不安之威脅。

此預防性甚高的一般性策略，雖對於打擊伊斯蘭恐怖主義不無效率，卻也引發了有關正當性之批判：預審及暫時拘留時間之長度、檢察機關事實上消失在預審法官背後之趨勢、「與從事恐怖主義有關之犯罪組織」之觀念所可能造成恣意之危險等等，特別是依歐洲人權公約來檢視，均不無疑慮。此外，外國人可以因爲與恐怖主義相關之理由而被暫時或永久地禁止入境法國，而歸化取得法國國籍之個人，亦可能因犯恐怖主義行爲之重罪或輕罪而被行政當局撤銷法國國籍，惟如是規定並未被憲法委員會宣告違憲。

2、911之後

與1986 和 1996之攻擊行動相比，911之特點表現在非國家團體大規模破壞能力之躍進、其技術、財務及跨國組織之宏大、以及逐漸分權或去領土化。然而911之後，法國並未如美國或英國一樣投入非常法制（lois d' exception），或如美國或德國一樣進行大規模的結構性改革，而是於1986年立法之基石上，進行一些調整，陸續通過了2001年11月15日日常安全法（la loi du 15 novembre 2001 relative à la sécurité quotidienne）、2003年3月18日內部安全法（loi du 18 mars 2003 pour la sécurité intérieure）以及2004年3月9日司法因應犯罪行爲演變法（loi du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité），以強化其反恐能力。

其中2001年法律第5章納入了有關強化反恐之規定：

— 簡化對於身分之管控及汽車之檢查，並將對於住宅搜索之事由擴及軍火及麻醉品交易之追查。管控區域以及所授與之權力擴大。其中最受爭議的一點是，賦予經省長認可之私人安全人員搜查行李以及進行人身安檢之權。

緊急狀態法制之探討

— 進一步規範資訊及傳播技術之使用。網路之提供者必須保留其所擁有之個人資料並由司法機關支配使用。資訊和傳播新科技之使用應改善刑事調查之進行，特別是有助於遠距離之訊問。

— 擴大對於恐怖主義之控訴。

爲了減少對自由權利之侵害，2001年法律仿義大利或加拿大之規定，限制這些措施之適用期間，亦即至2003年12月31日止。惟2003年內部安全法又將有關住宅搜索及機場及港口地區之管制延長至2005年底，且將其餘之機制恆常化。此外，而這些革新因新的安全機構—內部安全會議（Conseil de sécurité intérieure）之設立以及新的「小心海盜」（Vigipirate）計劃之提出而效果更爲顯著。

(二)、反恐手段之強化

雖然上述法律不無發揮功效，但法國所遭受的威脅並未消失。首先，即便1996年後法國領土上並未再遇到恐怖攻擊，但其於外國之利益卻經常成爲恐怖主義攻擊的目標；其次，基於與阿爾及利亞之特殊關連，阿爾及利亞伊斯蘭恐怖主義趨向國際化更使其可能成爲劍靶；再者，2004年3月15日政教分離法之制定並不爲伊斯蘭世界所接受；最後，2005年底發生之郊區騷動，是以暫時實施緊急狀態始得加以遏制。在此背景下，於是通過了2006年1月23日反恐法。本法充實1986年所建立之機制而設立一套行政保安制度，並輔之嚇阻恐怖主義行爲之新措施。

1、恐怖主義之行政保安制度

爲了有效對抗網狀和跨國的伊斯蘭恐怖主義，新法特別事先應因以行政保安措施，期能易於掌握動向並取得資訊。

一方面，爲了預見可能的恐怖攻擊，2006年法律對於地點、人員以及車輛強化管控。就地點而言，本法第1條擴大了錄影監視之可能，除恐怖主義行爲成爲設置錄影監視系統之合法事由，而自此百貨公司、大企業或是禮拜場所等較可能成爲攻擊目標的地點，得經省長許

可而拍攝其附近之公用通道外，省長亦得要求一些基礎建設（諸如機場、車站或港口、核電廠）之管理者，進行錄影監視。就人員而言，本法第3條擴大了在國際列車上進行系統化身分管控之可能，使得在超出疆界20公里之地區進行管控。就車輛而言，本法第8條允許警察、憲兵及海關單位設立固定或流動的車輛特徵資料自動化管控裝置，用以在適當的地點，特別是在邊界、港口或機場地區，拍攝其使用者。

另一方面，爲了確實掌握可能犯下恐怖攻擊事件之人，2006年法律方便個人資料、行政檔案之取得，並強化對通訊經營者之管控。就個人資料之處理而言，本法第7條准許內政部長得對於來自或去向非歐盟國家之國際遷移場合所收集之個人資料，進行自動化處理，自此，內政部長擁有的旅客資料包括名字、出生日期、國籍、性別、護照或身分證號碼及其到期日、發照國家，以及入境次數、停留時間以及目的國。就行政檔案之取得而言，依本法第9條，負責反恐而經確實授權之人得讀取內政部長所持有一些檔案中之資訊，例如駕照、護照、身分證或是有關外國人之檔案。就對通訊經營者之管控而言，原本郵政及電信法典只規定電話之經營者及網路之提供者應保存其客戶之技術資料，自此，「作爲主要或附帶職業活動而提供公眾藉由網路連線傳遞訊息者」，亦須遵從此一義務，惟被保存之資料主要涉及辨認預約或連接之號碼以及與使用之終端設備之確定地點有關之資料，並不及於電子通訊之內容，且只有經個別任命並嚴格授權之國家警察或憲兵始得請求取得這些資訊。

2、嚇阻恐怖主義行爲之新措施

自1986年法律起，對恐怖主義之威嚇即爲反恐之重要途徑，2006年法律更進一步制定新的刑事規定，並輔之以其他措施。

在刑事程序上，恐怖主義基於其性質以及對公共秩序所帶來之動亂，在特別是有關拘禁之延長或是律師之介入上，均遵循特殊之規定。自1986年起，如果有調查之必要而經法官決定，有關恐怖主義之拘禁即可達96小時，而2006年法律准予再延長24小時的時間，並得展期一次。而在刑事控訴上，刑事法典有關對抗「民族、國家以及公共安寧」

緊急狀態法制之探討

之罪章中本明定有犯罪結盟之罪責（第L. 450-1條），新法並未在此條文下引進有關恐怖主義之規定，反而在有關恐怖主義行為之規定中增列了第L. 421-6條，對於爲了準備恐怖主義行為之結盟處以20年之有期徒刑，而一般犯罪結盟僅10年徒刑。最後，在刑罰之執行上，本法將有關執行之決定集中至巴黎大審法院。

補充措施則在於保護調查員、驅逐法國恐怖分子以及使其財源枯竭。首先，原本調查員之名字會出現在程序中，而使其暴露於危險，此後，經巴黎上訴法院檢察總長之允許，這些人員可以在程序中以登記號碼化名，而在相同的條件下作證。對於法國籍恐怖分子之「驅逐」，民法法典在其第25及25-1條中，十分嚴格地限制法國國籍喪失必須基於非常重大而經嚴格定義之犯罪（例如對抗國家根本利益之罪、恐怖主義行為或是侵害行政機關），在徵詢最高行政法院之意見後爲之。而失權原本限於犯罪事實發生在取得國籍前或在取得國籍十年內，新法第21條將失權之期間限制由10年延長爲15年。至於財務之斷絕，本法允許財政部長凍結某些自然人或法人在銀行或是其他金融機構之財政資源，爲期六個月並可得展期。在此之前，資金之凍結不但限於屬於蓋達組織或其他恐怖主義組織之嫌疑人，且應建立在實施聯合國安理會之決議與共同體規則之上，本法則制定了全然自主且得適用於歐體居民之凍結程序。

由分析法國反恐相關法制可知，在面對恐怖主義威脅時，法國選擇了強化一般法律，而拒絕「非常立法」（*législations d'exception*）。雖然截至目前爲止，法國對抗國際恐怖主義是在一般法律的範疇下進行，然若在法國領土上發生911般的大規模恐怖主義攻擊，訴諸憲法第16條所賦予國家元首之特別權力，或是憲法、立法以及行政所分別建構出的戒嚴狀態、緊急狀態以及例外情勢（*circonstances exceptionnelles*），在法律上並非不可能。

此外，恐怖主義也成爲歐盟之首要關注課題。特別是在2004年馬德里恐怖攻擊事件後，歐洲強化共同體以及多邊的合作。除歐盟理事會之反恐宣言外，2004年3月25及26日之布魯塞爾歐洲高峰會議允許採

行一系列的反恐合作措施，涉及恐怖主義之財源（銀行秘密之廢除、稅務天堂之透明化等等）、受害人之照料，並提前實施歐洲憲法第I-43條之「團結條款」（« clause de solidarité »）：依此條之規定，「若一會員國成爲恐怖主義攻擊之對象或是天然或人爲災害之受害者，聯盟及其會員國在團結之精神下共同行動。聯盟得動員所有其所支配之方法，包括成員國所交付其支配之軍事手段…」。

附帶一提的，就組織面而言，在法國有人鼓吹，對於恐怖主義災難，宜超越各機關間的合作，而依俄羅斯新成立之緊急事務部（Ministère des Urgences）之模式，成立一特別的國務秘書來直接操控。在美國，Eric A. Posner則提出管制模式（regulatory model）及反恐管制局（Counterterrorism Regulatory Agency）之構想。

（三）、法院在反恐中的角色

爲因應一波波接踵而至的恐怖主義行動，法國於1986年即建立起一套反恐的立法機制，此後並隨著威脅之增加而經由其他法律陸續補強。此套特殊而恆常之機制雖賦予公權力機關有違普通法之特別權力，但仍維持法官於反恐之核心、尊重刑法之基本原則、並力求公共自由之保護。換言之，法國並未動用非常立法（législations d'exception）以規避司法制度所提供的保障。

事實上，絕大多數與反恐相關的法律均曾提交憲法委員會，而反恐之立法既然從屬於傳統的司法結構，憲法委員會之合憲性審查自然適用其傳統的判例，亦即，既無非常立法，即無非常判例（jurisprudence d'exception）。惟恐怖主義對於公共秩序造成嚴重侵犯而要求公權力予以強烈的回應，人民自由權利受損之危險性不免大增。基此，憲法委員會作爲基本權利維護者有其特殊之角色，有關反恐立法之合憲性審查因而特別地尖銳。

1、審查之方式

（1）、審查之依據

緊急狀態法制之探討

依憲法第34條之規定，有關人民行使公共自由權利之基本保障，由立法機關規範之。憲法委員會在其相關決定中不斷強調，立法機關於行使此一使命時，應調和可能產生衝突之各項憲法要求。為審查立法機關實現此一調和之方式，憲法委員會運用「具憲法價值之目標」（objectifs de valeur constitutionnelle）之觀念，而使得公益之考量可以減低包括基本權利保障在內的某些憲法要求之影響。在反恐上，適切的「具憲法價值之目標」中，特別包括了公共秩序之維護以及犯罪行為人之追查。

(2)、審查之限制

首先須說明的，憲法委員會之審查是在法律公布前進行，而審查並非強制性的，須經有權提請者提出，依憲法第61條，包括總統、總理、國會兩院議長、60名國民大會議員或60名參議院議員。因為反恐立法是屬於對於自由權利構成高危險之領域，通常國會之反對派都會要求憲法委員會加以審查。因此，除反恐立法之源頭－1986年9月9日法律－成爲1986年9月3日決定(décision n° 86-213 DC du 3 septembre 1986)之審查對象外，其後五個重要的補充法律中（1996年7月22日法律、2001年11月15日法律、2003年3月18日法律、2004年3月9日法律、2006年1月23日法律），只有2001年11月15日法律因是在911後於高度共識下通過，而未曾向憲法委員會提出。

此外，憲法委員會審查所本之原則向來是－其並不具備如國會般之裁量和決定權。正如同在其他領域，憲法委員會在反恐事務上並不構成第三院。

最後，憲法委員會之審查是「合乎比例性之審查」（contrôle de proportionnalité），其檢視：

－有關拘禁期間之新規定並未對個人自由造成過度之侵害（décision n° 2004-492 du 2 mars 2004, cons. 27）；

—拘禁時律師介入之新規定並未對個人自由、防禦權以及司法機關之特權造成*無理之侵害* (décision n° 2004-492 du 2 mars 2004, cons. 34) ；

—車輛及乘客監測之機制對於確保私生活之尊重及公共秩序之維護間之調和並未有*明顯地失衡* (décision n° 2005-532 DC du 9 janvier 2006) 。

2、內容之研究

整體而言，憲法委員會對於國會通過之相關條文均予以尊重，然而，在每一個決定中都附帶有保留或宣告部分無效。這些部分無效之宣告或保留雖未涉及立法者大方向上的選擇，卻也顯示出其在此領域之小心謹慎，而使得反恐之名不足以正當化所有的作為。

(1)、有關恐怖主義行為之定義

1986年法律並未將恐怖主義活動獨立成特別之犯罪，當時的理由或在於避免賦予其一政治特質。該法僅於刑事程序法典中訂立有關追訴、預審以及審判之特殊程序法則，以及規定在符合哪些條件下，某些有限列舉之普通法上的犯罪，因具備恐怖主義之特質而適用此等特殊法則。因此，刑事上可得處罰之恐怖主義行為之定義結合了某些刑法法典所明定的普通法上的重罪或輕罪（例如故意殺人），以及其與「以威嚇或恐怖手段嚴重動搖公共秩序為目的之個別或集體舉動」之關連。憲法委員會在其1986年9月3日決定中認為，此種結合式的定義符合刑法所要求之清楚性及明確性。

立法者於制定新的刑事法典之際（1994年生效），始加入恐怖主義行為之罪責（art. 421-1）。雖仍採取結合之定義方式，但大量地擴大可能被定性為恐怖主義行為之罪名，例如任何偷竊、內線交易或洗錢等罪若與恐怖主義舉動有關，則可能被定性為恐怖主義行為。因相關規定並未提交憲法委員會審查，因此後者無法對此表示意見。惟立法者並不因此可得在恐怖主義行為的名單中放入任何其以為有必要之犯罪：1996年7月22日法律將幫助外國入境及非法居留之輕罪納入可

緊急狀態法制之探討

能被定性為恐怖主義行為之犯罪中，就此，憲法委員會認為立法者之判斷明顯地不成比例，因為所針對之舉動並不涉及直接侵害財產或人身安全之實質行為，而僅構成幫助處於非法狀態之個人之單純幫助行為，因而與恐怖主義行為沒有立即的關係。此外，憲法委員會並指出，即便與恐怖主義舉動出現關連，該事實亦可經由窩藏人犯或是參與犯罪組織等罪而受追訴。

(2)、有關管轄法院之法則

在恐怖主義行為之追訴、預審以及審判之程序法則中，有關於刑事審判法庭之規定。對於具恐怖主義性質之罪，正如同麻醉品交易等其他特定罪名一樣，是由一單純由專業法官組成之刑事法庭審判（此法庭設主席一人，陪席法官六名，上訴時則有陪席法官八名），而沒有任何一般公民列席，此點與普通法之規則不同。在其1986年9月3日決定中，憲法委員會並未宣告此項規定違憲。其適用傳統上有關平等原則之判例而主張立法者有權依事實、情勢以及法則所適用之對象而制定不同的程序法則，只要這些不同對待並非出自不合理之歧視，並且給予當事人相同之保障。就此，憲法委員會認為，依犯罪是否具恐怖主義之特質而在犯罪行為人之間建立不同的對待，是為了避免裁判機關之安寧受到威脅，因此並非出自於不合理的歧視。而就其組織而言，特別組成之刑事法庭具備獨立性及公正性，且防禦權亦獲保障。

(3)、有關拘禁制度之調整

恐怖主義上的拘禁制度有二方面的特性，一方面，涉及律師介入之時間點，另一方面涉及拘禁之期間。首先，對於憲法委員會而言，於拘禁期間會見律師構成一於刑事調查程序階段行使之防禦權（*décision n° 93-334 DC du 20 janvier 1994, cons. 18 ; n° 2004-492 DC du 2 mars 2004, cons. 31*）。此權利為所有被拘禁之人所享有，但行使之方式可以基於犯罪之性質而作調整。因此，有關恐怖主義以及麻醉品交易之犯罪，與律師會面只得在拘禁72小時後才能進行。憲法委員會兩度宣告此項規定合於憲法（*décision n° 93-334 DC du 20 janvier 1994, cons. 16 à 19 ; n° 2004-492 DC du 2 mars*

2004, cons. 28 à 34)，惟在其第2個決定中，憲法委員會作成解釋上的保留而明確指出，法律之所以規定在置於拘禁時，共和國檢察官必須被告知有關犯罪事實之性質，此即意味著其應立即審查相關司法警察人員對該事實所為之定性。藉此保留，憲法委員會強調了司法機關有效控制警察行動之必要性。

至於拘禁之時間，憲法委員會持非常審慎之態度。1986年法律規定拘禁得超出普通法所定最長期間（亦即48小時）48小時。有鑑於其適用範圍限於有待特殊追查之恐怖主義犯罪、應經法官裁定，以及必須置於醫療監護下等條件，憲法委員會在其1986年9月3日決定中認可此拘禁之延長。而2006年1月23日法律又將該措施之整體期間延長至144小時，亦即6天，比現行對於最嚴重犯罪所規定之最長期間要多上48小時。這項延長雖獲得共識，而未有議員向憲法委員會提出異議，然而憲法委員會卻基於其對個人自由所造成之侵害而自行依職權審查相關規定。其一方面慮及司法機關介入之必要性（依憲法第66條，司法機關為個人自由之守護者），另一方面慮及措施之必要性以及其合比例性，而基於下述理由宣告此項規定有效：

— 新規定並未對變動對於拘禁之前四天既有之保障；

— 新的延長只得以例外之名義為之，且僅得在明確規定的兩種情形下進行：「於法國或外國存在有恐怖主義行為逼近之嚴重危險」，或「國際合作之必要所迫切要求」；

— 最後，這些例外之延長僅得由負責自由及羈押之法官（juge des libertés et de la détention）以附理由之決定為之，此法官與負責掌握資訊之預審法官不同。

(4)、有關私生活之尊重

2006年1月23日法律強化了憲警特殊部門所擁有之預防及嚇阻手段。例如允許錄影監視之發展、允許特殊部門在行政保安之範圍內取得內政部所管有而與反恐目的無關之眾多檔案、允許對於旅客在歐盟以外遷移之資料進行自動化處理等等。對於此等措施，向憲法委員會

繫屬之國會議員並無爭議，而憲法委員會亦未依職權宣告無效。有爭議部分僅涉及兩點。其一是允許特殊部門之人員得爲了防範恐怖主義而取得某些與電子通訊有關之技術資料。雖然交換之內容並不包括在內，但因相關資料涉及私生活，而具備敏感之特質。本條之原創性在於能在司法程序展開之前，於行政保安之範圍內徵調這些資料，也因此草案原將徵用限於恐怖主義行爲之防範，只是國會於通過時另加上了嚇阻之目的。然而嚇阻之目的，依三權分立之原則，在傳統上意含著司法機關之管控，憲法委員會於是宣告有關嚇阻目之部分無效。惟憲法委員會並未更進一步：其宣告其他規定有效，認爲此程序附隨若干之限制和預防措施，而這些預防措施適於確保調和二方面的要求，一是個人私生活之尊重以及經營者之營業自由，一是恐怖主義行爲之防範。

另一受到爭議之規定在於允許憲察單位得使用自動裝置拍攝車輛以及其乘客。憲法委員會認爲，此程序之性質本身並未侵犯個人人身自由，亦未侵害遷徙自由。此外，依立法之目的以及立法者所提供之保障，這些規定是適於確保私生活之尊重以及公共秩序之維護間之調和，而未造成明顯的不平衡。

憲法委員會雖認可立法者所採之主要反恐措施，而使一套兼具效率和人權保障之反恐制度得以設置，但藉由其所作之保留以及部分無效之宣告，也表現出其對於相關領域之謹慎，而使立法者不脫離憲法之規範。

第三節 加拿大

雖然美國和加拿大有著不同的憲法結構，他們在十九以及二十世紀使用緊急權限的方法是類似的。在十九世紀，國家軍隊在兩個國家都用來平息地方的叛變，通常都是依照地方政府的請求。然而，在一次大戰期間，兩個國家都將緊急權的行使轉化爲實定法的規定，加拿大制訂戰時權限法(War Powers Act)由國會授權行政部門行動；在美

國，授權的範圍也很廣泛，由許多一系列的小規模法律構成國會對行政部門的授權。

這樣的架構直到緊急權的濫用問題在1970年代在兩個國家都漸漸出現才開始爲人所檢討，從此兩個國家走向不同的發展，加拿大採取一個廣泛的憲法修正將所有緊急權限包含在憲法的概念當中；然而美國繼續使用成文法的補丁去規範緊急時期行政以及立法之間的關係，其結果在911之後兩個國家的反應並不相同，加拿大採取一個對緊急權限較爲保守的態度，但美國則較熱中於緊急權限的使用。²⁶

一、緊急法

加拿大緊急法(Emergency Act)授權加拿大政府採取特別措施以確保國家的緊急期間的安全。本法在1988年7月21日獲得皇家許可，取代戰時措施法，兩者之間主要有兩處不同²⁷：1)緊急情況的宣布必須由國會重新審查；2)任何依本法所實行的暫時性的法律仍然要受加拿大權利與自由憲章的拘束。因此，任何在緊急狀態下拘束人權的措施，仍必須要受加拿大憲章第一條「合理且正當」的拘束

聯邦的緊急政策由緊急法(Emergencies Act)，以及準備緊急法案(Emergency Preparedness Act)所構成，這兩項法案建構了聯邦、州以及市以及個人在緊急情況下的責任，這樣的政策強調了國家在緊急狀態下各階層的整合。

緊急法的目的在於確保加拿大政府可以啓動特殊的權限去處理緊急事件，總共包括了四種緊急情況的態樣，以下表簡述之。

²⁶ Kim Lane Scheppelle (2006), North American emergencies: The use of emergency powers in Canada and the United States, *International Journal of Constitutional Law*, Volume 4, number 2, at 213-243.

²⁷ Canadian Emergency Preparedness Legal Framework, *see* http://www.tc.gc.ca/vigilance/sep/emergency_preparedness/what_we_do.htm

表4：加拿大緊急法的規範類型

	期間(展延的 期間亦同)	管制措施	項目
公共福祉	90天	§ 8 1. 管制或禁止到特定區域旅行 2. 遷徙人民及財產 3. 徵收財產 4. 建立醫院或避難所	天災 傳染病等
公共秩序	30天	§ 19 1. 限制人民的旅行 2. 指定保護的區域	危害社會安全的情況
國際緊急 情況	60天	§30 1. 管制特定產業 2. 進入或搜索民宅、交通工具 3. 指定特定保護區域 4. 規範加拿大公民海外旅行 5. 管制人口移動 6. 管制加拿大與國際的金融活動 ◎ 管制的限制 除了不能造成各省不當的負擔以外， 本法明文規定不能以信件檢查的目的 壓迫或控制資訊出版或是言論自由。	國際衝突
戰爭	120天	§ 40	戰爭

		<p>1. 不包括徵兵制</p> <p>2. 總督可以頒佈相關的命令或管制</p> <p>(沒有列舉管制措施)</p>	
--	--	---	--

來源：作者製表

值得注意的是，2003年3月26號安大略省省長 Ernie Eves 依照安大略省緊急計畫法(Ontario Emergency Plans Act) 宣布SARS為該省的緊急狀態。當時加拿大政府並沒有依緊急法宣告緊急狀態也沒有動用聯邦檢疫法，如果聯邦政府宣告緊急狀態，依照緊急法，會有權限留置有嫌疑傳染疾病的人民或是財物，聯邦檢疫法允許48小時之內的強制隔離人民進行醫療檢驗，如果超過48小時，健康局必須向法院申請繼續拘留。

即便沒有宣告緊急狀態，加拿大聯邦政府仍然在SARS期間採取了若干措施：1)科學以及醫療的研究以控制蔓延；2)公共安全措施—在各國際機場對來自疫區的人民進行檢疫；3)公眾宣導措施 - 在各機場張貼宣傳防疫的海報以及告知人民疫情狀況。

為何在SARS期間加拿大聯邦沒有依照緊急法(Emergencies Act) 發佈緊急宣告?因為前述緊急法第14條第2項對於聯邦權限加諸一個重要的限制，就是如果緊急狀態只有發生在一省地域的情況時，不能由聯邦發佈緊急宣告，除非緊急狀況超過該省能力或權限所能負擔。

二、反恐法

911事件之時加拿大並沒有依緊急法宣布緊急狀態。911之後加拿大因應恐怖主義制訂的法律：Bill C-36 (also called the Anti-Terrorism Act, or ATA)ATA基本上是依照聯合國安理會決議1373號的要求所制訂，是加拿大履行國際義務的一種實踐。

緊急狀態法制之探討

加拿大反恐法(Anti-Terrorism Act²⁸,ATA):加拿大政府決心採取措施對抗國內外的恐怖主義以及恐怖行動,定義、追訴、判決以及懲罰恐怖團體,提供新的調查工具以執行法律以及國家安全機構,透過對抗仇恨性犯罪以及煽動法律以及確保加拿大尊敬的價值以及平等被保存。²⁹雖然如此,本法仍有許多招致批評之處。其中之一是對於恐怖主義的定義太過廣泛,另外兩個爭議之處是調查性聽證(investigative hearings)以及預防性逮捕(preventive arrests)。

(一)、恐怖團體及恐怖活動的定義及處罰

(Identify, prosecute, convict and punish terrorist activity)

在加拿大,恐怖主義活動通常被認為是犯罪,在刑法中恐部分子已經可以被以綁架、謀殺以及其他暴力罪名被追訴,加拿大政府已經簽署12份有關反恐的聯合國的公約以及協定,當中已有10份已經批准,包括防止劫機、核子工具以及防止人質協持以及爆炸行為。

在政府計畫的反恐措施當中,加拿大政府還會批准下列兩個公約:1)禁止資助恐怖份子公約(The Suppression of Terrorist Financing Convention):凍結恐怖份子的財產或經濟資助,加拿大將會有義務允許聯邦法院法官核發扣押令以及沒收和恐怖攻擊相關的財產。2)禁止恐怖炸彈攻擊公約(The Suppression of Terrorist Bombings Convention)對於公共場所設施炸彈攻擊的禁止。

1、恐怖行為

加拿大在刑法中定義何謂「恐怖行為」,包括:

(1)、十個聯合國反恐公約以及協定當中其中之一所定義的恐怖犯罪行為

²⁸ http://www.justice.gc.ca/en/news/nr/2001/doc_27787.html

²⁹ 本法自2007年3月19日起正在檢討修正中

(2)、因為政治、宗教或是意識型態的原因所採取的措施，以殺人、重傷或危害人身安全的方式或引起實質財產的損害或是干擾必需品的供給、服務、系統或是設備的運作。

2、恐怖團體

政府可以指定特定符合恐怖活動定義的團體為「恐怖主義團體」(terrorist groups) -- 提供警方以及檢察官比較清楚的指示。這些定義小心的限制並意圖釐清如果是因為合法的抗爭或是罷工而影響必需品的供給、服務並非恐怖活動，因為並不是意圖要對人民造成嚴重的傷害。包括：

(1)、故意收集或是提供資金，直接或間接資助恐怖團體犯罪。即使犯罪的地點在加拿大境外，加拿大法院對這樣的犯罪仍具有審判權

(2)、故意參與共謀或是幫助恐怖團體。包括故意招募團體成員以增強恐怖團體的力量。

(3)、教唆他人採取恐怖活動

(4)、故意運送或是藏匿恐怖份子

除了刑法的改革，新的指定措施也會使得這些資助恐怖份子的團體在所得稅法上的charitable status被否定或移除。

(二)、強化調查工具(Stronger investigative tools)

恐怖組織將不斷翻新並隱藏他們的行為，法律的執行以及國家安全的機構必須有能力調查對加拿大安全造成威脅的團體或個人，新的調查工具將使安全以及執法機構更能蒐集恐怖份子的資訊。

1、電子偵察

例如竊聽，高等法院認為應該要合比例的使用，並且在完成監聽三年內通知被監聽者。

緊急狀態法制之探討

公務員秘密法必須因為國家安全考量被修正，這些考量包括威脅加拿大安全的外國間諜活動以及恐怖組織，並改名為資訊安全法 (Security of Information Act.)

(1)、刑法的修正

①、處罰行為前置--預備犯的規定

②、要求個人如有相關資訊必須在法院前進行調查，同時經由檢察官同意可以增加執法以及調查的效率及能力以獲得恐怖組織的證據，同時必須注意證人保護。

(2)、證據法的修正：改變法庭以及訴訟程序確保資訊的保護，如有危害國家重要利益的情況，可不加以公開，必須對公開法庭的原則加以平衡修正。

(3)、國家防衛法的修正：增加通訊安全機制(CSE)的確立-攔截來自恐怖份子的通序以及保護政府網路，國防部長可以被要求授權攔截私人之間的通訊時需注意個人隱私。

2、增加「預防性逮捕」的權限

以逮捕被懷疑為恐怖份子的人以及嚴格規定釋放的條件，此規定的目的在避免恐怖活動以及保護加拿大人民的生命安全，允許治安官逮捕並移送個人至法官前加以合理的監督，如果有合理懷疑該人犯下恐怖行為，除有緊急狀況存在應申請核發令狀，並且必須在逮捕後24小時內移送法院。

3、洗錢防制法修正

為了授權金融交易報告與分析中心 (Financial Transactions and Reports and Analysis Centre (FINTRAC)) 發覺可能危害加拿大安全的金融交易以及揭露資訊給加拿大證券資訊部門(Canadian Security Intelligence Service (CSIS).)

4、DNA資料的蒐集

DNA授權計畫以及資料庫被擴張到包括恐怖攻擊犯罪(1998年國家DNA資料銀行建立，特定刑事罪犯必須提供DNA樣本)

(三)、廣泛的制衡機制(Comprehensive checks and balances)

ATA包括對政府措施的制衡機制以確保加拿大法體系的一致性與協調性，包括加拿大權利與自由憲章。這些機制包括：

1、國會對反恐立法必須在三年內再審查³⁰

2、條文清楚的定義是本法是針對「恐怖份子」以及「恐怖團體」，並對兩者做出概念的定義，正當合法的政治活動以及抗爭可以透過這樣清楚的定義被保障。

3、對「意圖」舉證責任仍在國家。

4、確保加入一個團體進入恐怖份子的名單中必須要有一些移除及司法審查的條款以避免誤認，此外每兩年要經由副檢察長(Solicitor General.)重新檢查恐怖團體名單。

5、要求必須要有檢察總長同意才能追訴恐怖主義的金融犯罪。

6、要求由國防部長授權通訊安全局(Communications and Security Establishment，CES)去攔截與加拿大有關的外國通訊

(四)、強化對抗仇恨性犯罪以及煽動的法律執行

在911之後，加拿大人需要一個重新對於加拿大所尊重價值的承諾—平等、多元以及正義以及對於以憎恨為動機的暴力波及無辜的譴

³⁰ ATA第145條要求自本法實施(2004年12月18日施行)三年後國會的委員會開始一個對於本法條文以及運作做廣泛的檢討，因此在2004年12月9日House of Commons授權司法、人權、公共安全以及緊急準備的常務委員會(Standing Committee on Justice)開始審查ATA的條文，Senate也組成特別委員會就ATA加以審查(The Senate Special Committee on the Anti-terrorism Act.)，值得注意的是，ATA所執行的兩項刑事條文—調查性聽證以及預防性逮捕條款預計在2007年初失效，這樣的日落條款不會因為國會的解散或是國會審查的進度而有所改變。

責。這是一場對抗恐怖份子的戰役而不是針對特定的族群或信仰，加拿大政府對於立法的感便是為了重申加拿大價值以及對抗憎恨暴力。

刑法的修正，使得法院可以命令刪除公然的仇恨宣傳，例如在網路上的言論，個人如果有這樣的行為可以證明自己不是發表憎恨的煽動言論。

增加新罪名—有關偏見動機的危害，因為宗教、種族、膚色、國籍、原族裔的原因歧視或仇恨，反對特定宗教的崇拜或是相關的資產

增補加拿大人權法（Canadian Human Rights Act）禁止以電訊的方式散布重複的仇恨訊息。

第四節 其他國家

下表5對於各國憲法中緊急狀態之規制設計乃是由三個面向加以觀察，即：1.從憲法對國家如何進入緊急狀態，所採取之發布模式（下稱發布模式）究竟是採取行政模式（即由行政權做成該決定），抑或國會模式（即由立法權做成該決定）；2.憲法對國家之進入緊急狀態有否規定發布原因（下稱發布原因），若有，復是否基於原因之不同而有相異之規範規劃，質言之，是否進行類型化；3.憲法有否於進入緊急狀態時，對基本權利之限制加以調整。

綜觀下表之各國憲法，除少數國家之憲法在上述三個觀察面向上，均有規定外，如：匈牙利、印度、波蘭、南非；其他各國之憲法對上述觀察面向，則僅規定其中一至二項；甚至對於相關緊急狀態或命令之規制付之闕如者，亦不在少數³¹。可見各國憲法在緊急狀態之規範規劃有相當之歧異性，應是為因應各國不同之政治、經濟、自然條

³¹ 惟在憲法中未有關於緊急狀態或命令之規制者，亦可能以法律規定之，如加拿大。

件之故，惟仍可嘗試以歸納的方法得出各國憲法安排之共通性，指出各國憲法如是安排之一些理路。

一、從緊急狀態的發布原因來區分

(一)、原因及規範內容之類型化

至於對發布原因，下表中各國憲法有加以規定者，其原因大致有兩項相同，即戰爭及天災乃大部分對此有作規制之憲法，均會將其列為發布之原因事項。又對此有規範之憲法中，以印度憲法較為特殊，其對不同之發布原因進行類型化，在需得國會追認之期限上及緊急狀態持續之時間上作相異之規範設計，此點乃其他就發布原因設有規定之憲法所無，足見印度憲法規範規劃之細緻。

(二)、經濟危機的納入與否

加勒比海的各國憲法中並無規定到因經濟危機而發布進入緊急情況的類型。但緊急情況仍可能因其他已規範的項目而被發布，如對於必要服務（essential services）提供的威脅，這時與經濟發展有關之法律及管制措施便可以合理的方式來因應這類威脅。例如多明尼加（Dominica）就曾於1979年因颶風過境而發布國家進入緊急狀態，並以管制措施控制建材的價格。

在經濟危機的時刻國家會希望能對採用會對權利與自由產生影響的法律，千里達及多巴哥與牙買加即可能利用在其憲法中一些賦予以多數決通過的法律權力以排除權利一的特別排除條款。但這卻是困難的，原因在於特殊例外條款所企圖建立的長久規制與緊急命令的暫時性本質格格不入。

二、從緊急狀態發布機關來區分

緊急狀態法制之探討

於下表中，各國對於憲法所採取之發布模式雖可區分為行政模式與國會模式，惟採取行政模式之國家，多半有賴國會對於行政權此項發布之追認，惟其中法國雖採取行政模式，但近乎於未設制衡機制，僅規定總統應向憲法委員會徵詢意見；而採取國會模式之國家，於國會不在任期中時，亦需賴行政權代為發布。因此，以行政模式及國會模式之差異應不如想像中大³²。

(一)、由國會發布國家緊急狀態

由國會發布國家緊急狀態之類型，有兩種制度設計之可能：第一，國會須被動地等待由行政權之代表（總統或政府）向其要求作出國家進入緊急情況的決定；第二，要求國會須以較通過正常法案為困難的程序來決議是否進入緊急狀況³³。

斯洛維尼亞憲法第92條規定，「國家緊急狀態之發布……應由國家議會為之。」；但其亦同時規範，如此之發布僅能「於政府主動提起時」作成³⁴。

在保加利亞的憲法（第84條第12項）中也可以找到相類的規定。但差別在於，前述請求得由總統或是政府提出³⁵。

至於匈牙利的國會則得無待行政機關的請求及發布國家緊急狀態（第19條第3段第1項），但是其權力則是由附加的程序規定來加以限制，即要求作成發布國家緊急狀態之決議須得到三分之二之多數同意始能通過³⁶。

³² 國會模式似是依循古羅馬之傳統。古羅馬時，由元老院若認定國家處於危急狀態，元老院即請求執政官任命一位專政官，以採取臨時專政措施，並授與專政期間不受限制之權力。

³³ Venelin I. Ganev, *Emergency Power and The New East European constitutions*, 45 AM. J. COMP. L. at 588.

³⁴ *Id.* at 588.

³⁵ *Id.* at 588.

³⁶ *Id.* at 588.

立陶宛的憲法則是例外：未有憲法上的限制加諸於國會的前述（發布國家緊急狀態的）權力，就結論言，立陶宛國會得僅以簡單多數決即作成「發布國家緊急狀態」的決定³⁷。

由於第一種由國會發布進入緊急情況之類型，可能會出現國會不再會期中的情況，所以對於憲法是採取第一種類型的國家，均對此種國會不在會期中的情形另為安排，即規定總統得於此時享有發布國家進入緊急情況之權力，惟憲法亦規定總統應立即（或於一定期間之內）召集國會³⁸。

（二）、由總統發布國家緊急狀態

波蘭憲法第37條規定，總統「得對於國家領土之一部或全部，發布進入緊急狀態」。而值得提起的是，總統於作成前述決定前無須徵詢其他主要政府官員（political actors）之意見³⁹。

羅馬尼亞的總統也有相類似的權限（羅馬尼亞憲法第93條），其謂：「……羅馬尼亞總統得宣布戒嚴或發布國家緊急狀態」。不過他的權力有些被限縮，因為發布國家緊急狀態之命令應經總理副署（同法99條第2項）。此外，總統更負有於於48小時內召集國會之義務⁴⁰。

斯洛伐克憲法第102條第e項規定，總統「須在憲法行爲（constitutional act）之基礎上，發布國家緊急狀態」，而同法第84條第3段規定「憲法行爲是指經全體議員五分之三之同意」⁴¹。

至於捷克憲法則缺乏相關緊急權力之規定。但仍有理由相信緊急狀態之發布須總統與國會的共同參與。捷克憲法第63條第2段規定「共和國總統享有未明文列舉為憲法行爲以外之權力」⁴²。

³⁷ *Id.* at 589.

³⁸ *Id.* at 591-593.

³⁹ *Id.* at 589-590.

⁴⁰ *Id.* at 590.

⁴¹ *Id.* at 590.

緊急狀態法制之探討

對於當前的西印度國家之憲法（West Indian constitutions）而言，其是企圖給予國會某種對於行政權發布國家進入緊急狀態的控制權力。質言之，即以行政權所發布的緊急情況，若於一定期間內未得國會之追認則會失效的方式。亦因其是作為拘束行政權之用，所以在制度設計的形式及功能上均為消極的⁴³。

發布因為欠缺國會之追認而失效，僅是憲法制度設計安排上的一個面向的考量。另外，附加於國會之上的權力則有，以決議的形式延長緊急時期。並且國會對於這種決議僅需以簡單多數決作成⁴⁴。

對於以上所述的國會決議之特點描述，將其當成提高行政權力的手段，毋寧較控制手段更為貼切。更甚者，國會之延長決議將無損於行政權更新發布緊急情況的權力。在延長緊急統治的範圍內，其有明白且附加的法律基礎⁴⁵。

三、從基本權利的限制程度來區分

在基本權利限制之觀察面上，各國憲法之規定方式有三：一、概括性地允許限制或中止基本權利；二是明列得加以限制或中止之基本權利，其中多是與緊急時期之國家利益可能產生衝突之基本權利；三是針對不得限制之基本權利加以列舉，而不得限制之基本權利，多是與緊急狀態時之國家利益較無直接關係者。此三種規定方式得交錯使用，如匈牙利憲法即概括地允許基本權利限制，但仍列舉出不得限制之若干基本權利；波蘭憲法則是列舉出不得限制之基本權利，並列舉出得加以限制之基本權利。其中波蘭憲法並針對不同之發布原因而得以限制之基本權利做出區分，申言之，對因緊急情勢或因天災而得限制之基本權利即有不同。

⁴² *Id.* at 590.

⁴³ *Id.* at 115.

⁴⁴ *Id.* at 116.

⁴⁵ *Id.* at 116.

在巴貝多斯 (Barbados) 及牙買加 (Jamaica) 的憲法中，並無明白的排除條款規範，但是在各別規定個人自由的權利與免於歧視的自由的權利之條文中，有允許於緊急時期排除權利之規定，其得以經由合理地正當化排除權利，已因應緊急局勢。牙買加憲法第20條第9項更允許排除刑事追訴上的公平審判程序，但不允許排除刑法中的溯及禁止與溯及加重刑責⁴⁶。

此外，巴哈馬 (Bahamas)、貝里茲 (Belize) 及蓋亞納 (Guyana) 三國之憲法則或許是遵循《歐洲基本權利與自由公約》(the European Convention on Fundamental Rights and Freedom) 的模型，允許大多數基本權條款的排除，也因此使未被規定為得以排除的基本權條款，即便是在緊急時期亦不得排除。這些在緊急時期之排除條款範圍外的權利是：生命權、刑事犯罪之溯及處罰或加重其刑、免與不人道待遇之自由、免於為奴之自由、免於強制勞動之自由。其中蓋亞納的憲法將免於強制勞動之自由列為非排除條款之外；同時，貝里茲的憲法除上述所列之外，更保障信仰 (良心) 自由不受排除⁴⁷。

由於肯定某些權利在緊急時期，面對幾近擁有絕對權力之政府，仍能繼續發揮一定之限制作用，所以如千里達及托巴哥 (Trinidad and Tobago) 憲法顯示得排除所有權利條款的情形，就特別值得重視。所有實質權利均規定於該國憲法第4條及第5條；而依同憲法第7條第3項所規定之排除條款謂，所有於緊急時期所發布之法律及依第7條第10項所訂定之規制，若僅規定於緊急時期有效時，即令其等規定與第4條及第5條之規定相衝突，其仍具效力⁴⁸。

至於聖露西亞 (St. Lucia) 憲法有與千里達及托巴哥相同的排除條款，不過對於在千里達及托巴哥之憲法中，仍會受到排除的人身自由與歧視禁止之權利而言，在聖露西亞憲法的排除條款則否。但對於

⁴⁶ Margaret DeMerieux, *The Regimes for States of Emergency in Commonwealth Caribbean*, 3 J. TRANSNAT' L L. & POL' Y at 106.

⁴⁷ *Id.* at 106.

⁴⁸ *Id.* at 106-107.

緊急狀態法制之探討

兩國憲法來說相同的是，排除條款中「證明未被合理地正當化」(shown not to be reasonably justified) 的規定會轉換舉證責任，使原應由國家舉證者變為應由對於緊急法律及管制的挑戰者舉證⁴⁹。

表5：各國（排除亞洲國家）憲法有關緊急狀態之規範

國名	憲法對國家進入緊急狀態所採取之發布模式	憲法對國家進入緊急狀態所規定之發布原因	憲法於緊急狀態時，對基本權利所為之限制
澳大利亞	未見規定。	未見規定。	未見規定。
奧地利	未見規定。	未見規定。	未見規定。
比利時	未見規定。	未見規定。	未見規定。
捷克	未見規定。	未見規定。	未見規定。
丹麥	▲行政模式 國王得於國會不能召集時發布臨時法律（provisional laws），並於國會得召集之時送交其追認（丹麥憲法第23條）。	未見規定。	未見規定。

⁴⁹ *Id.* at 107.

<p>法國</p>	<p>▲行政模式</p> <p>法國憲法在既有的兩種模式，即國會模式和行政模式之中，法國乃係採取總統（行政）模式。此外，對於法國憲法中之總統特權（法國憲法第16條），係幾乎未設計任何的制衡方式，僅規定總統「應向憲法委員會徵詢意見」。</p>	<p>△共和國制度、國家獨立、領土完整、國際義務之履行遭受威脅</p> <p>法國憲法第16條對於發布緊急狀態的原因列有：「共和國制度、國家獨立、領土完整或國際義務之履行遭受嚴重且立即之威脅，而憲法公權力之正常運作中斷」，除對戒嚴的情形另行規定於法國憲法第36條外，並未對發布緊急狀態的原因另作區隔。</p>	<p>未見規定。</p>
<p>芬蘭</p>	<p>未見規定。</p>	<p>未見規定。</p>	<p>於芬蘭憲法中似僅見對於緊急狀態時，基本權利限制之規定：即在不違反芬蘭之國際義務的前提下，於對芬蘭進行武裝攻擊的情形，或以法律所規範之可與武裝攻擊相較之嚴重緊急情形，始得以臨時條款限制基本權利（芬蘭憲法第</p>

緊急狀態法制之探討

			23條)。
匈牙利	<p>▲國會模式</p> <p>匈牙利憲法第19條之規定，明白的採取由國會發布緊急狀態之模式，並以須增加重多數決之程序規定，對國會之權力加以限制。</p> <p>又匈牙利憲法要求國會在作出第19條第g、h、i項之決定時，須經全體議員三分之二以上之同意。</p> <p>另鑑於國會可能有不在會期之中或召集困難的情形，匈牙利憲法規定總統於此種情形亦有發布緊急狀態的權力。而於總統作出國會是否難以召集，或發布緊急狀態是否正當之判斷，應經國會議長、憲法法院之主席與總理參與（匈牙利</p>	<p>△戰爭、準戰爭、武裝行動、天然及工業災害</p> <p>發布緊急狀態之原因，（廣義地說）限於三種情形：戰爭、準戰爭（national crisis）、以推翻憲法命令或取得行政權為目的之武裝行動，以及天然與工業災害的事件（匈牙利憲法第19條）。</p>	<p>於緊急狀態時期，基本權利得中止或限制之，但匈牙利憲法第54條到第56條（生命權、人性尊嚴、人身自由）、第57條第2項到第4項（無罪推定、刑事訴訟之程序保障、罪刑法定）、第60條（良心及宗教自由）、第66條到第69條（男女平等、少數族裔之參政權、公民權）及第70條第E項，不在此限（匈牙利憲法第8條）。</p>

	憲法第19條之A)。		
以色列	<p>▲國會模式</p> <p>若國會決定認定國家處於緊急狀態，國會得主動或依政府之提案宣布緊急狀態存在。但若政府認定有緊急情況存</p>	未見規定。	緊急管制不得禁止法律上之請求、不得溯及處罰、禁止侵犯人性尊嚴(以色列基本法：政府篇第50條)。

緊急狀態法制之探討

	在，且有發布緊急狀態之必要性，其得於國會召集前發布之，惟應於七日內得國會追認，否則失其效力（以色列基本法：政府篇第49條）。		
義大利	<p>▲行政模式</p> <p>在緊急且必要之例外時期，政府發布臨時條款（provisional measures），並於發布之同日提交國會。國會不在會期中，應於五日內自行召集之。若於六十日內未得國會之追認，臨時條款失其效力。（義大利憲法第77條）。</p>	未見規定。	未見規定。
荷蘭	<p>▲國會模式</p> <p>當發生由國會以法律所界定之緊急狀態事例時，得發布以皇家命令（Royal Decree）以維持國家安全（荷蘭憲法第103條）。</p>	未見規定。	緊急狀態時之皇家命令得限制憲法第6條（信仰自由）、第7條（言論自由）、第8條（結社自由）、第9條（集會自由）、第12條（居住自由）、第113條第1

第三章 緊急狀態之制度比較

			項至第3條（受司法審判之權）之權利。
紐西蘭	未見規定。	未見規定。	未見規定。
挪威	未見規定。	未見規定。	未見規定。
波蘭	<p>▲行政模式</p> <p>波蘭總統得經由行政會議之要求，發布以90日為限之緊急狀態。必要時得經國會之同意延長一次，但不得超過60日（波蘭憲法第230條）。</p>	<p>△戒嚴、天緊急狀態、天災</p> <p>波蘭憲法規定，於正常憲政規範不足應付之危機發生時，得以特別命令發布：戒嚴、緊急狀態及天然災害（波蘭憲法第228條第1項）。</p>	<p>波蘭憲法規定，緊急狀態時，基本權利得受到限制。且得以法律規定，人民對於因基本權利遭特別命令限制，所受財產損害之補償條款（波蘭憲法第228條第3項、第4項）。</p> <p>波蘭憲法第233條另規定，規範緊急狀態時基本權利限制之法律，不得限制第30條（人性尊嚴）、第34條、第36條（公民權）、第38條（生命權）、第39條、第40條、第41條第4項（人道處遇）、第42條（刑事程序保障）、第45條（訴訟權）、第47條（人身自由）、第53條（良心與宗教自由）、第63條（請願權）及第48條與第72</p>

緊急狀態法制之探討

			<p>條（家庭及孩童權）之權利。規範天然災害時基本權利限制之法律，得限制第22條（經濟活動自由）、第41條第1項、第3項及第5項（人身自由）、第50條（居住自由）、第52條第1項（遷徙自由）、第59條第3項（罷工權）、第64條（所有權）、第65條（工作權）、第66條第1項（工作環境權）及第66條第2項（休息權）之權利。</p>
羅馬尼亞	<p>▲行政模式</p> <p>羅馬尼亞憲法第93條規定，總統得宣布戒嚴或發布國家緊急狀態。但發布國家緊急狀態之命令應經總理副署（羅馬尼亞憲法第99條第2項）。此外，戒嚴或緊急狀態之發布，應於5日內得到國會之追認。若國會不在會期中，應於48小時內</p>	未見規定。	未見規定。

	召集之。		
西班牙	未見規定。	未見規定。	西班牙憲法第55條規定，宣布緊急狀態或戒嚴時，下列於憲法中承認之基本權利得被中止：第17條（人身自由）、第18條第2項及第3項（居住自由與秘密通訊自由）、第19條（遷徙自由）、第20條第1項第a款及第d款及第5項（言論自由、資訊交通自由、對於出版品、紀錄及其他資訊之扣押須由法院決定）、第21條（集會自由）、第28條第2項（罷工權）及第37條第2項（團體協約權）。
斯洛維尼亞	▲國會模式 斯洛維尼亞憲法第92條規定，「國家緊急狀態之發布……應由國家議會為之」，明白的採取由國會發布的模式；但	未見規定。	斯洛維尼亞憲法第16條規定，基本權利得受暫時性地中止或限制，惟僅得於緊急狀態期間為之，且不得僅因種族、出身國、性別、語言、宗教、政治或其他信

緊急狀態法制之探討

	其亦同時規範，其發布僅能「於政府主動提起時」作成。		仰、資力、出身、教育、社會地位及其他個人條件而為限制。
斯洛伐克	<p>▲行政模式</p> <p>斯洛伐克憲法第102條第1項規定，總統須在憲法行為之基礎上，發布國家緊急狀態，而斯洛伐克憲法第84條第3項規定，憲法行為是指經全體議員五分之三之同意。</p>	未見規定。	未見規定。
南非	<p>▲國會模式</p> <p>緊急狀態僅得由國會發布之（南非憲法第37條第1項）。</p>	<p>△戰爭、受侵略、叛亂、失序、天災或其他公共緊急情況</p> <p>緊急狀態之發布，僅得因戰爭、受侵略、叛亂、失序、天災或其他公共緊急情況而危及國家安全者（南非憲法第37條第1項第a款）。</p>	於有急迫必要時，且在不違法共和國於緊急狀態時之國際法義務時，得限制基本權利（南非憲法第37條第4項）。惟下列權利不在此限：平等權（不得僅因種族、膚色、出身、性別、語言而差別對待）；人性尊嚴；生命權；人身自由（禁止虐待與受非人道之待遇，非經告知後同意不得為醫學與科學實現之對象）；

第三章 緊急狀態之制度比較

			禁止為奴；孩童權 （禁止虐待、漠視及 羞辱，禁止強制勞 動、受拘禁時應與18 歲以人之人分離，並 被安置於適當之處 所、十五歲以下之孩 童不得服役）；被逮 捕、扣押、拘留及被 訴者之權利（緘默 權、受告知之權利、 不得強迫取證、請求 確認拘留合法之權 利、接受公平審判的 權利、通譯權、影響 審判公平之證據排 除）。
--	--	--	--

來源：作者製表（資料來源：<http://www.oefre.unibe.ch/law/icl/>）

表6：亞洲各國憲法有關緊急狀態之規範

國名	憲法對國家進入緊急狀態所採取之發布模式	憲法對國家進入緊急狀態所規定之發布原因	憲法於緊急狀態時，對基本權利所為之限制
孟加拉	<p>▲行政模式</p> <p>當總統認定有重大緊急危難存在時，得發布緊急狀態。（孟加拉憲法第141條之A第1項）</p>	<p>△戰爭、外侮及內亂</p> <p>孟加拉憲法第141條之A第一項規定，若孟加拉之安全或經濟生活受到戰爭、外侮或內亂之威脅時，得發布進入緊急狀態。不待此等事件之真實發生，有急迫危險之時，亦得發布（同條第3項）。</p>	未見規定。
中華人民共和國	<p>▲國會模式</p> <p>由全國人民代表大會常務委員會決定全國或者個別省、自治區、直轄市的戒嚴，並由國家主席發布之（中華人民共和國憲法第67條、第80條）。</p>	未見規定。	未見規定。
印尼	<p>▲行政模式</p> <p>總統得發布國家之緊急狀態（印尼憲法第12條）。</p>	未見規定。	未見規定。

<p>印度</p>	<p>▲行政模式</p> <p>依印度憲法之規定，緊急狀態之發布係由總統為之，故其係採取行政模式（印度憲法第352條、第356條、第360條）。</p>	<p>△戰爭、外侮、憲政運作困難、財政危機</p> <p>印度憲法第352條規定，總統得於戰爭、受侵略及武裝叛亂時，發布緊急狀態。但總統對於前述的發布，應經總理領導之部長會議要求，且此項發布須於一個月之內經國會之追認。緊急狀態可持續六個月，並可經國會同意再延長六個月。</p> <p>按印度憲法第356條規定，若國家之憲政運作窒礙難行，總統得發布緊急狀態，即總統經省長之報告或其他消息來源，認為憲法條文之遵行以不可能時，得發布緊急狀態，且應於六個月之內得國會之追認。此種緊急狀態可維持六個月之久，且最長可延續三年，但須每六個月經國會之同意。若緊急狀態須發布超三</p>	<p>在緊急狀態時，印度國民之基本權利會暫時中止，而六項自由權會自動中止。但生命權與人身自由不在得限制之列（印度憲法第359條）。</p>
-----------	--	--	---

緊急狀態法制之探討

		<p>年，則得以憲法增補條款為之。而在此緊急狀態之期間，總統得掌握全部之行政權。</p> <p>印度憲法第360條規定，若總統認為，印度之經濟情勢係處於金融秩序不穩定或印度之債信受到威脅時，總統得發布財政之緊急狀態，且應於兩個月之內得國會之追認。又此種緊急狀態之效力持續到總統撤銷其發布為止。</p> <p>此外，於金融緊急狀態時，總統得取消所有政府官員之薪俸，且包括最高法院與高等法院之法官。</p>	
日本	未見規定。	未見規定。	未見規定。
馬來西亞	<p>▲行政模式</p> <p>馬來西亞國家元首（Yang di-Pertuan Agong）認為有重大緊急情勢時，得發布進入緊急狀態（馬來</p>	<p>△聯邦之安全、經濟生活或公共秩序遭受威脅</p> <p>馬來西亞憲法第150條第1項規定，若聯邦之安全、經濟生活</p>	未見規定。

第三章 緊急狀態之制度比較

	西亞憲法第150條第1項)。	或公共秩序遭受威脅時，得發布進入緊急狀態。不待此等事件之真實發生，有急迫危險之時，亦得發布(同條第2項)。	
南韓	<p>▲行政模式</p> <p>總統為維護國家安全、公共和平與秩序，於不及召集國民大會時，得發布緊急命令(南韓憲法第76條第1項)。</p> <p>總統得於有軍事之必要、維持國家軍事動員令之秩序、武裝衝突及其他相類之緊急情況時，宣布戒嚴(同法第77條第1項)。</p>	<p>△內亂、外患、天災或嚴重的財政經濟危機</p> <p>南韓憲法第77條第1項規定，發生內亂、外患、天災或嚴重的財政經濟危機時，總統得發布緊急命令。</p>	於宣布戒嚴時，特別條款得中止令狀之必要、言論、出版、集會及結社亦由(南韓憲法第77條第3項)。
斯里蘭卡	<p>▲行政模式</p> <p>關於公共秩序之緊急規制，得由總統作成。</p>	未見規定。	未見規定。

來源：作者製表整理

第五節 國際規範架構：以反恐為中心

2001年9月所發生的911事件，不但使美國遭逢前所未有的緊急狀態，也震撼國際社會。不過，事實上，恐怖攻擊在更早一點的冷戰時期就已經開始，也從未間斷過。以聯合國為中心的國際社會更是在1970及80年代就已經開始制訂簽署與反恐相關的國際公約。

表7：聯合國12個主要的反恐公約整理

<p>1. 防止對於航空器的特定恐怖攻擊公約(東京公約--1963)</p>	<p>1. 適用在影響航空安全的工作</p> <p>2. 授權機長採取合理的強制措施，包括限制可能影響飛行安全者的行動。</p>
<p>2. 防範不法佔領航空器公約(海牙公約--1970)</p>	<p>1. 禁止任何人非法使用武力脅迫登上航空器，或使用任何恐嚇手段不法佔領航空器。</p> <p>2. 要求締約國對劫機行為處以重刑</p> <p>3. 要求締約國拘留犯人至引渡或是起訴</p> <p>4. 要求締約國協助彼此的刑事程序</p>
<p>3. 防範對民航機的不法行為公約(蒙特婁公約--1971)</p>	<p>1. 任何人不得非法意圖在飛機上施行暴力行為或放置炸藥在飛機上。</p> <p>2. 要求締約國對以上行為處以重刑</p> <p>3. 要求締約國拘留嫌犯至引渡或是起訴。</p>

<p>4. 預防及處罰傷害國際保護人士公約(1973—避免政府官員以及外交人員受到攻擊)</p>	<p>1. 定義何謂國際保護人士一如國家元首、外交部長、國家的官方代表或是國際組織的官方代表。這些人在國際法下被賦予特殊保護的地位</p> <p>2. 要求締約國處罰意圖謀殺、綁架、或其他攻擊行為之人以及其共犯。</p>
<p>5. 防範人質挾持公約(1979)</p>	<p>1. 防止任何人為了強迫第三團體，例如國家、國際組織，扣押、留置或意圖殺害、傷害其他人。</p>
<p>6. 核能物質的保護公約(1980—防止不法取得或使用核能原料)</p>	<p>1. 禁止不法持有、移轉、使用核能物質或威脅使用核能物質致人於死或其他身體、財產上的損害。</p>
<p>7. 防止在民用航空機場的不法暴力行為公約議定書（1988--增補上面的防範對民航機的不法行為公約，即蒙特婁公約）</p>	<p>1. 擴大蒙特婁公約的適用到包括在機場發生的恐怖攻擊行為。</p>
<p>8. 防止針對海運的不法行為公約</p>	<p>1. 建立可以適用於防止國際海運恐怖攻擊的法律機制</p> <p>2. 禁止不法及意圖扣押或採取任何控制措施、暴力行為控制船舶或危及船舶安全、裝置摧毀設施</p>

<p>9. 防止對位於大陸棚上的固定平台的恐怖攻擊議定書(1988)</p>	<p>建立防止相關恐怖攻擊的法律機制，類似防止航空恐怖攻擊的機制。</p>
<p>10. 偵測炸彈公約(1991—用化學記號標示以及偵測炸彈)</p>	<ol style="list-style-type: none"> 1. 控制未經標記或偵測的爆炸物使用 2. 締約國負有在其領土內確保對於未經標示的爆炸物控制的責任。
<p>11. 防止恐怖爆炸國際公約(1997)</p>	<ol style="list-style-type: none"> 1. 創造全球性的司法審判體系針對不法的使用爆裂物或是用爆裂物危害公眾場所以及意圖殺害、傷害人民或炸毀公共設施。
<p>12. 抑制恐怖主義經濟來源公約(1999)</p>	<ol style="list-style-type: none"> 1. 各締約國應該避免直接或間接資助恐怖分子。 2. 各締約國應該將資助恐怖份子的人士以刑事、民事或行政手段加以制裁。 3. 提供特定、凍結或扣押與恐怖主義相關的資金，銀行應加以配合。

來源：作者製表（資料來源：http://www.unodc.org/unodc/terrorism_conventions.html）

表7-1 : Major UN Conventions on Anti-Terrorism

<p>1. Convention on Offences and Certain Other Acts Committed On Board Aircraft ("Tokyo Convention", 1963--safety of aviation):</p>	<p>applies to acts affecting in-flight safety; authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, when necessary to protect the safety of the aircraft;</p>
<p>2. Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention", 1970--aircraft hijackings):</p>	<p>makes it an offence for any person on board an aircraft in flight [to] "unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft" or to attempt to do so; requires parties to the convention to make hijackings punishable by "severe penalties;" * requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution; requires parties to assist each other in connection with criminal proceedings brought under the convention.</p>

<p>3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("Montreal Convention", 1971--applies to acts of aviation sabotage such as bombings aboard aircraft in flight):</p>	<ul style="list-style-type: none">■ makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft; to place an explosive device on an aircraft; and to attempt such acts or be an accomplice of a person who performs or attempts to perform such acts;■ requires parties to the convention to make offences punishable by "severe penalties;"■ requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution;
--	---

<p>4. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973- outlaws attacks on senior government officials and diplomats):</p>	<ul style="list-style-type: none">■ defines internationally protected person as a Head of State, a Minister for Foreign Affairs, a representative or official of a state or of an international organization who is entitled to special protection from attack under international law; <p>requires each party to criminalize and make punishable "by appropriate penalties which take into account their grave nature," the intentional murder, kidnapping, or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act "constituting participation as an accomplice;"</p>
---	--

<p>5. International Convention Against the Taking of Hostages ("Hostages Convention", 1979):</p>	<p>* provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention;"</p>
--	---

來源：作者製表（資料來源：
http://www.unodc.org/unodc/terrorism_conventions.html）

緊急狀態法制之探討

第四章 我國實踐經驗的分析及檢討

1999年，台灣發生有史以來規模最強烈的921大地震。2003年，嚴重急性呼吸道症候群（SARS）的傳染危機，同時衝擊台灣及全球。為有效防治疾病的快速蔓延，以因應此一疾病對國內經濟、社會所造成之重大衝擊。2004年，敏督利颱風引發72水災，同年8月又有艾利風災，對中南部造成史無前例的重創，也使國人開始對於因全球暖化、氣候變異所導致之重大天然災害有所警覺，進而重視制度化因應管道的相關討論。

第一節 921震災

一、災害情形

921大地震（集集大地震）為迄今台灣傷亡損失最大的天災，發生時間為1999年9月21日凌晨1時47分12.6秒，震央在北緯23.87度、東經120.78度、位於台灣南投縣集集鎮，震源深度8公里，芮氏規模達7.3。此次地震是因車籠埔斷層的錯動，並在地表造成了長約100公里的破裂帶。全島均感受到嚴重搖晃。共持續102秒。

由於台灣的臺中縣、南投縣為主震央區域，受災特別嚴重。

表8：九二一震災的傷亡統計

死亡人數	2455
受傷人數	11305
房屋全倒	38935
房屋半倒	45320

資料來源：交通部氣象局，1999；九二一震災災後重建推動委員會，1999

<http://www.cwb.gov.tw/>；<http://portal.921erc.gov.tw/>

台北縣、台北市、苗栗縣、臺中市、彰化縣、雲林縣等地亦有嚴重災情。三週後，行政院主計處公佈死亡人數最多為臺中縣1138人，次多為南投縣928人，有40845棟房屋全倒、41373棟半倒。地震級數7.3，深度為1.1公里。

9月22日，政府動用緊急預備金，提供各鄉鎮村長200萬元賑災。9月25日，總統發布緊急命令，立法院於9月28日追認通過，以減少行政上的程序，加速救災。不久各國救難隊便抵達台灣協助救災。各地救災及募捐行動如火如荼的展開。

二、921震後處理情形⁵⁰

88.9.21

行政院成立「重大地震中央處理中心」，宣布九項緊急處理
行政院舉行會議，決定十五項救災重要措施。

88.9.23

總統召開第二次高層會議，決定成立「九二一地震救災督導中心」，由副總統連戰負責，中心設在中興新村，展開全面動員救災。

88.9.25

李總統針對集集大地震救援與復建發布緊急命令，該命令共十二條，為期六個月，至八十九年三月廿四日止。

總統下達緊急命令，將中部在大地震中受災的縣市納入災後重建縣市，行政院成立「九二一災後重建推動委員會」，由院長蕭萬長擔任主任委員、副院長劉兆玄擔任副主委兼執行長。

行政院公平交易委員會決定成立專案小組⁵¹，主動展開調查，將對認定違法者科處新台幣五萬元以上，二千五百萬元以下罰鍰。

⁵⁰ 資料來源 台中縣政府網頁

88 年10月

教育部常務次長吳清基表示，位於活斷層帶一百公尺以內、在大地震中震毀的二十餘所學校，未來將全數遷校，不在原地重建。

內政部函頒「災後縣（市）鄉（鎮市）及社區重建推動委員會設置要點」。

88 年12月

長期作物灌溉用蓄水池重建，農委會最後核定補助五百七十一萬元。

內政部頒佈「九二一震災災區建築管理作業規定」。

89 年3月

內政部社會司就有關九二一慰助金及租金發放情形考核。

89 年6月

行政院九二一重建推動委員會正式於中興新村掛牌成立運作。

行政院游副院長親臨中興新村召開九二一震災災後整體重建會議。

91年5月

司法院大法官作成釋字第543號解釋。

⁵¹ 主要規範聯合漲價以及哄抬物價的行為

1. 聯合漲價：公平交易法第七條，所稱聯合行為，謂事業以契約、協調或其他方式之合意，與有競爭關係之他事業共同決定商品或價格，或限制數量、技術、產品、設備、交易對象、交易地區等，相互約束事業活動之行為而言。公平交易法第十四條，事業不得為聯合行為。

2. 哄抬物價：公平交易法第二十四條，除公平交易法另有規定者外，事業亦不得為其他足以影響交易秩序之欺罔或顯失公平之行為。
公平交易委員會對於違反公平交易法規定之事業，得限期命其停止、改正其行為或採取必要更正措施，並得處罰鍰。

緊急狀態法制之探討

91年6月

行政院九二一震災災後重建推動委員會組合屋安遷專案小組於第四次委員會決議，地方政府需於規定時間內確實辦理組合屋不符合續住戶之強制執行。

93年1月

司法院大法官作成釋字第571號解釋

95年2月

行政院九二一震災災後重建推動委員會功成身退

二、規範面的因應

(一)、憲法

憲法增修條文第2條第3項：「總統為避免國家或人民遭遇緊急危難或應付財政經濟上重大變故，得經行政院會議之決議發布緊急命令，為必要之處置，不受憲法第四十三條之限制。但須於發布命令後十日內提交立法院追認，如立法院不同意時，該緊急命令立即失效。」

1. 制訂緊急命令共12條

2. 憲法解釋

(1) 釋字第543號解釋

緊急命令係為避免國家或人民遭遇緊急危難或應付財政經濟上重大變故，於國家不能依現有法制，亦不及依循正常立法程序採取必要對策因應之緊急情況下，由總統經行政院會議之決議發布之不得已措施，其適用僅限於處置一定期間或地點發生之緊急事故，具有暫時替代法律、變更法律效力之功能。又，憲法就發布緊急命令之要件、程序及監督機制定有明確規範，並應遵守比例原則，以避免國家機關濫用權力，期以保障人民權益，並維護自由民主基本秩序。

緊急命令之發布，以不得再授權為補充規定即可逕予執行為原則，其內容應力求詳盡而周延。緊急命令雖可允許執行機關以命令補充該緊急命令之相關細節性、技術性 事項，惟應於緊急命令中明文規定其意旨，並於立法院完成追認程序後，由執行機關再行發布。又此種補充規定無論其使用何種名稱均應依行政命令之審查程序送交立法院審查，以符憲政秩序。

立法院就緊急命令行使追認權，僅得就其當否為決議，不得逕予變更其內容。

(2) 釋字第571號解釋

八十八年九月三十日台（八八）內社字第八八八五四六五號、八十八年十月一日台（八八）內社字第八八八二三三九號及八十八年十月三十日台（八八）內社字第八八八五七一號函，對於九二一大地震災區住屋全倒、半倒者，發給慰助金之對象，以設籍、實際居住於受災屋與否作為判斷依據，並設定申請慰助金之相當期限，旨在實現前開緊急命令及執行要點規定之目的，並未逾越其範圍。且上述設限係基於實施災害救助、慰問之事物本質，就受非常災害之人民生存照護之緊急必要，與非實際居住於受災屋之人民，尚無提供緊急救助之必要者，作合理之差別對待，已兼顧震災急難救助之目的達成，手段亦屬合理，與憲法第七條規定無違。又上開函釋旨在提供災害之緊急慰助，並非就人民財產權加以限制，故亦不生違反憲法第二十三條之問題。

(二)、法律與命令⁵²

1、法律

(1)、九二一震災重建暫行條例(已廢止)

(2)、行政院九二一震災災後重建推動委員會暫行組織規程

⁵² 資料來源：全國法規資料庫

緊急狀態法制之探討

(3)、九二一震災重建暫行條例

(4)、其他法律當中有關921震災的規定

表9：其他法律當中有關921震災的規定

法條	內容
都市計畫法臺灣省施行細則 (89.12.29 訂定) (民國 95 年 07 月 21 日 修正)第 39-1 條	都市計畫住宅區、風景區、保護區 或農業區內之合法建築物，經依行 政院 專案核定之相關公共工程拆遷處 理規定獲准遷建，或因地震毀損並 經全部 拆除而無法於原地重建者，得按其 原都市計畫及相關法規規定之建 蔽率、 容積率、建築物高度或總樓地板面 積，於同一縣（市）都市計畫住宅 區、 風景區、保護區或農業區之自有土 地，辦理重建。原拆遷戶於重建後 自有 土地上之增建、改建或拆除後新 建，亦同。 位於九二一震災地區車籠埔斷層 線二側各十五公尺建築管制範圍 內之建築 用地，於震災前已有合法建築物全

	<p>倒或已自動拆除者，經縣（市）政府審 查核准，得依前項規定辦理重建。</p>
<p>所得稅法施行細則（民國 96 年 03 月 05 日 修正）第 56 條第 2 項</p>	<p>本法第六十九條第四款所稱依本法或其他有關法律規定免徵營利事業所得 稅者，係指依本法第四條第一項第十三款、第十四款及第十九款規定免納 所得稅之教育、文化、公益、慈善機關或團體及其附屬作業組織、消費合 作社、公有事業及依廢止前獎勵投資條例第六條、中華民國八十八年十二 月三十一日修正公布前促進產業升級條例第八條之一、促進產業升級條例 第九條、第十條、第十五條、第七十條之一、中華民國九十年一月二十日 修正公布前科學工業園區設置管理條例第十五條、科學工業園區設置管理 條例第十八條、獎勵民間參與交通建設條例第二十八條、中華民國八</p>

	<p>十九 年十一月二十九日修正公布前九二一震災重建暫行條例第四十條、促進民間參與公共建設法第三十六條、企業併購法第三十七條、第三十九條、國際金融業務條例第十三條、中華民國八十九年一月二十六日修正公布前農業發展條例第十八條及其他法律規定全部所得額免徵營利事業所得稅之營利事業。</p>
<p>基隆河流域整治特別條例（民國 90 年 10 月 31 日公布）第 6 條</p>	<p>為加速改善基隆河流域地區排水防洪功能，政府執行整治計畫時，為排除相關法律之限制，得比照九二一震災重建暫行條例之規定，辦理整治計畫</p>

來源：作者整理

2、命令

(1)、中華民國八十八年九月二十五日緊急命令執行要點

(所引發爭議：立法院院陳其邁等七十八位委員認為行政院依總統八十八年九月二十五日發布之緊急命令，制定「緊急命令執行要點」，

但程序上及實體內容均有違憲疑義，聲請大法官解釋。司法院大法官於第1189次會議中，就該案作成釋字第五四三號解釋。）

(2)、九二一震災臨時住宅拆遷辦法（已廢止）

(3)、民間機構參與九二一震災災區公共建設適用免納營利事業所得稅辦法

(4)、民間機構參與九二一震災災區公共建設適用投資抵減辦法

(5)、九二一震災災區祖先遺留共有土地減徵土地增值稅標準（已廢止）

(6)、二一地震災區歷史建築補助獎勵辦法

(7)、九二一地震災區歷史建築修復工程採購辦法

(8)、九二一地震災區公有歷史建築管理維護辦法

(9)、九二一震災重建僱用災民獎勵辦法（已廢止）

(10)、九二一震災重建就業服務職業訓練及臨時工作津貼請領辦法（已廢止）

(三)、特別預算

九二一震災重建暫行條例第六十九條規定：「I.緊急命令規定在新臺幣八百億元限額內發行公債或借款及其支用，得繼續適用至中華民國八十九年十二月三十一日，不受預算法及公共債務法之限制。但仍應補辦手續。II 中華民國九十年災區復建所需經費新臺幣一千億元，應循特別預算程序辦理，不受預算法及公共債務法之限制。其後不足部分，應循年度預算程序辦理。但重建總經費不得低於新臺幣二千億元。」

依照上開法條的授權，總共有兩期特別預算播出，分別是中央政府九二一震災災後重建第一期特別預算，以及中央政府九二一震災災後重建第二期特別預算。

三、執行面的因應

(一)、行政機關

1、特別編組

震災發生之後，行政院主計處成立災區緊急應變指揮系統；行政院成立「重大地震中央處理中心」

九二一救災督導中心在行政院人事行政局地方行政研習中心成立，由副總統連戰負責，中心設在中興新村，展開全面動員救災。

行政院九二一震災災後重建推動委員會成立，由院長蕭萬長擔任主任委員、副院長劉兆玄擔任副主委兼執行長。(2006年二月已功成身退)

2、中央與地方之分工

在災後救助重建的部分，大多數的態樣為中央補助地方從事特定的重建作業，例如：行政院文化建設委員會⁵³--補助九二一震災重建區縣市政府文化建設以及產業。行政院農業委員會支援地方政府因應土石流災害處理協助項目及程序規定。行政院救災委員會邀集各中央災害防救業務主管機關召開災害潛勢公開機制研商會議，擬具有關準則，由各部會及地方政府據以執行；

緊急命令的發佈可能造成中央權限的擴張，地方權限的壓縮？對此，有主張九二一震災暴露出中央與地方政府間、地方政府各部門間垂直與水平整合的協調與溝通不足，導致政府救災成效不彰。如何建立政府間各部門之協力合作關係，為類似事件發生能迅速處置得當之

⁵³ 請參照，行政院文化建設委員會補助九二一震災重建區縣市政府生活重建作業要點

關鍵所在。應成立專責機構，否則亦應加強原有行政院任務編組「中央防災會報」的功能⁵⁴。

(二)、行政措施

1、禁止或限制

(1)、強制搬遷

重建區組合屋輔導安置及整併作業

補助完成災區個別住宅或集合住宅重建或鼓勵人民租購國宅，完成災民重建安置後，集中整併、拆除組合屋區⁵⁵。

(2)、公平交易委員會禁止哄抬物價或壟斷交易

(3)、災區進行土地重新規劃或整理時，直轄市、縣（市）政府得劃定範圍限制或禁止該範圍內建築；其限制或禁止之期限為三個月，必要時得延長三個月⁵⁶。

4)建立土石流以及斷層危險帶評估機制，將危險地區劃定為特定水土保持區，禁止開發行為⁵⁷。

2、援助或補貼

(1)、行政院同意國宅以七折出售給受災戶，利率以三%計算，分卅年償還，租用國宅者給予一年免費優惠。

⁵⁴ 行政院研考會研究發展處處長楊秀娟
www.rdec.gov.tw/public/Attachment/53181103971.ppt

⁵⁵ 行政院九二一震災災後重建推動委員會住宅及社區處日前在工作會報指出，有關組合屋是否延長居住期間及如何整併、安置、拆遷執行案，目前台中縣政府採取不整併，不延長一年；重建會已將台中縣政府的作法提供南投縣政府參考。

依九二一震災重建暫行條例第二十三條規定「各級政府及公益社團於緊急命令期間提供災區居民之臨時住宅，其居住期間以三年為限。但必要時，經縣（市）政府同意後得延長之，延長期間以一年為限。

⁵⁶ 九二一震災重建暫行條例第6條規定

⁵⁷ 資料來源：農委會網站 <http://www.coa.gov.tw/view.php?catid=3030>

緊急狀態法制之探討

(2)、補助九二一震災災區社區更新規劃設計⁵⁸：

補助對象：依據九二一震災重建暫行條例第四條定義之震災災區，其受災集合式住宅及街區以都市更新方式實施重建，合於本須知補助項目者，均得依規定申請補助。

補助經費來源：九二一震災社區重建更新基金預算。期限：至95年2月4日。

補助單位：內政部營建署

受理單位：直轄市、縣（市）政府

(3)、國宅的興建

(4)、各縣市政府給予受災戶學童教育補助

(5)、就業服務與臨時工作津貼

(6)、賦稅的減免

3、其他措施

(1)、建置全國性水土保持敏感區資料庫與資訊系統

(2)、農委會成立專案計畫，針對土石流及潛在危險山坡地進行調查、規劃，以逐步建立全國性之水土保持敏感區資訊，做為防災、救災、土地開發、國土分區和國土開發規範之基本資料。

(3)、土石流危險溪流調查及觀測機制建置

(4)高危險度潛在危險區村落調查及劃定

⁵⁸營建署90年5月28日90營署都字第901609號函
行政院九二一震災災後重建推動委員會92年10月27日重建社字第0920020346號函
同意修正；行政院九二一震災災後重建推動委員會94年3月16日重建綜字第
0940001631號函同意修正

表 10：九二一 震災處理之其他措施

救助及慰問	死亡者每位發放救助及慰問金總數一百萬(包括中央及地方政府)。重傷者每位發放救助及慰問金二十萬。住戶全倒者，每戶發放二十萬元，半倒者每戶十萬元。	中央及地方政府
災民安置	災區收容所之設置及災民之安置，由公共工程委員會協助地方政府積極辦理。	公共工程委員會、內政部營建署
緊急救災基金	緊急提撥四億元給前進指揮所，另動支二十四億元第二預備金，其中台中縣十億元、南投縣十億元及其他縣市四億元供作慰問金，並將平衡預算基金結餘提前撥付，供救災之用。	主計處
災後重建融資	為減輕災區民眾災後重建之財物負擔，中央銀行提撥郵政儲金轉存款一千億元供銀行辦理受災戶重建緊急融資。	中央銀行
房屋及工商貸款	在受災嚴重的七個縣市中，選擇十四個國民住宅社區，總共四千四百四十六戶國宅由受災戶承購，為了減輕受災戶的負擔，這些國宅將以公告出售價格的七	財政部

緊急狀態法制之探討

	成售於受災的民眾。	
疫情防治	做 預防疫情發生	衛生署
民 民生物 資供應	政 政府將充分供應民生物資，全力穩定物價。水庫及維生線(包括瓦斯、油槽、輸油管線、水管、電線等)	經濟部
緊急醫療系統	內 內政部消防署啓動所有救災措施，成立災害救助處理中心，衛生署啓動緊急醫療指揮系統，全力搶救受災民眾，提供醫療設施至災區。	內政部、衛生署
受災勞工就業 輔助	<p>(一)動用就業安全基金十億元，提供受災地區勞工申領臨時工作津貼。</p> <p>(二)協助受災勞工免費參加職業訓練，受訓期間發給生活津貼，並輔導就業。</p> <p>(三)提供職業訓練券及就業券。</p>	行政院勞工委員會

註、資料來源：作者製作

四、分析檢討

(一)正面

九二一震災的因應，是我國憲法增修條文有關緊急權規定的首次適用，相關憲法爭議也引起學界諸多討論。⁵⁹ 學者認為，我國憲法第43條以及增修條文第2條3項並未給予總統這麼大的「例外緊急性權力」，因此在解釋上應該限縮緊急命令的性質在「個別具體措施」的決定上，避免總統的權限過度侵犯立法權。增修條文第2條第3項指出「得發布緊急命令，為必要的處置」在此應將緊急命令之發布當作是一種手段，把必要處置作為該手段的具體形式。緊急權限只是授權總統在憲法規定的範圍內可行使的不受一定法律程度限制的執行權，無論如何不會異化為規則制訂權。

同時，緊急命令應該被認為是因為緊急變故而導致正常體制無法立即有效運作，為了爭取時效讓正常體制運作，所為的憲法上特別設計。所以不論是立法院、行政院，當其正常體制可以開始運作之後，緊急命令當然就可以退位了。

亦有學者認為因應社會的複雜性、時間的緊迫性，緊急命令應該還是可以是一個一般性的法規，緊急命令體制不見得就是憲政獨裁，可能比較適理解為一種特別的立法過程。從而進一步主張緊急命令不應侵害立法權，且應以逐步恢復常態體制為大原則。緊急命令的存續期限應該是，一旦立法院可以恢復運作之後，就必須使相關體制逐漸恢復常態。

另外一種看法則是認為國家緊急權的存在可能是先於成文憲法的存在，甚至超憲法存在的一種權力，只不過對於它的行使、

⁵⁹參見台灣本土法學雜誌，第六期(2000.1)，緊急命令之憲法問題研討會議題討論(台灣法學會、台灣本土法學雜誌社主辦)；許宗力，從九二一震災看緊急命令相關問題；顏厥安，緊急命令的性質－一個初步看法－；李建良，淺析緊急命令之憲法爭議－從「九二五緊急命令」談起－。

緊急狀態法制之探討

要件、程序、效力的控制，從立憲主義的精神來講，我們希望透過憲法有比較明確的規範，但是否意味著緊急權限一定要仰賴一部成文憲法作為明確的授權規範，這一點是有疑問的。

第二，緊急權是否只能涉及立法權？有學者認為應該視事故的嚴重性以及政府部門在緊急狀況之下的應變與運作能力，才能決定在不同緊急情況之下緊急命令不同位階與效力，換句話說，就是要依據各種情況加以類型化。

此外，不一定要必須要有足以影響國家憲政制度的根本存在的緊急狀況發生，可以發佈緊急命令，就算只有地區性、局部性的傷害，也不需要剝奪任何緊急命令發佈的可能，以類型化的思考來看，如果事故沒有這麼嚴重那麼就對國家緊急權的手段以及效力作比較嚴密的控制，在這種情況下我們不會否認緊急權的行使在效力上會超過憲法或者改變憲法的規範，但是如果是更嚴重的狀況，是有必要超越一般法律，甚至停止憲法部分規範的效力。

在緊急命令的審查是否為一個政治問題的討論上，學者亦有主張此問題並非不受審查的政治問題，但是就監督或審查來說，應該多尊重國會與總統的互動，司法可以介入的空間或可能相對來說都比較低。

(二)負面

關於總統緊急權限的行使，陳新民教授指出，過去我國憲法43條的規定，在發展上步上了威瑪憲法的後塵，沒有緊急命令法制的規定，使得總統行使緊急權限的內容付之闕如。以及可能過份擴充總統權限，而唯一制衡的門檻僅是立法院十天的追認，如果總統濫用權限後果將不堪設想。⁶⁰

⁶⁰陳新民，〈法治國家與危機—論總統緊急命令權之立法問題〉，《思與言》，38卷1期，頁45-78（2000）。

許宗力教授則認為，在緊急命令內容客觀上明顯可分的情況，應許為一部接受，一部不接受。此外，緊急命令不是法律，就算要送到立院審查也是因為法規命令是基於法律授權而定，立法院有權要求行政機關不逾越授權範圍。緊急命令不是立法院所制訂，所以緊急命令的執行要點自無必要依照中央法規標準法送立院審查。假如允許行政院進一步訂定具有外部性的執行要點，該執行要點也無法避免立法院的制衡，行政院主張制衡的內容僅止於「知悉」，並不代表立院有權對內容作實質的審查，既然執行要點具有外部性，即便是作為母法的緊急命令是由總統所發佈，並非如一般法律一樣是由立法院所制訂，但從權力制衡觀點立院仍有權作實質審查。⁶¹

⁶¹許宗力，〈從九二一震災看緊急命令相關問題〉，《臺灣本土法學雜誌》，6期，頁85-91（2001）。

第二節 SARS疫情

一、災害情形及定位

(一)災害情形

台灣從2003年3月14日發現第一個嚴重急性呼吸道症候群(下稱SARS)病例，到2003年7月5日世界衛生組織宣佈台灣從SARS感染區除名，近4個月期間，共有346個病例，其中73人死亡，存活人數273人。

(二)SARS大事表

SARS疫情大事記⁶²：

2003/3/27：行政院宣布，將SARS列為第四類法定傳染病，疑似被傳染者可留院隔離，公務員暫停前往中國、香港、越南等疫區地。

2003/4/10：衛生署10日起在桃園中正和高雄小港機場實施入境旅客量測體溫。

2003/4/22：台北市立和平醫院爆發7名醫護及行政人員疑似集體感染SARS，和平醫院全院消毒，暫時關閉急診及停收住院病人。

2003/4/23：行政院與台北市政府共同宣布平醫院封院，1000多人被隔離在院內。行政院並宣布，即日起暫時拒絕北京、廣東、山西、內蒙等疫情地區大陸專業人士來台。

⁶² 主要參考：
http://www7.www.gov.tw/EBOOKS/TWANNUAL/show_book.php?path=3_008_012 (最後瀏覽日期：2007/5/3)。

- 2003/4/24：衛生署下令院內感染嚴重的台北市仁濟醫院封院14天。
- 2003/5/2：立法院三讀通過「SARS防治及紓困暫行條例」，中央政府編列特別預算新台幣500億元作為防疫經費。
- 2003/5/9：台北市大理街華昌國宅因有「社區感染」之疑慮，遂採取召回整排大樓（大理街160巷23弄1至55號）所有人員，並在家執行居家隔離。
- 2003/5/23：立法院三讀通過新台幣500億元的防治SARS及紓困特別預算。
- 2003/7/5：台灣正式從SARS感染區除名。
- 2003/7/15：行政院SARS防治及紓困委員會完成階段性任務功成身退，即日起SARS防治責任移交衛生署；陸委會宣布金馬小三通16日起全面恢復客貨運往來。

二、規範面的因應

(一)憲法

人身自由：憲法第8條⁶³；司法院大法官釋字第271、384、392、436、523號。

(二)法律

63其規定：「人民身體之自由應予保障。除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之（第1項）。人民因犯罪嫌疑被逮捕拘禁時，其逮捕拘禁機關應將逮捕拘禁原因，以書面告知本人及其本人指定之親友，並至遲於二十四小時內移送該管法院審問。本人或他人亦得聲請該管法院，於二十四小時內向逮捕之機關提審（第2項）。法院對於前項聲請，不得拒絕，並不得先令逮捕拘禁之機關查覆。逮捕拘禁之機關，對於法院之提審，不得拒絕或遲延（第3項）。人民遭受任何機關非法逮捕拘禁時，其本人或他人得向法院聲請追究，法院不得拒絕，並應於二十四小時內向逮捕拘禁之機關追究，依法處理（第4項）。」

(舊)傳染病防治法第35條⁶⁴(強制隔離之要件)、第37條⁶⁵(居家隔離之依據)、第24條第1項第2款⁶⁶(封院)⁶⁷。

嚴重急性呼吸道症候群防治及紓困暫行條例第5條、第8條。

(三)特別預算

嚴重急性呼吸道症候群防治及紓困暫行條例第16條：特別預算⁶⁸。

三、執行面的因應

(一)行政機關

1.特別編組

行政院SARS防治及紓困委員會：依據嚴重急性呼吸道症候群防治及紓困暫行條例第2條設立。

2.中央與地方的分工

⁶⁴ (舊)傳染病防治法第35條：「各級主管機關對於傳染病病人之處置，應採行下列措施：一、第一類、第二類甲種傳染病病人，應強制移送指定醫院施行隔離治療；第二類乙種傳染病病人，應勸告其住院，必要時並得強制其住院。二、第三類、第四類傳染病病人，應視其病況採取適當之防治措施。必要時，得比照第一類傳染病病人處置(第一項)。前項各款傳染病病人經各級主管機關強制移送指定醫院施行隔離治療者，其費用由中央主管機關編列預算支應之(第二項)。」

⁶⁵ (舊)傳染病防治法第37條：「曾與傳染病病人接觸或疑似被傳染者，得由該管主管機關予以留驗；必要時，得令遷入指定之處所檢查，或施行預防接種等必要之處置(第一項)。為有效掌握疫情，中央主管機關得就傳染病之危險群及特定對象實施檢查(篩檢)；其實施對象、範圍及檢查辦法，由中央主管機關會商中央目的事業主管機關定之(第二項)。」

⁶⁶ (舊)傳染病防治法第24條：「傳染病發生時，地方主管機關應視實際需要，會同有關機關，採行下列措施：一、限制或禁止上課、集會、宴會或其他團體活動。二、管制特定場所之出入，並限制其容納人數。三、管制疫區交通之一部或全部(第一項)。前項措施，中央主管機關於必要時，得直接指示地方主管機關辦理，地方主管機關不得拒絕(第二項)。」

⁶⁷ 傳染病防治法於2004年1月20日總統華總一義字第09300010081號令修正公布全文75條；並自公布日施行。

⁶⁸ 批評：黃國鐘，〈非典型肺炎與典型政治「嚴重急性呼吸道症候群防治及紓困暫行條例」及特別預算平議〉，《全國律師》，7卷10期，2003/10，頁11-21。

憲法第110條第1款；地方制度法第18條第9款、第19條第9款；傳染病防治法第4條、第2條。

有學者援引司法院大法官釋字第550號，而認定傳染病防治法同時關係地方居民健康，依憲法規定各地方自治團體有辦理衛生、慈善公益事項等照顧其行政區域內居民生活之義務。因此地方政府亦有功同參與防疫之權責，在此意義下，傳染病防治並非「中央專屬任務事項」，而應屬「中央與地方共同任務事項」⁶⁹。

亦有學者批評傳染病防治法第24條之規定方式：相關防治措施由地方主觀機關為之，惟中央主管機關於必要時，得直接指示地方主管機關辦理；易造成權責不清：若發生封院決定有所誤差時，究應由中央或地方負責？如遇有地方主管機關拒絕之情形，中央主管機關能否代為處分？其因此建議宜直接規定，傳染病防治法第24條第一項之措施，中央主管機關於必要時，得直接為之⁷⁰。

此外，也有主張傳染病防治法仍不脫「平時法制」之基本區分原則：中央負責「政策規劃」，地方負責「執行實施」的基本架構。但是，在緊急危機處理法制或疫情處理機制上，似宜採中央一條鞭式，以集中事權方式為宜。

另有學者介紹德國聯邦憲法法院1998年11月23日之Rastede裁判中所認定之標準：源自地方共同生活體或者與其有特殊關連性的需求與利益。蓋此判斷標準，一方面可將一般性行政事項排除於地方管轄範圍之外，一方面能確保地方住民對地方性行政事務的參與權；此外，只有基於確保地方自治團體適當完成其任務的考量，而非僅基於行政效率或經濟的考量，即得剝奪地方自治事項。因傳染病具有「蔓延」的性質，故傳染病防治事務不具「源

⁶⁹ 陳清秀，SARS傳染病之疫情防治法制相關問題，台灣本土法學雜誌，49期，2003/8，頁49。

⁷⁰ 李建良，由正當法律程序觀點透析SARS防疫相關措施，台灣本土法學雜誌，49期，2003/8，頁95。

自於地方共同生活體或者與其具有特殊之關連性」。質言之，傳染病防治法將其定性為中央事項並未侵及地方自治事權。

(二) 行政措施

衛生署於2003年3月27日指定SARS為法定第四類傳染病⁷¹，自始傳染病防治法所規定之相關措施始得施行。

1. 禁止或限制

以隔離、檢測體溫、強制配戴口罩及徵用民間防治器具、運輸工具等措施為主要防治手段⁷²：

—2003（以下同）年3月27日衛生署致函檢送各直轄市、縣市政府衛生局「SARS隔離通知」；要求對可能與SARS疑似並患有相當接觸者或其他經本署發布應密切注意之情事者實施居家隔离，期間以十日為原則。

—衛生署於4月3日將SARS隔離比照（舊）傳染病防治法第3條第1項第1款所定之第一類法定傳染病；據此，依（舊）傳染病防治法第35條第1項第1款規定，各級衛生主管機關如發現有感染SARS病患，即應強制移送指定醫院施行隔離治療。

—衛生署在4月10日採取國際機場入境全部旅客耳溫測量措施；發現航班旅客有疑似SARS症狀者即依傳染病防治法相關規定採行相關隔離檢查措施；4月23日衛生署公告實施出境旅客之測量體溫。

—交通部自4月25日起，針對國道長途客運強制駕駛人員應配戴口罩，旅客乘車前應測量體溫及登載通訊資料。

⁷¹ 現列為第一類法定傳染病。

⁷² 主要參考陳愛娥，前揭文，頁33-36。

- 衛生署於4月24日支持台北市政府對台北市立和平醫院所為之封院，並緊急隔離1300餘醫護、病患及家屬之決定；4月29日對仁濟醫院，比照和平醫院模式封院14天。
- 交通部於5月2日要求搭乘國際航線：香港、澳門及新加坡與國內航線之旅客，除食用餐飲時外，於機艙內應全程配戴口罩，另外所有進出商港船舶上之船員及搭乘之旅客亦應全程配戴口罩；5月8日強制市區公車、一般公路客運及計程車駕駛人配戴口罩；5月14日起，要求鐵路旅客應配戴口罩始能進站；台北市政府則於5月10日起強制大眾捷運系統之旅客須配戴口罩始能進站搭乘。
- 5月9日台北市大理街華昌國宅因有「社區感染」之疑慮，遂採取召回整排大樓（大理街160巷23弄1至55號）所有人員，並在家執行居家隔離並測量體溫。
- 5月20日衛生署公告緊急徵用各民間貨運及航空器寄送SARS檢體，要求其不得拒絕地方衛生機關交寄之防疫檢體運送箱；5月26日衛生署依嚴重急性呼吸道症候群防治及紓困暫行條例之規定，徵用自國外輸入已報關未提領、已進儲倉尚未報關或逾48小時未提領，數量在一萬片以上之口罩。

2. 援助或補貼

補償規範：傳染病防治法第51條、第52條、第58條⁷³；嚴重急性呼吸道症候群防治及紓困暫行條例第7條、第8條、第12條、第13條、第14條之1。

⁷³ 修正公布後之傳染病防治法與修正公布前之舊法相類，（舊）傳染病防治法第15條：「醫院應依指定設傳染病隔離病房及依實際需要之床位數目（第1項）。第一類、第二類傳染病隔離治療之醫療機構，由中央主管機關指定之。其他傳染病有指定隔離治療之醫療機構必要時，亦同（第2項）。各級主管機關於傳染病流行時，得徵用私立醫院或公共場所，設立臨時傳染病醫療所，並得徵調民間醫事人員協助防治工作；對於人民因徵用或徵調所受之損失，並應予以相當之補償（第3項）。第二項傳染病隔離治療之醫療機構指定辦法與前項徵用、徵調之作業程序及補償辦法，由中央主管機關定之（第4項）。」；（舊）傳染病防治法第22條：

第三節 風災水災等重大天然災害

2004年，敏督利颱風引發72水災，同年8月又有艾利風災，對中南部造成史無前例的重創，也使國人開始對於因全球暖化、氣候變異所導致之重大天然災害有所警覺

一、天然災害之定位

(一)災害防救法的定義

1.災害防救法第2條規定：

「本法專用名詞定義如下：一、災害：指下列災難所造成之禍害：（一）、風災、水災、震災、旱災、寒害、土石流災害等天然災害。（二）、重大火災、爆炸、公用氣體與油料管線、輸電線路災害、空難、海難與陸上交通事故、毒性化學物質災害等災害…」

2.同法第1條第2項規定：

「災害之防救，本法未規定者，適用其他法律之規定。」

我國目前除災害防救法外，其他災變防治之重要法令包括傳染病防治法、核子事故緊急應變法、反恐怖行動法（草案）、全

「前條媒介傳染病之飲食物品、動物或病死動物屍體，經依規定予以焚毀、掩埋或為其他必要之處置時，除其所有人、管理人違反本法或其他法令規定或未立即配合處理者不予補償外，地方主管機關應評定其價格，酌予發給補償費；其補償辦法，由中央主管機關另定之（第1項）。前項補償費，由地方主管機關支應；中央主管機關並得予以補助（第2項）。」；（舊）傳染病防治法第27條：「為防止傳染病傳入或傳出國境，對於出、入國境之運輸工具及其所載人員、物品，得施行國際港埠檢疫，並徵收費用；其檢疫方式、程序、管制措施與處置及其他應遵行事項之規則；費用徵收數額、繳納方式與期間及其他應遵行事項之辦法，由中央主管機關定之（第1項）。經依前項規定檢疫結果，有傳染病發生或有發生之虞者，中央主管機關應採行下列措施：一、運輸工具：必要管制及防疫措施，所受損失並不予補償。二、傳染病人或疑似傳染病人：防疫措施。三、物品：輸入者，令其退運或銷毀，並不予補償；輸出者，準用第二十一條及第二十二條規定處置（第2項）。違反中央主管機關依第一項所定規則有關申報、接受檢疫或輸入方式規定之輸入物品，中央主管機關得不經檢疫，逕予令其退運或銷毀，並不予補償（第3項）。第一項所稱國際港埠，指出、入中華民國國境之港口、碼頭及航空站（第4項）。」

民防衛動員準備法等等。其中又以災害防救法作為一般性天然災變（風、水、震、旱、土石流等災變）應變機制之基礎。

(二)天然災害大事年表

表11：天然災害大事年表

年份	大事紀要
1956	4月臺灣省政府頒訂「臺灣省人民因災害死亡及住屋倒塌救濟辦法」，規定其災害種類為「風災、水災、火災、震災及其他災變」等5種。
1959	8月發生八七水災。嗣後政府依據〈動員戡亂時期臨時條款〉規定頒佈〈總統緊急處分令〉
1964	1月發生白河大地震。
1965	頒訂「臺灣省防救天然災害及善後處理辦法」。
1994	災害防救方案於8月正式函頒。
1999	9月發生921震災。
2000	災害防救法於6月完成三讀、7月頒布實施。
2001	9月發生納莉風災。
2005	7月發生海棠風災。
2006	1月立法院通過行政院八年1160億的「易淹水地區水患治理特別預算」加上「石門水庫及其集水區整治特別條例」的250億，共有1410億投入水患治理工作。

來源：作者製表

二、規範面的因應

(一)憲法

在八七水災時期，由於天災受害面積廣泛且嚴重，政府依據〈動員戡亂時期臨時條款〉規定頒佈〈總統緊急處分令〉。主要內容為增減預算、限制國民消費、開增稅捐及發行儲蓄卷等。在開增稅捐方面，附增『水災復興建設捐』、營利事業所得稅附加15%、綜合所得稅附加30%、屠宰稅附加30%、娛樂稅以台北、台中、台南、基隆、高雄等五縣市電影票為限，每張戲票加1至2元、宴席稅附加30%、地價稅與田賦皆附加40%，房屋、證照、貨物稅等亦附加30%，而公有及私用小客車、電費、電話費、鐵公路票價亦一併附加『水災復興建設捐』。另由台灣銀行發行『八七災區復興建設有獎儲蓄卷』，前後共十二期，面額10元，每期開獎，特獎獎金達40萬元，借此募集資金⁷⁴。

(二)法律

1. 災變防救法

「災害防救法」是臺灣地區第一部全國性的災害防救法規，共計52條，分為總則、災害防救組織、災害防救計畫、災害預防、災害應變措施、災後復原重建、罰則與附則等八章。對於中央、直轄市、縣（市）鄉三層級政府的行政部門，以及民間、社區、民防、國軍等單位、組織在內的防救災體系建置，體系內各主要單位所應負責的災前、災時、災後等重要工作項目及其運作加以規範。

⁷⁴ 參見，台灣歷史學會，《歷史上的八七水災》網頁，網址：<http://www.twhistory.org.tw/20010806.htm>；亦可參見八七水災，《行政院文化建設委員會國家文化資料庫知識管理系統》網頁，網址：<http://km.cca.gov.tw/myphoto/show.asp?categoryid=36>。

2.其他法規

全民防衛動員準備法第3條第1項：「動員任務如下：一、動員準備階段結合施政作為，完成人力、物力、財力、科技、軍事等戰力綜合準備，以積儲戰時總體戰力，並配合災害防救法規定**支援災害防救...**」同法第6條第1項：「動員計畫區分為動員準備綱領、動員準備方案、動員準備分類計畫，其內容如下：一、動員準備綱領：以國防戰略目標為指導原則，配合國軍全般戰略構想，統籌策劃全國人力、物力、財力及科技等動員能量，以備平時**支援災害防救**，戰時支援軍事作戰，及兼顧民生需求...」

表12：災害防治相關規範沿革表

時期	規範基礎
災害防救相關法令制定前(1945年 ~ 1965年 4月)	曾發生八七水災、白河地震等多起重大災害，這段時期並無災害防救法令或規章，遇到天然災害發生時，主要是靠軍警與行政單位人員進行救災工作，工作重點在於災後撫恤。
防救天然災害及善後處理辦法時期（1965年 5月 ~ 1994年 7月）	臺灣省政府於 1965年5月頒訂「臺灣省防救天然災害及善後處理辦法」做為執行應變救災時的依據。當時災害防救組織的最高層級是災害防救會報，由省府各災害相關單位首長組成，負責處理天然災害防救聯繫、協調與監督事宜，下設綜合防救中心，處理災害中的緊急防救事宜。
災害防救方案時期（1994年 8月 ~ 2000年 6月）	1994年 1月美國洛杉磯大地震後，行政院邀集相關機關草擬「天然災害防救方案」。同年，名古屋發生的華航空難，政府取法日本處理各項災後應變措施的經驗與方式，把上述方案擴大修正為「災害防救方案」，以因應各種天然或人為災害的防救。這一方案於 1994年 8月正式函頒，全國依據該方案規劃為中央、省（市）、縣（市）及鄉（鎮、市、區）四級的災害防救體系（後配合凍省改為三級）。

緊急狀態法制之探討

災害防救法時期 (2000年7月 至今)	1999年921大地震，是災害防救方案建置與運作以來最大的考驗，為使日後各項災害防救工作有明確的法源依據與規範，行政院加速研擬災害防救法(草案)，該法於2000年6月完成三讀並於同年7月頒布實施。
----------------------------	--

來源：李維森，2007，〈災害防救體系〉，《科學發展》，410期，頁56～62。

(三)行政命令

在行政命令的層級，以各類災害發生之救助為主要對象，舉例如下：

主管機關	命令名稱
內政部	風災震災重大火災爆炸災害救助種類及標準
內政部	土石流災害救助種類及標準
內政部	結合全民防衛動員準備體系執行災害防救應變及召集實施辦法
農委會	旱災災害救助種類及標準
農委會	森林火災救助種類及標準
經濟部	農田水利設施天然災害善後處理辦法
經濟部	農業天然災害救助辦法
經濟部	水災公用氣體與油料管線輸電線路災害救助種類及標準
環保署	毒性化學物質災害救助種類及標準

來源：全國法規資料庫，網址 < <http://law.moj.gov.tw/fl.asp> >

(四)特別預算

民國80年代，基隆河沿岸發生多次重大水患，災害損失嚴重，政府遂研訂「基隆河整體治理計畫」，行政院於民國91年5月核示辦理，並分前、後二期推動⁷⁵。2005年7月海棠風災過後，行政院以基隆河整治之經驗為基礎，開始推動八百億治水特別預算，2006年一月立法院通過行政院八年一一六〇億的「易淹水地區水患治理特別預算」加上「石門水庫及其集水區整治特別條例」的二五〇億，共有一四一〇億將在未來八年投入水患治理工作⁷⁶。

三、執行面的因應

(一)行政機關

1.特別編組

在中央層級，依據災害防救法第6條，行政院設中央災害防救會報。另同法第7條規定：「中央災害防救會報置召集人、副召集人各一人，分別由行政院院長、副院長兼任；委員若干人，由行政院院長就政務委員、有關機關首長及具有災害防救學識經驗之專家、學者派兼或聘兼之。為執行中央災害防救會報核定之災害防救政策，推動重大災害防救任務與措施，行政院設**災害防救委員會**，置主任委員一人，由副院長兼任，並配置專職人員，分組處理有關業務；其組織由行政院定之。為提供災害防救工作之相關諮詢，加速災害防救科技研發與落實，強化災害防救政策與措施，行政院災害防救委員會設**災害防救專家諮詢委員會**，並得設**災害防救科技中心**。為執行災害防救業務，

⁷⁵ 參見行政院主計處特別預算網頁：
<http://www.dgbas.gov.tw/ct.asp?xItem=8458&CtNode=1836>

⁷⁶ 參見行政院主計處特別預算網頁：
<http://www.dgbas.gov.tw/ct.asp?xItem=8458&CtNode=1836>

內政部應設置消防及災害防救署。」因此中央災害防救會報下設行政院災害防救委員會，其以「災害防救專家諮詢委員會」與「災害防救科技中心」作為幕僚單位。

但行政院災害防救委員會並非直接處理第一線災害防治之單位，依本法第13條規定：「重大災害發生或有發生之虞時，中央災害防救業務主管機關首長應立即報告中央災害防救會報召集人。召集人得視災害之規模、性質，成立**中央災害應變中心**，並指定指揮官。前項中央災害應變中心成立時機、程序及編組，由行政院定之。」⁷⁷同時本法第14條規定，災害發生或有發生之虞時，業務主管機關、各級相關機關、單位或公共事業，應設**緊急應變小組**，配合中央災變應變中心執行各項應變措施。

在地方層級，各級政府分別依據本法第8~12及14條設立各級災害防救會報、災變應變中心、及緊急應變小組。簡言之，在目前之災害應變架構下，中央（行政院）與地方政府於平時召開災害防救會報（其中中央災害防救會報底下並設專職之幕僚機構，包括災害防救專家諮詢委員會與災害防救科技中心）。當有（重大）災害發生或有發生之虞時，則由各級中央或地方災害防救會報召集人視情況決定成立災害應變中心。各級業務主管機關、各級相關機關、單位或公共事業，並應設立**緊急應變小組**，配合災變應變中心執行各項應變措施。

2.中央與地方的分工

災害防救法雖規範各級組織，並要求各級政府制定災害防救計畫，唯對各級政府之權責無明確劃分，僅於災害防救法第34條規定：「鄉（鎮、市）公所無法因應災害處理時，縣（市）

⁷⁷ 以相關關鍵字查詢，查無中央災變應變中心時機、程序編組之相關命令。

政府應主動派員協助，或依鄉（鎮、市）公所之請求，指派協調人員提供支援協助。直轄市、縣（市）政府無法因應災害處理時，該災害之中央災害防救業務主管機關應主動派員協助，或依直轄市、縣（市）政府之請求，指派協調人員提供支援協助。前二項支援協助項目及程序，分由各中央災害防救業務主管機關、縣（市）政府定之。直轄市、縣（市）政府及中央災害防救業務主管機關，無法因應災害處理時，得申請國軍支援，其辦法由內政部會同有關部會定之。」在實際運作上，地方政府往往過於仰賴中央之協助。

(二)行政措施

1. 禁止或限制

依據災害防救法，行政機關於災害應變之必要範圍內，得採取徵用、禁入、移除建物、優先使用媒體等處分或強制措施。本法第31條規定：「災害應變中心指揮官，於災害應變之必要範圍內，得為下列之處分或強制措施：一、徵調相關專門職業及技術人員協助救災。二、劃定一定區域範圍，製發臨時通行證，限制或禁止人民進入或命其離去，或指定道路區間、水域、空域高度，限制或禁止車輛、船舶或航空器之通行。三、徵用民間搜救犬、救災器具、車、船或航空器等裝備、土地、建築物、工作物。四、危險建築物、工作物之拆除及災害現場障礙物之移除。五、優先使用傳播媒體及通訊設備，蒐集及傳播災情及緊急應變相關資訊。六、其他必要之應變處置。」同法第32條規定：「各級政府為實施第二十七條之措施，得對於其所必要物資之製造、運輸、販賣、保管業者，命其保管或徵用。為執行前項命令，得派遣攜有證明文件之人員進入前項業者營業場所或物資所在處所檢查。」相關單位基於上述條文所為之必要處置應對當事人予以補償，當事人若違反、不遵守權責單位基於上述條文所為之處份，本法第八章定有相關罰則（罰鍰）。

2. 援助或補貼

災害防救法對於「災後重建資金之籌措」、以及「受災者（受傷、死亡、失蹤或因災致住屋毀損達不堪居住程度者）之救助」均有規定。本法第44條規定：「行政院災害防救委員會應儘速協調金融機構，就災區民眾所需重建資金，予以低利貸款。前項貸款金額、利息補貼額度及作業程序應由行政院災害防救委員會定之，利息補貼額度由各級政府編列預算執行之，補貼範圍應斟酌民眾受災程度及自行重建能力。行政院災害防救委員會應於災害發生後之當年度或下年度稅捐開徵前，依本法訂定災害之稅捐減免或緩徵。」第48條規定：「災害救助種類及標準，由各中央災害防救業務主管機關會同直轄市、縣（市）政府統一訂定之。」現行救助方式主要以安遷及發給災害救助金之方式為之。

3. 其他措施

災害防救法第24條規定：「災害發生或有發生之虞時，為保護人民生命、財產安全或防止災害擴大，直轄市、縣（市）政府、鄉（鎮、市、區）公所應勸告或指示撤離，並作適當之安置。」本條文應為嗣後土石流發生時撤離人民的法律基礎，唯對不配合撤離、或撤離後再度擅自返回之人民並無明確罰則。

四、分析檢討

現行災害防救法對於災害之防救可區分為「預防」、「應變」、「重建」三階段，在預防階段由各級災害防治會報與災害防救委員會負責。應變階段則設立臨時性的災害應變中心，配合各相關業務機關所設之緊急應變小組以因應災害。重建階段則回到各業管部會負責。對此一架構之分析檢討認為，災害防救事權過度切割，防救災之統合能量不足：現行體制下，不同災害由不同機關個別主導救災，當复合型災害發生時，視單一災害指派指揮官之作法無法全方位處理救災所需。

此外，災害防救經驗無法累積傳承：預防、應變、重建三階段未有專職人力，災防經驗無法累積傳承。而地方災害應變救援過度依賴中央：中央縣市鄉鎮之三及災害應變權責不清，易延誤第一時間救災。最後，防災資訊通訊系統未能充分整合：支援災害防救、危機管理的相關科技仍有待加強，防災資訊通訊系統亦有待充分整合。

值得一提的是，現行救災體制以「災害損失→政府慰助金或低利代款→重建→同樣的災害損失→政府再提供慰助金或低利代款」為主要運作模式，未建立災害管理資訊之回饋系統，並容易一再犯相同錯誤。應強化「減災→整備→應變→復建」之災害管理循環功能⁷⁸。

第四節 恐怖攻擊

一、災害情形及定位

台灣被列為恐怖攻擊的目標？

2004年11月24日，中國時報記者張孝義⁷⁹報導，台灣國安單位已收到極機密的情資，指稱恐怖組織攻擊台灣的方式，極可能會採取如同印尼峇里島以汽車炸彈進行爆炸攻擊的模式，尤其可能改裝消防車、偵防車，在定點進行恐怖攻擊，該報導指稱，國安單位分別在去年8月27日、9月12日、11月24日及12月24日，四度接獲來自國外有關蓋達組織攻擊台灣的警訊，國內包括松山機場、101金融大樓等地在內都可能成為恐怖分子覬覦的目標。

不過，國安局於同日立即發表聲明指出，媒體的報導並非事實，近期內國安局並沒有接獲將台灣列為恐怖攻擊目標的情資，並且呼籲媒體勿以訛傳訛，造成社會恐慌；內政部長蘇嘉全隨即也於25日表示

⁷⁸ 參見李建中、李至倫，〈災害防救政策之研究〉，《財團法人國家政策研究基金會國政分析》網頁，網址：
<http://old.npf.org.tw/PUBLICATION/SD/092/SD-R-092-004.htm>。

⁷⁹ 中國時報記者張孝義11.23.2004

⁸⁰，他赴美國夏威夷州參加亞太國土安全高峰會時，也沒有得到台灣將遭恐怖攻擊的情資，但政府已設立了反恐管控辦公室，且警政署也將在桃園縣設置反恐訓練基地，結合警政署維安小組及各縣市霹靂小組，執行國內的反恐勤務，以免台灣真的發生恐怖攻擊時無法因應。

以恐怖攻擊而言，我國國內目前尚未直接遭受恐怖攻擊災害，但無庸置疑的是，全球化恐怖攻擊已經開始影響台灣的軍事、政治、經濟政策，甚至也開始影響一般人民的生活態度，並且政府部門的因應態度也有了轉變。

恐怖攻擊，不同於前述過去台灣經歷的幾次天然災害，在性質上屬於人為的緊急狀態，但不排除可能於其他類型的緊急災害匯流，例如使用炭疽熱或其他病毒進行攻擊，即可能與傳染病防治因應系統有關；如恐怖份子攻擊核能電廠、水庫或其他大型重工業據點，即可能與工業災害之因應有關。

九一一事件發生後，台灣政府的反恐行動，主要以配合美國的反恐活動為主，並呼應當時反恐的國際潮流。

二、規範面的因應

(一)憲法

目前沒有。但在大法官第六零三號解釋城仲模大法官協同意見書中，提到「環顧當下，在美國遭受九一一恐怖攻擊及英國倫敦地鐵爆炸案發生後，世界性的恐怖主義與反恐戰爭已然開始，整個地球村刻正處於隨時遭受不可確知危險的時期，因此預防性的工作相較於過去，必須有所提昇」

⁸⁰ 中央社記者謝佳珍11.25.2004

(二)法律

表 13：我國反恐相關規範表

我國反恐相關法制表列整理	
國際協定	1.中華民國（臺灣）與帛琉共和國防制洗錢及資助恐怖主義情報交換合作協定
內國法	1.入出國與移民法第5條第1項 2.國家情報工作法第7條（民國 94 年 02 月 05 日公布） 3.入出國及移民法第7條(民國 92 年 02 月 06 日 修正) 4.外國護照簽證條例第 12 條(民國 92 年 01 月 22 日 修正) 5.通訊保障及監察法第8條第9條(民國 95 年 05 月 30 日 修正)

緊急狀態法制之探討

<p>行政命令</p>	<ol style="list-style-type: none"> 1.試辦金門馬祖與大陸地區通航實施辦法第 17 條(民國 96 年 03 月 31 日 修正) 2.在臺原有戶籍大陸地區人民申請回復臺灣地區人民身分許可辦法第5條(民國 93 年 02 月 27 日發布) 3.內政部警政署辦事細則第5條(民國 96 年 03 月 27 日 修正) 4.大陸地區人民來臺從事商務活動許可辦法第28條(民國 95 年 11 月 30 日 修正) 5.行政院海岸巡防署辦事細則第9條(民國 95 年 10 月 16 日 修正) 6.財團法人國際合作發展基金會捐款及贈與處理辦法第4條(民國 95 年 04 月 19 日 修正) 7.戰備各階段公民營通信設施支援軍事管制運用辦法第17 條(民國 95 年 10 月 11 日 修正) 8.航空器飛航作業管理規則第177條(民國 96 年 01 月 17 日 修正) 9.行政院衛生署疾病管制局辦事細則第10條(民國 93 年 09 月 22 日 修正) 10.醫院緊急災害應變措施及檢查辦法第2條(民國 93 年 12 月 20 日 修正) 11.中央流行疫情指揮中心實施辦法第9條(民國 93 年 12 月 20 日發布)
<p>草案</p>	<p>反恐行動法草案</p>

來源：作者整理製表

(三)反恐行動法草案

行政院發言人陳其邁指出，爲了進行反恐行動，確保反恐行動法制之完備、成立專責處理單位、統合全國相關情報、負責國際間動態合作，並參酌各國另立專法之體例，爰擬具「反恐怖行動法」草案，並於92年11月4日將送請立法院審議，惟迄今仍未通過。

1.立法宗旨

爲維護國際和平、因應世界各國反恐潮流，應強化反恐怖行動之法制、成立統一事權之專責處理小組、統合全國相關情報及執法機構，對外負責與國際間之動態合作，以上目標有賴專法之制定，始克有效達成，爰擬具「反恐怖行動法草案」。

2.恐怖分子之定義

- ①恐怖行動：係指個人或組織基於政治、宗教、種族、思想或其他特定信念之目的，從事計畫性、組織性足使公眾心生畏懼，而危害個人或公眾安全之行爲。
- ②恐怖組織：係指三人以上，有內部管理結構，以從事恐怖行動爲宗旨之組織。
- ③恐怖份子：係指實施恐怖行動或參加、資助恐怖組織之人員。

3.主管機關

行政院專責單位、國家安全局、各地方自治政府、國防部。

4.反恐行動內容

(1)資訊方面

- ①**國際反恐資訊掌握與統合**：國家安全局負責統合協調辦理反恐怖情報資訊之蒐集及處理，並應將國際間已認定之恐怖組織、恐怖份子，或疑爲恐怖組織或恐怖份子之資訊，及其他必要之情報資訊，適時提供反恐怖行動專責單位。

各單位對國安局所提供的資料有保密義務，非經國家安全局同意不得公開。

②**通訊監察**：為避免國家安全遭受恐怖行動危害，而有監察通訊之必要者，得由國家安全局局長核發通訊監察書後進行通訊監察。但通訊之一方在境內設有戶籍者，其通訊監察書之核發，應先經最高法院檢察署之檢察官同意。但情況急迫者不在此限，此時，國家安全局局長應即將通訊監察書核發情形，通知最高法院檢察署之檢察官補行同意；未在二十四小時內獲得同意者，應即停止監察。

為處理重大恐怖攻擊事件之需要，避免人民遭受緊急危難，國家安全局得命阻斷或限制相關通信，並應即時通報行政院反恐怖行動專責小組。

③**網路監察**：為防制恐怖份子利用網際網路進行恐怖行動，電信事業應使其通信系統之軟硬體設備具有**保存及提供**網際網路跨境連線通信紀錄之功能。於有事實疑為恐怖份子利用網際網路進行恐怖行動時，電信事業應依治安機關之請求，就特定之網際網路範圍位址，保存並提供通信紀錄。

(2) 人流控管

①**嫌疑人留置**：對於有事實疑為恐怖份子者，治安機關於必要時得予留置調查，並應即時通報行政院反恐怖行動專責小組，但不得逾24小時。

② 可疑交通工具與建物的搜索檢察

(3) 財務控管

① 洗錢防制

對有事實疑為恐怖份子利用帳戶、匯款或通貨以外之其他支付工具從事恐怖行動者，最高法院檢察署檢察總長、行政院海岸巡防署署長、法務部調查局局長、內政部警政署署

長，為防制恐怖行動之發生，而認有必要時，得對該工具為禁止或限制付款、轉帳、提款或交付等金融交易之命令，並應即時通報行政院反恐怖行動專責小組。

②可疑物品與財產之扣留

對有事實疑為恐怖份子所使用作為從事恐怖行動之動產、不動產及其他財產，最高法院檢察署檢察總長、行政院海岸巡防署署長、法務部調查局局長、內政部警政署署長，為防制恐怖行動之發生而認有必要時，得為扣留或禁止處分之命令，並應即時通報行政院反恐怖行動專責小組。

(4)特別刑法與管轄權

- ①參加恐怖組織罪：參加恐怖組織者，處五年以上有期徒刑，得併科新臺幣一億元以下罰金
- ②加重刑度規定：以恐怖行動犯本法以外之罪者，加重其刑至二分之一。
- ③管轄權：中華民國人民在中華民國領域外犯前二條之罪者，不問其犯罪地之法律有無處罰規定，依本法處罰。

三、執行面的因應

2001年911事件發生後，聯合國隨即於9月28日通過聯合國第1373號決議，2004年3月26日又再通過第1353號決議，要求其會員國應共同支持反恐行動，台灣雖非會員國，但仍呼應反恐的全球潮流及具體的美國反恐行動，進行了一些因應措施，例如，控管有嫌疑的伊斯蘭國家人民是否「借道台灣，入境美國」；但近年來，反恐行動已與台灣本身的國家安全結合，最明顯的轉變，就是防範恐怖攻擊相關事務的主要權限，由國安會移轉至行政院。

(一)行政機關

- 1.特別編組：行政院反恐管控辦公室之設立

美國發生九一一恐怖攻擊後的一個月，國安會曾於台北火車站進行一場跨部會的核生化防護演習，這也是台灣第一個反恐演習，而於2004年11月16日，行政院召開了行政院反恐行動政策小組會議⁸¹，建立了「反恐行動組織架構及運作機制」，將反恐行動界定為「國安」和「行政」的雙軌機制，針對恐怖行動的性質區分為暴力、生物、毒化物、放射性物質、重大公共建設、資通和其他等7類，並在反恐管控辦公室下設立七個應變組⁸²，依當時行政院院長游錫堃的指示，各應變組於設立三個月內，均應演練一次；並由曾經任職於國安會的郭臨伍擔任辦公室主任，該辦公室的其他成員來自於警政署、國安會、原能會等單位，以進行各部門的溝通與整合，因應恐怖攻擊行動此種與傳統不同的風險類型。

在反恐管控辦公室設立之後，行政院長謝長廷於2005年4月13日，率相關首長於台北大直「聯合演訓中心」舉行首次反恐專案演習，測試政府因應反暴力、反生物、反毒化、反放射性、反資訊通訊等五大恐怖攻擊的能量，建立標準作業程序，強化政府未來處理危機的能力⁸³。

2.行政機關：國安及行政二系統雙軌制

陳其邁表示，依據反恐怖行動法草案，我國反恐工作的組織體系採取國安、行政二系統相互合作之雙軌制設計，並在反恐組織機制的建立及運作上，區分「平時」（危機預防）與「變時」（危機處理）兩階段，並建立兩者間的「轉換機制」。平時階段，以既有的行政架構為運作基礎，強化國安體系與行政院情資通報聯繫機制；而「轉換機制」則是協助既有行政架構順利轉換成危機應變功能取向的危機處理組織；再輔以動員分級制度，識別平

⁸¹游揆：反恐行動刻不容緩，行政院一週內成立「行政院反恐怖行動管控辦公室」，11.16.2004，行政院即時新聞

⁸² 反恐與台灣安全威脅結合 臺當局將反恐鎖定大陸，08.23.2005. 華夏經緯網

⁸³ 行政院首次反恐演習 因應五大恐怖活動，中央社楊嘉慧，4.12.2005

時風險管理（三種燈號）或變時（恐怖攻擊發生）之事件類型，分別律定應變處置作為。所謂的三種燈號，係指綠燈（低風險階段）、黃燈（中度風險提升階段）、紅燈（高度風險嚴重階段）。

陳其邁表示，在「平時」的反恐行動組織架構上，係由行政院「行政院反恐怖行動政策小組」、「行政院反恐怖行動管控辦公室」與國安體系的「國家安全會議之情勢研判小組」及「國家安全局反恐怖情報整合中心」等單位組成。其中，「行政院反恐怖行動管控辦公室」更針對暴力、生物、毒化物、放射性物質、重大公共設施、資通及其他等類型的恐怖攻擊，分別設立七個應變組。進入「變時」階段後，國安體系乃由國安會成立「反恐怖行動危機處理決策小組」；至於行政體系部分，則視發生兩種以上或單一類型之恐怖攻擊事件，來決定反恐組織架構，前者由行政院啟動「反恐怖行動應變中心」，後者係由各部會依據恐怖活動類型分別成立各種「指揮中心」；此外，各縣市政府則應依權責設立「反恐怖行動現地應變中心」。

在反恐機制運作上，當台灣遭受恐怖攻擊時，警示紅燈亮起，由行政院長立即召開反恐行動政策會報，啟動「反恐攻擊二級應變中心」；若同時發生兩種以上的生化毒物攻擊或資訊交通攻擊，則啟動「一級應變中心」，並向軍方要求支援，此時總統也將發佈緊急命令，下令軍隊出動執行反恐任務。

至於平常運作，例如這次倫敦遭恐怖攻擊，就是由國安局官員負責情資整合，再交由反恐辦公室，如經評估認為無需提升反恐層級，在安全防護的因應上便僅加強外館及人員的保護，而不會有更進一步的行動。

緊急狀態法制之探討

第五章 緊急狀態的法制因應與制度設計

緊急狀態的形成來自多種原因，因應的作法往往也必須因案而異。然而，面對緊急狀態的發生的日漸頻仍，相關法制如何因應，已是當前主要國家共同面對的問題。固然，在論述的過程中，對緊急狀態所存在的例外情形，原則上大都能肯定其必要性，但也有積極認可其存在與消極容忍其存在的根本差異。這種差異表現在實際運作層面上往往造成相當程度的法律爭議。從憲法上權力部門之間的權力消長與制衡，到緊急因應法制的立法必要性與範圍，乃至法院的角色與補償的必要性等等，都有釐清並尋求共識的必要。

以下分爲憲法層次、法律層次以及執行層次三方面，對緊急狀態的法律因應進行分析，討論相關政策選擇的問題，其中亦涉及相關制度設計的問題與建議。由於緊急狀態的存在與因應涉及多重價值的選擇，在法制因應的分析過程中，我們特別考量到人權的保障、安全的確保、效率的實現以及國際合作等面向。

第一節 憲法層次的因應

憲法規範著權力部門之間的運作與制衡，更規範著人民權利保障以及司法的審查等等。在緊急狀態的法制因應上，往往立即涉及現行憲法的規定應如何詮釋，以即是否有因應緊急狀態修改憲法的必要。

一、國會的監督與制衡

緊急狀態往往必須賦予執行部門較強的權力以因應變局，然而，任何權力都必須受到監督，即令在緊急狀態也不例外。而整個監督問題的核心，乃是國會的角色。這其中涉及權力的授權以及監督制衡的問題。

(一)國會以漸進超多數決進行授權

緊急法制在憲法層次上所面臨的第一道課題，便是緊急權力之行使如何取得正當性的問題，亦即，國會對於行政部門的緊急權限應如何授權的問題。

首先，即令在緊急狀態，行政部門的緊急權行使，仍須取得正當性。問題是，是否事事都必須經過國會的事先認可？如容許事後追認，其相關機制為何？國會授權的同意門檻是否應有不同的設計？凡此問題，都是學說上對憲法上緊急權行使論爭的主要議題，也確實有不同的意見。不過，在美國發生911事件以及國際社會面臨恐怖攻擊之具體威脅後，允許國會以事後追認方式，甚至進一步採取漸進多數的授權方式，成爲備受注目也相當具有說服力的一種制度設計方式。

國會以漸進多數決的授權方式來追認行政部門之緊急權行使，最早係由美國耶魯大學憲法教授Bruce Ackerman所提出。⁸⁴依他的論點，在緊急狀態發生時，應允許總統先行宣布緊急狀態，但須經過國會事後藉由簡單多數來認可（國會開議中必須在一週內，不在議期中則至多兩週內）。不過，即使國會事後同意，緊急狀態的期間也只能存續兩到三個月。如果要獲得兩個月的展延，必須取得國會60%的同意，第二次的展延則需要70%的同意，第三次以後的展延則均需獲得80%的同意。這樣的設計有以下的優點：

首先，其最核心的功能是避免緊急狀態被常態化，而使其在實踐上必然會被終止；第二，國會的每次投票都必然會引發討論，這可以使得受到不當處遇之人犯，其權利狀態得以受到適當的關注；第三，可以避免政府濫用人民對危機的恐慌來清算政治上的對手；第四，讓行政機關預期到緊急狀態終將終止，因而在行使緊急措施時，考量到緊急狀態結束後可能受到的檢討與制裁，而更加的謹慎小心；第五，

⁸⁴ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

避免政府爲了說服人民對政府具有信心，而對特定人種或族裔進行標籤化的作用。

漸進多數的機制涉及國會的立法形成空間。原則上，憲法以普通多數決爲原則，超高多數爲例外，否則會對往後世代形成限制而違憲。但緊急法制的超高多數是可以被允許的，因爲其正是希望確保緊急狀態成爲一種例外的狀態，而不會被常態化。並且，透過漸進式的超高多數決，也可以避免人身保護的懸置被廣泛的濫用。爲了達到所需的多數，國會必須對「叛亂」或「入侵」進行一次又一次的討論，有助於抑制行政機關過度的擴張限制人身自由的範圍。

雖然此種漸進多數的授權機制主要是針對恐怖攻擊或戰爭等人爲因素所導致的緊急狀態所提出，但在天然災害所造成之損害相當劇烈或有持續情形時，亦可能有所適用。例如，2004年重創南亞的海嘯，其對當地所導致諸多衍生性的重大損害就持續了相當長的時間，當地甚至因此有一段不算短時間的緊急狀態，在此種情形，也可能考慮此種漸進授權的機制，避免因災害的持續而使政府任何濫用權力或危及人權保護之可能。

(二)國會設立監督委員會進行監督

當國家突逢空前危機時，政府有可能盲目採取各種極端措施來因應，而殃及池魚。911事件之後美國採取所謂搜索網(dragnet)的建構，就是適例。雖然可能會逮捕一些確實與恐怖組織有關連的人犯，但也必然會使許多無辜者被羅織入獄。因爲這種犯錯的必然性，行政機關常常不願公開資訊，而以機密之名掩藏實況，然而完全公開資訊又會使得恐怖份子因此得益，因此必須有更細緻的制度建制。

由國會設置監督委員會，負責對行政部門相關緊急措施的資訊監控，就是一個可行的方法。美國憲法學者Ackerman甚至主張在此種監督委員會的人員組成上，有必要讓反對黨擁有過半數之席次或由反對

黨人士出任委員會主席。⁸⁵因為他認為在緊急時期，政府不論在資訊情報上或權力行使上都擁有幾乎絕對之優勢，考量到有效的政治監督，應該給予反對黨更多的制衡空間。不過，執政黨對於反對陣營所提出的人選，也有權挑選其認為較能接受的一位，以顧及公平與真正實施上的可行性。當然，這種制度設計也必須考量到反對黨濫用權力之可能。

無論在委員會的組成上是否特別考慮政黨的角色，由國會設置此種委員會的最主要功能還是在監督行政緊急權力之行使。其中，最重要者即為此一國會委員會對行政機關在緊急時期中的舉措進行調查，並在一年內向大眾做成公開的報告。以此方法來設置委員會的功能如下：首先，反對黨掌控監督委員會可以避免委員會袒護行政機關，而對資訊的散佈做出過度的限制；其次，這類的委員會也較能夠在資訊的保密性（*secrecy*）與公開性（*publicity*）之間求取平衡；最後，這也使得每次國會展延緊急狀態的投票能夠獲得更充分的訊息基礎。

(三) 授權與監督的範圍

對緊急權力作制度建制必然會涉及權力範圍的問題，包括啟動緊急機制之「事件」的範圍，以及緊急狀態中所能採取之「措施」的範圍，應該以權力分立與制衡的架構性制度設計為主，而對緊急權力作實質性的規範只是輔助。這是因為實質性的權力規範只有在良善的權力分立與制衡架構下，才能發揮實際的效果。如果缺乏制衡的制度設計，單純憲法的文字是不足以發揮功能的。

在「事件」的範圍部分，就人為因素所導致之緊急狀態如恐怖威脅或攻擊等，原則上應限制在具體實際發生的攻擊(*actual attack*)。這個標準比一般所謂「明顯而立即的危險」(*clear and present danger*)更為嚴格。因為行政機關（尤其是情治單位）往往很容易認為存在有明

⁸⁵ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

顯而立即的危險，其也常常將判斷實際情況所必須的資訊列為最高機密，讓外人無法獲悉。相較之外，實際發生的攻擊就無可爭辯。至於如何界定實際發生的攻擊，應該交給政治部門來作政治決定。至於在天然災害的緊急狀態，當然是以災害之具體發生作為規範之時點。在「措施」的範圍部分，應從正面的方式來界定。緊急權之行使涉及救濟（relief）與預防（prevention）兩個面向，所有在緊急狀態所允許的措施都必須與這兩個目的產生正當的連結。

二、司法的角色與定位

對於緊急狀態因應的憲法規範秩序的安排，行政部門的緊急權限以及國會對其權限行使的監督與制衡，當然是最主要的核心。不過，司法部門仍在其中扮演重要角色，包括對於緊急法制的整體健全，以及對於具體個案中人權的確保，法院都必須肩負起重要的事後救濟功能。在人為因素所導致的緊急狀態，法院對於人權的保護往往表現在事前的管制與預防，而在天然災害的情況，司法的功能角色往往在事後的賠償或補助。

（一）法院介入的時機與議題

在緊急法制整體健全的部分，核心問題是法官對於總統或國會最初宣告緊急狀態的決定是否有事後置喙的餘地？基本上，在危機發生初期，應尊重並信賴政治部門之判斷及決定。在前面章節曾分析討論美國及法國之緊急法制的設計與安排，對於是否遭逢緊急狀態的決定，在法國的法制上是規定總統應向憲法法院請求提供諮詢意見，但美國則由行政部門決定，美國聯邦最高法院亦未曾於事後所涉之裁判中質疑行政部門之決定。⁸⁶ 儘管對於是否遭逢緊急狀態之判斷，法院應該尊重行政部門的判斷，但關於程序事項法院仍應扮演守門員的

⁸⁶ *Korematsu v. United States*, 323 U.S. 214 (1944).

角色，例如在總統未獲得所需的超高多數，但卻拒絕停止相關措施的情況下，法院就應該介入。當然總統也許會繼續和法院對抗，此時「政府是否決定要拋棄法治選擇獨裁」，就會成為論辯的焦點。

(二)具體個案中的人權保障

除前述關於緊急狀態之判定外，法院在緊急時期的功能最主要應該還是保障人權，確保行政所採之緊急措施符合人道處遇原則，尤其是絕對禁止虐待。有人曾經主張，如果是為了避免一枚已知存在的定時炸彈引爆，虐待犯人求取情報也許例外可以被容許，但即使在此類情況也應該由法官審查並簽發令狀。不過，法官也是人，也會恐慌，在緊急狀態下法官可能成為橡皮圖章。並且，無限制的人權侵害也可能使得官員因為害怕受報復而試圖無止盡地延續緊急狀態，而導致向警察國家傾斜。從而，即使在緊急狀態下亦必須適度給予遭受逮捕或拘禁之犯罪嫌疑人或被告相關之司法扶助，律師扶助請求權（**Right to counsel**）就是其中的重要內涵。律師可以提供被拘禁人協助，幫助準備辯護資料，並成為與家屬之間的中介。當然此一權利可以受到合理的限制，例如某些資料可以禁止公開。調查單位可能會採用旋轉門策略，重複拘禁缺乏證據但其高度懷疑的對象。如果調查發現新證據，重複拘禁當然可行，但是此時就必須透過正常的刑事程序為之。

個案的爭議也會累積成對於整體緊急法制的思考：法院在判斷個案時，也會思考當下個案對未來的緊急法制整體的意義。另一方面，雖然人權侵害、各種程序的濫用、甚至對特定種族的標籤化都難以絕對避免（例如在緊急狀態下，拘禁前的證據聽證程序會被延宕），但是檢調機關仍須向法院提供理由，如果事後這些理由證明為假，也應該有各種處罰、補償之機制，這些成本都會促使檢調更為謹慎。

最後，緊急法制中漸進多數決的設計，會使得檢察官預期到緊急狀態不會無限的持續，為了避免屆時的案件塞車，檢察官會有動機預先蒐集相關的資料。檢察官的壓力加上未來補償的可能性，會使得行政機關對缺乏明顯證據的案例更為謹慎，甚至提早釋放。漸進多數決

對法官也有正面影響，這涉及法官如何得知緊急狀態將結束，對權利例外的限制何時應回歸到正常的法制，在這一點上，漸進式多數決將決定的責任加諸於立法機關而非法院。當然回歸正常法治可能會引發國家社會仍未回復正常的疑慮，這樣的疑慮存在，但不該阻礙緊急法制的建立，任何的漸進式超高多數都會比現狀更好。

三、現行憲法的爭議

前述從憲法學理上對緊急狀態之憲法規範的建議，如要進一步於我國憲法中具體落實，必須先面對我國憲法在緊急權之行使的相關規定以及其衍生的爭議。我國憲法歷經過去長達約四十年之動員戡亂及戒嚴體制，在1990年初民主轉型之後又有七次之憲法增修，目前憲法中因應緊急危難之相關條文可以說相當紊亂，配套之法制亦不齊備。

憲法本文關於國家面對緊急危難的相關條文，主要有二：一是憲法第39條有關戒嚴之規定，另則是第43條有關總統發布緊急命令之規定。不過，在長達約四十年的動員戡亂體制之下，動員戡亂臨時條款第1條授予總統緊急處分權，使之不受前述憲法本文第39及43條規定之限制。即便在動員戡亂臨時條款於1991年廢止之後，憲法增修條文仍沿襲過去作法，於第2條第3項另外規定總統之緊急命令權，使之不受憲法第43條之拘束，但保留憲法第39條有關戒嚴之規定。

憲法第39條規定：「總統依法宣布戒嚴，但須經立法院之通過或追認，立法院認為必要時，得決議移請總統解嚴。」係憲法就戒嚴程序所為之規定，但並未涉及戒嚴或解嚴之實質要件。根據1948年即公布生效並於1949年有過一次修正的戒嚴法，其第1條規定戰爭或叛亂發生時，總統得依戒嚴法宣告或使立法院宣告戒嚴。也就是說，目前我國法制對於戒嚴宣布之要件，限於戰爭或叛亂之狀態。而憲法增修條文第2條第3項，將總統發布緊急命令之情況，限於「國家或人民遭遇緊急危難」或「財政經濟上之重大變故」，與憲法本文第43條所稱之「天然災害、癘疫、或國家財政經濟的重大變故」並非相同，在範圍上似

更加限縮。惟在程序要件上則有所放寬，不再要求必須依據緊急命令法，而可直接爲之。

在目前的規定下，憲法第43條所規定之緊急命令法，是否仍有制定必要？憲法增修條文第2條第3項所稱之緊急危難及財經重大變故，在解釋上是否能包括前述2003年的SARS危機、2004年的風災水災？或其他尚未達到戰爭或叛亂狀態的重大政治或社會危機？目前國際上的的反恐戰爭(war on terrorism)、北韓核子試爆在東亞及國際所引發的重大危機，是否可能構成我國戒嚴法所稱之戰爭或叛亂？前述憲法學理的討論中，美國耶魯大學法學院憲法學者Bruce Ackerman建議必須以「實際發生攻擊」(actual attack)作爲憲法上緊急權限行使的判準。如果以此判準來論，目前我國憲法允許發布緊急命令之情狀，較爲寬鬆。如真有實際發生攻擊的情況，甚至已構成宣布戒嚴的要件，而進入某程度之軍事統治。當然，在此種情況發生時，總統亦可不宣布戒嚴，而僅以發布緊急命令來加以因應。從憲法學理來看，民主憲政國家即使面臨重大危機時，原則上仍應盡量避免戒嚴的宣布，而盡可能以暫時性、人權侵害或限制程度較低之措施爲之。從而，倘若我國遭逢重大危機，原則上應優先考量緊急命令而非戒嚴。

在921震災之後，大法官曾作成釋字第543號解釋，初步釐清目前憲法增修條文有關緊急命令之性質與界限，但卻也引發出許多值得更進一步思考的議題。在該號解釋中，大法官一則肯定緊急命令爲憲法所授權，具有替代並變更法律之效力，以有效因應國家緊急危難及財經重大變故；另則同時確認任何補充緊急命令之規定，都必須事先於緊急命令明文規定其意旨，並於事後經立法院追認。從而，在憲法增修條文第2條第3項的規定下，司法院大法官對於緊急命令之發布，採取完全的國會控制及嚴格的法治主義。亦即，雖然憲法例外允許行政部門發布具有法律效力之緊急命令，以因應國家緊急危難或財經之重大變故，但大法官仍堅持嚴格法治主義，要求緊急命令的後續或補充，都必須事先於緊急命令授權，並事後由立法院追認。

值得我們進一步思考的問題是，此種高度國會控制之緊急命令體制，是否真能在國家面對緊急危難或財經重大變故時發揮效能、及時充分因應？在緊急危難的狀態下，強調國會控制及法治主義，是否真等同對於人民權利的積極維護與保障？其實，釋字第543號解釋雖然非常強調對於緊急命令的國會控制，但卻也因為現實的考量，對該次未經事先授權、亦未經事後追認的執行要點，仍肯認其法效性，而稱尚不生違憲問題。從而，我國憲政史上首次緊急命令發布的經驗，清楚彰顯出一個所謂「理想」與「現實」的落差。

這個落差，反映出目前我國憲法以及相關法律，對於政府如何面對及有效因應緊急危難的狀態，缺乏一套完整規劃的機制，也給予我們一個全盤檢討、研擬因應對策的契機。

四、修憲的考量

我國憲法關於緊急狀態之規定，主要有二個條文規範。首先是憲法增修條文第2條第3項規定，總統為避免國家或人民遭遇緊急危難或應付財政經濟上重大變故，得經行政院會議之決議發佈緊急命令，為必要處置，但發布命令後十日內必須提交立法院追認。其次是憲法第39條規定總統依法宣布戒嚴，但須經立法院通過或追認。

基本上，不管是緊急命令之發布或戒嚴之宣告，在我國憲法規範的安排上，都是允許行政部門先發動，再由國會行使監督之權限，於事後予以追認。從這一點來看，與前述討論所建議採行之模式相符。不過，一旦緊急命令發布或宣告戒嚴之後，除依憲法第39條國會可以決議移請總統解嚴，或依司法院大法官釋字第543號解釋之意旨，國會可以審查緊急命令進一步授權訂定之細節規定外，別無其他前述學理討論之漸進多數授權的制度設計。如果要在我國憲法落實此一制度，可能涉及修憲，不過，在解釋上，亦可能透過憲政實踐進一步形成憲政慣例的方式，在行政部門以同一緊急事件為由而發布緊急命令或宣告戒嚴時，由國會以漸進多數決的模式來進行監督。

雖然修憲的困難度非常高，不過，在2001年的911事件之後，全球各國為有效因應新型態之緊急危機，多有修憲之提議及討論。即使修憲門檻非常高的國家如美國，也不例外。在這些修憲提議的討論上，國會的功能角色是一個重點，這可以參考中東歐與南非的經驗。在中歐與東歐，國會被賦予較重要的功能，尤其在波蘭，緊急狀態的展延必須上議院的多數同意。但波蘭的制度瑕疵是其規定緊急狀態無論如何只能展延一次，這常常不符合現實上的需求。南非則是第一個設立漸進多數決機制的國家，要求緊急狀態的展延必須有國會60%以上的同意。

五、 憲法規定的法律銜接

當然，對修憲門檻很高的國家來說，要以修憲方式很快將前述較為完備之緊急狀態相關規定納入憲法，有相當之困難度。從這個角度來說，透過制定特別法律的方式來落實前述制度設計，亦不失為可行方法。例如，在美國，考量到修憲的困難，在緊急時期總統與國會間的權限分工與制衡就是透過許多法律的規定。國會於1976年制定的國家緊急法（National Emergency Act, NEA），就是這樣的制度嘗試。從這個角度來說，國家緊急法關於緊急權限之行使及其限制，具有準憲法之位階與效力。該法賦予總統單方宣告緊急狀態的權利，也同時規定國會必須每六個月集會商議是否終止緊急狀態。比較可惜的是，相應的諮詢或報告程序規定較為不清，也從未被真正實踐，法院也沒有相應的法律基礎以強制履行。不過，即便仍有諸多制度上可以進一步改進的地方，國家緊急法在補充憲法規定不足的地方，已經發揮重要功能，亦有其時代意義。

第二節 法律層次的因應

緊急法制在憲法層次的問題，必須從現有憲法文本去做解釋，解釋的方向則必須對當代緊急狀況的內含與因應有合乎時代的體認，如

果無法透過憲法解釋，甚至必須修改憲法。然而，修憲茲事體大，程序也很繁雜，何況許多緊急法制，也都可在法律的層次去做處理。

一、緊急法制的立法型態與整合

在法律的層次上來思考緊急法制的設計，是否整合立法以及法律的內涵，則是最主要的關鍵問題。

(一) 整合立法與分散立法的考量

任何議題的立法都一樣會面臨整合立法或分散立法的選擇與考量。分散立法可以具體針對個別議題進行規範，而且在修改的時候也較機動，可以針對個別的問題進行零星修正。但是，分散立法與分散職權一樣，往往也造成許多整合的介面。整合得好，固然問題較不嚴重，但因為組織的慣性，往往分散立法的情況下，仍然容易造成本位主義，使得法律與法律之間的重疊與漏洞產生比想像還要大的問題。這種法律間的問題，在每個法律都有主管機關的前提下，往往造成機關與人員間協調的介面。對一個特別講究統合與協調的緊急應變法制而言，能夠有較完整的整合立法，絕對是制度因應上的正面資產。當然，整合立法是否能從需求面做最好的設計，真正從法律面向上做出實質的整合，也是必須正視的。

從這個觀點上看，我國許多緊急應變的法律，是可以考慮從全風險(all hazard)的觀點，做出整合立法。制訂一部整合性的緊急應變法，並在立法過程中整合現行的相關立法，應該是可以立即著手研究草擬的工作。加拿大在緊急因應法中區分為幾種類型，並做不同的處理，應是可以好好參考的對象。

(二) 反恐法立法的必要性與評估

緊急狀態法制之探討

制訂反恐法雖是聯合國的決議，在現實上美國也發揮影響力，除了美國本身外，也促成包括日本、加拿大等相關國家立法因應。然而，從反恐法立法以來，已經有相當多的檢討聲音，對於立法的必要性更有許多討論。即令在發生九一一事件的美國本身，也隨著時間的經過，而有較多冷靜的考量與長遠的思考。

其實，撥開九一一的悲情情境，反恐法立法問題，仍然必須與其他法律的立法情形一起考量。尤其是在法律上或組織上是否將反恐納入整體緊急因應的一環，更是當中的重要考量因素。反恐的因應納入整體緊急因應的體系，並做整體制度化的整備，在緊急應變法已經完整考量反恐此一緊急因應類型之下，其實並沒有必要非另行立（反恐）法不可。因此，重要的是緊急法制中是否有涵蓋反恐措施，而非是否有特別立一部反恐法。當然，國際外交上的壓力確實也是其中一項考量因素，但當今許多國家都已經有不同的作法，連美國也有反省的呼聲。

二、緊急法制的重要立法議題

對緊急因應做整合立法的確是努力的方向，所謂的整合法制應該有哪些內涵？以下幾個議題是當前思索緊急因應法制獲得重視的幾個課題。

（一）緊急事件類型與決策機制

造成緊急因應的原因容有多端，或來自風災水災等自然原因，或來自恐怖主義破壞等人為因素，或僅限於國內因素，或與國際或文明衝突相連貫，可以說不一而足。針對此一多元狀態，緊急法制的因應上有兩種不同的作法。一種是採分散的方式，個別處理。如此固然能夠針對不同的緊急原因進行規範與制度設計，但是往往造成資源的配置甚至因為協調界面的繁多而影響效能。因此，整合型的處理，已經

是許多國家努力的方向。如果此種整合處理能搭配整合立法則其整合效果更為可觀。這其中，加拿大的緊急法是最值得注意的。

加拿大的緊急法規定了四種緊急態樣，容許加拿大政府權限去處理緊急事件。這四種類型分別是：

1.影響公共福祉的緊急狀態(Public Welfare Emergencies)：包括(1)火災、洪水、颶風、地震或其他天災。(2) 人類、動物、植物的疾病(3)意外或污染；造成的結果會危害生命、財產，造成社會崩解，或是物資、服務或資源短缺。

2.影響公眾秩序的緊急狀態(Public Order Emergencies)：所有威脅加拿大安全的緊急狀態。

3.國際情勢的緊急狀態(International Emergencies)：威脅加拿大以及其盟國主權的恫嚇的行為或是武力的使用的緊急狀態。

4.戰爭(War)：其他國家對加拿大或是其盟國發生或是即將要發生衝突。

針對不同的緊急狀態，區分不同的有效期限以及管制措施。其中，第一類事件的有效期間為90天，展延亦同。第二類事件的有效期間為30日，展延亦同。第三類事件的有效期間為60日，展延亦同。第四種事件的有效期間為120日，展延亦同。有效時間的長短反應事件的性質，例如涉及戰爭時的有效期間最長，為120日。涉及公共秩序的第二類，有效時間最短，僅30日。相對的，對於各種不同的事件類型，也容許政府作不同的緊急應變行為。這些配套的規定，詳請參閱下表的整理。

	期間(展延的期間亦同)	管制措施	項目
公共福祉	90天	1.管制或禁止到特定區域旅行 2.遷徙人民及財產 3.徵收財產 4.建立醫院或避難	天災 傳染病等

緊急狀態法制之探討

		所	
公共秩序	30天	1.限制人民的旅行 2.指定保護的區域	危害社會安全的情況
國際緊急情況	60天	1.管制特定產業 2.進入或搜索民宅、交通工具 3.指定特定保護區域 4.規範加拿大公民海外旅行 5.管制人口移動 6.管制加拿大與國際的金融活動	國際衝突
戰爭	120天	1.不包括徵兵制 2.總督可以頒佈相關的命令或管制	戰爭

來源：作者製表

我國緊急法制的建制，應該採用整合的立法模式，而在法制的設計中，則仍有必要區分類型，並針對此一類型一前述憲法精神，分別採取不同的授權期間，並設定不同的授權門檻，且採累進方式。在另一方面，針對不同類型，也可貼切地授權政治為不同類型的侵害行為，以妥適面對緊急事故因應的需求。

(二)人身安全的限制與救濟管道

雖然是以上述緊急類型為基礎作授權有效期間、再授權門檻以及政府剝奪或限制人權等相關行為的不同規定，但緊急法制終究是例外與暫時的。法律的規定仍必須明確宣示與憲法基本權利之間的連結關係。加拿大的緊急法便明文規定，任何依本法所實行的暫時性的法律仍然要受加拿大權利與自由憲章的拘束。因此，任何在緊急狀態下拘

束人權的措施，仍必須要合乎憲法與國際人權公約對於人權保障的最低標準。我國憲法也有相當清楚與明確的人權保障條款，尤其是第八條的人身自由，及其他相關的各種自由權與平等權的保障。緊急法制的建立，必須清楚且明白地建立在受這些基本權利保障的基礎上，相關的例外容許都是暫時的，而且也不能逾越必要範圍。這種宣示固然可以高調地在憲法中明訂，但在緊急應變法中明訂也屬可行。

當然，如此原則性的要求仍必須有機制才能真正做到。在緊急時期，有關人權的維護與相關救濟管道不只應該暢通，甚至於積極救濟的必要，反而應該提供更有效率的救濟管道。緊急應變法中明白規定此一機制，應是值得認同的作法。當國家人權委員會建立之後，自應賦予人權委員會此一緊急時刻的特殊任務。

(三)補償

從九一一的實際案例中可以看到緊急事故的因應中，補償是個值得重視的問題。然而，補償的問題如果沒有事先設想並做好制度規劃，往往受到個案政治情緒影響，而發生扭曲的現象。例如，九一一的受害者確實獲得慷慨的補助，但被當成恐怖份子而拘捕的無辜者卻沒有受到相應的對待。補償的課題應該被納入緊急法制的一環，這不只與正義有關，更涉及行政效率。由於有補償的機制，相關人員在進行防範性的措施時，將更會重視比例原則，拘捕嫌疑人時會更為謹慎，進而也提升行政機關的效率。

補償固然是因應緊急事故必須考量的制度要件，但對於補償的要件、時機、範圍及程序等，都有待進一步詳細的規劃。除了上述有關緊急措施的無辜者應有補償的設計外，補償制度的設計也必須分析市場的力量，以及影響行為的誘因。不論天然災害或人為災害，如果建立在事後無條件的補償與復建，往往反而又發人們迎向風險。例如，人們仍向天災頻仍的地方聚集，或不願遠離風險。美國國家洪水保險（National Flood Insurance, NFIA）的失敗，即是基於這樣的一個誘因問題，因為它麻痺了市場的變動機制（anesthetized market

innovations)，並且造成道德危險（moral hazard）。我國以往的災後重建，往往也使得原本應該留給大自然的地方，一次又一次地透過重建，不斷與大自然爭逐，造成惡性循環。這些在進行補償的設計時，都應該注意。

(四)保險

九一一事件發生以來，對保險業造成了空前的衝擊，這是一般人所無法事先想到的。因此，緊急法制的思考過程中，也必須對保險政策與制度同步考量。九一一事件不只是一夕之間造成了龐大的賠償金額，傳統保險商品的區分在恐怖攻擊也無法提供風險分攤的功能。更重要的是，保險業缺乏對於恐怖攻擊的相關資訊，資訊的黑洞使得恐怖攻擊的風險無法被適當的反應。因此，由於風險過高，又缺乏充足的資訊，保險業往往選擇離開保險市場，因而造成市場供給的下降，需求卻上升，保費因而不正常的上漲。

面對這些問題，美國政府的反應是制定恐怖主義風險保險法(Terrorism Risk Insurance Act, TRIA)，內含政府出資的再保險計畫，由政府承擔恐怖攻擊的風險，試圖藉此使保險市場的供給與需求回復正常。嗣後保險市場確實趨於穩定，但是否可以歸功於TRIA，卻有許多爭論。更重要的是，TRIA是由政府介入分攤風險，而並沒有改變保險業本身的結構，因此保險業本身回應恐怖攻擊風險的能量並沒有增強。

政府的角色包括事前與事後兩種可能。政府可以採取如同TRIA一般的事前再保險計畫，或是採取在恐怖攻擊發生之後，對保險業者予以補助。當然，前者可能過度干擾保險市場，後者則是不可預測，也常常混雜了許多其他動機，進而而扭曲市場的一般運作。這兩種作法在緊急狀況下採行確實能發揮穩定市場的功能，但仍必須尋求其他更長遠的作法。尤其是必須深刻掌握從911以來緊急狀態本質的改變，進而影響保險業的運作結構，才是真正的長遠的作法。

第三節 執行層次的因應

緊急因應的相關法制固然應力求完整，但實際的執行層面往往不是單純法律的問題，執行面的因素也必須事先考量。

一、因應機制的設計

如果以全般緊急狀況的因應為思考的方向，那麼在因應機制的設計上，也要反應緊急類型的整合以及平時與變時的銜接等問題。

首先，在組織上，現行制度是採取組織分散的方式處理問題。各種災害防救有不同的主管機關，平時與變時並沒有辦法銜接，一般行政體系與國防動員機制間的橫向連結或分工亦非清楚，即令在行政院的分級，災害防救與反恐分屬不同機制運作。未來應透過組織改造，將包括反恐在內的緊急應變統合成為行政院下非部會的國土安全部門（例如，在行政院下設國土安全處，並由政務委員主導），作為統合各執行機關的機制。這個統合部門本身必須有專業幕僚，做常態的政策分析與協調，變時來臨並立即轉身因應。當然也必須於國防動員機制、甚至中央與地方間在緊急狀態下的分工合作，作更清楚與精確的分工。如此的設計，又能整合各種緊急原因類型，又能連結平時與變時，他的效益絕非單純是組織的精簡，而適應變的品質。

如果此一組織整合的設計，能與前述的法制整合搭配，更能將組織與法制做一併考量，達到最佳的整合效果。

二、演練整備與量能建立

緊急因應法制只是提供因應的運作架構，真正因應的重點在於平時的量能建立(capacity building)，以及此等量能在真正發生緊急事件時的銜接運用。因此，對於緊急因應法制的建立，必須同時含納平實的演練整備，以即整體制度量能的建立。

既然強調的是制度量能，在觀念上與作法上便不能只是相信或過度仰賴某個或某些很優秀的人，而是必須將所有好的想法作法能制度化，並作擴散。從指揮中心擴散到政府各相關機關，從中央政府機關擴散地方，從政府機關擴散到民間部門。

在量能建立的思考下，演練成了最具體的工作。演練的主要目的，在於作介面的銜接，政府機關之間必須靠演練才能在關鍵時刻做好職權與工作上的銜接，中央與地方也必須透過演練作銜接，政府與民間也是如此。演練並不是偶一為之，而是要有制度的進行。平時緊急因應機制，便必須有規劃地進行各種演練，並從演練中不斷找出問題，尋求突破解決，藉以強化制度量能。

除了演練以外，相關的緊急因應制度，包括法律、命令、組織、分工、財務等等，都必須不斷檢討強化。

三、政府與民間部門的連結

在量能建立的觀點下，政府固然必須不斷透過演練及制度的檢討改進來強化因應緊急事故的能力，但在執行面上，必須特別注意與民間部門的連結。威爾森模型(Wilsonian model) 中的中央集權模式現在已經過時了，權力已經不僅僅垂直地在政府組織間流動，更牽涉公部門與私部門的關係，現在已經進入了一種「夥伴關係」的時代。在風險時代，如果運用不當，政府的行為反而可能造成大災難，如果要有效降低損害，不只是要把資源從公部門移往私部門，更應該好好利用私部門（例如民間保險業者）更擅於評估複雜風險的優勢，利用適當的誘因，使得個人、政府、市場間能夠密切合作。

這可從三方面作努力。首先，政府的各種作為不能假設民間一定會配合或諒解，而必須隨時讓社會知悉。不能因為緊急因應制度，便理所當然想向必須「秘密」行動。除有特殊理由不適合公開以外，應對社會充分公開以得到民間部門的諒解與配合。這種諒解與配合，正是上述量能建立的一環。

其次，政府面對緊急事故的制度建立或善後，都必須思考到民間的角色，並適時納入其中。制度形成過程中，不斷思考到民間的角色，才合乎緊急因應法制的精神。

最後，緊急因應的演練，必須納入民間相關部門，並從中建立互動網絡，檢討互動的障礙，進而爭取民間的配合。

四、資訊系統的建置與強化

緊急因應的量能提升，尤其應包括資訊系統的建制與強化。在一方面，緊急因應所涉及的時間與空間的嚴重壓縮，更必須借重資訊系統來支援決策與執行。當前政府所建制的防救災資訊系統與決策支援系統，必須尋求與反恐相結合，以發揮更強的介面連結功能。在另一方面，由於緊急事故背後所涉的自然或人為原因，使得資訊系統更容易受到破壞，更必須有額外的措施，才能避免危害。除了各種資安的措施外必須強化外，資料的備援更必須重視。

緊急狀態法制之探討

參考文獻

一、中文

(一)王維卉

(1988)，〈新聞媒體在天然災難中如何運用〉，《憲政思潮》，84期，頁1-11。

(二)呂啓元

(2003)，〈SARS列爲法定傳染病之影響〉，《全國律師》，7卷10期，頁27-30。

(三)阿部泰隆

(2001)，〈「日本大災害法制對策的不足與法律整備的努力」演講紀錄〉，《東海大學法學研究》，15期，頁319-345。

(四)李建良

(1999)，〈緊急命令與法治行政——簡評「九二五緊急命令執行要點」〉，《新世紀智庫論壇》，8期，頁12-18。

(2000)，〈淺析緊急命令之憲法爭議——從「九二五緊急命令」談起〉，《台灣本土法學》，6期，頁97-102。

(2000)，〈論緊急命令法之制定問題（上）〉，《軍法專刊》，46卷7期，頁19-26。

(2000)，〈論緊急命令法之制定問題（下）〉，《軍法專刊》，46卷8期，頁13-26。

(2003)，〈論人身自由之憲法保障——兼談SARS防疫措施之合憲性〉，《思與言》，41卷4期，頁111-143。

(2003)，〈從正當法律程序觀點透析SARS防疫相關措施〉，《台灣本土法學雜誌》，49期，頁85-98。

緊急狀態法制之探討

(五)李維森

(2007)，〈災害防救體系〉，《科學發展》，410期，頁56-62。

(六)何賴傑

(2003)，〈SARS相關刑事法律問題研究〉，《台灣本土法學雜誌》，49期，頁122-126。

(七)吳志光

(2004)，〈國家緊急權行使之界限--以國際人權法為核心〉，《月旦法學》，111期，頁159-172。

(八)林世宗

(1999)，〈九二一大地震緊急命令與執行要點之憲政爭議〉，《全國律師》，3卷11期，頁6-10。

(九)林水波

(2000)，〈緊急命令執行要點的政治分析〉，《法政學報》，10期，頁1-53。

(2002)，《憲法政治學》，初版，台北：元照。

(十)林明鏘

(2003)，〈論SARS所生之行政法上法律關係——以醫療院所為中心〉，《台灣本土法學雜誌》，49期，頁99-113。

(十一)周萬來

(1999)，〈淺談我國總統緊急命令權與立院追認之程序〉，《立法院院聞》，27卷11期，頁4-12。

(十二)周良黨

(2001)，〈我國緊急命令權之研究〉，《憲政時代》，27卷2期，頁102-123。

(十三)邱淑娜、陳奎如

(2003)，〈面臨重大疫災危機中央政府應變處理策略——內政部SARS防疫經驗〉，《社區發展季刊》，104期，頁4-11。

(十四)吳嘉苓

(2006)，〈SARS的風險治理：超越技術模型〉，《台灣社會學》，11期，頁57-107。

(十五)武忠森

(2003)，〈「嚴重急性呼吸道症候群防治及紓困暫行條例」評議〉，《全國律師》，7卷10期，頁24-26。

(十六)郭正亮

(1999)，〈緊急命令出鞘，政治權謀蠢動〉，《新新聞週報》，658期，頁74。

(十七)張國城

(1999)，〈從九二一震災檢討國軍危機處理動員機制〉，《新世紀智庫論壇》，8期，頁31-36。

(十八)張聖時

(2000)，〈憲法緊急權改革之芻議〉，《三民主義學報(師大)》，20期，頁125-148。

(十九)許宗力

(2000)，〈從九二一震災看緊急命令相關問題〉，《臺灣本土法學雜誌》，6期，頁85-91。

(二十)程立民

(2000)，〈論九二一緊急命令及其執行要點-2-〉，《現代地政》，20卷5期，頁40-43。

(二十一)陳弘毅

緊急狀態法制之探討

(2000)，〈九二一地震災情及防災體系運作情形〉，《研考雙月刊》，24卷3期，頁59-64。

(二十二)陳英鈴

(2003)，〈抗煞(SARS)！要人權就不要命？——隔離與人身自由的保障〉，《月旦法學》，98期，頁193-204。

(2004)，〈SARS防治與人權保障——隔離與疫情發佈的憲法界限〉，《憲政時代》，29卷3期，頁391-443。

(二十三)陳建仁、簡吟曲、陳毓璟

(2003)，〈後SARS疫災評估我國公衛醫療體系的危機處理能力：回顧與前瞻〉，《社區發展季刊》，104期，頁12-16。

(二十四)陳清秀

(2003)，〈SARS傳染病之疫情防治法制相關問題〉，《台灣本土法學雜誌》，49期，頁43-53。

(二十五)陳淑芳

(2004)，〈國家緊急權制度之設計〉，《月旦法學雜誌》，111期，頁143。

(二十六)陳新民

(1992)，〈總統緊急權力和總統角色之定位——由Carl Schmitt的學說談起（上）〉，《軍法專刊》，83卷10期。

(1992)，〈總統緊急權力和總統角色之定位——由Carl Schmitt的學說談起（下）〉，《軍法專刊》，83卷11期。

(2000)，〈法治國家與危機——論總統緊急命令權之立法問題〉，《思與言》，38卷1期，頁45-78

(二十七)陳愛娥

(2004)，〈疾病控制的憲法問題——以我國政府在SARS事件中的應變措施作為反省基礎〉，《月旦法學》，105期，頁31-47。

(二十八)陳耀祥

(2004)，〈論大眾傳播媒體報導SARS疫情與人格權保障之衝突〉，《台灣海洋法學報》，3卷2期，頁119-162。

(二十九)黃俊杰

(1994)，《憲法規範國家緊急權之研究——以德國法治經驗為借鏡》，台大法律研究所碩士論文。

(1997)，〈論國家緊急權之規範設計——以納粹時代及動員戡亂時期為比較中心〉，《現代國家與憲法》，台北：月旦，頁1161-1260。

(1997)，〈我國憲法國家緊急權條款之研究〉，《中原財經法學》，3期，頁179-207。

(1997)，《國家緊急權之歷史經驗》，台北：傳文。

(1998)，〈法治國家之緊急權〉，《憲法體制與法治行政(一)》，台北：三民，頁78-105。

(1999)，〈九二五緊急命令之影響評估〉，《台灣本土法學》，5期，頁203-210。

(三十)黃榮村

(2000)，〈災後重建的政策性議題〉，《理論與政策》，14卷1期，頁157-172。

(三十一)黃國鐘

(2003)，〈非典型肺炎與典型政治「嚴重急性呼吸道症候群防治及紓困暫行條例」及特別預算平議〉，《全國律師》，7卷10期，頁11-21。

(三十二)黃錦堂

(1999)，〈緊急命令法治化問題之研究〉，《新世紀智庫論壇》，8期，頁4-11。

(2004)，〈疾病的控制的行政法問題——以嚴重急性呼吸道症候群(SARS)為討論〉，《月旦法學》，105期，頁9-30。

(三十三)葉俊榮、張文貞

(2002)，〈轉型法院與法治主義：論最高行法院對違法行政命令審查的積極趨勢〉，《人文及社會科學集刊》，14卷4期，頁515-559。

(三十四)楊重信

(2000)，〈九二一災後重建：基本考慮、目標與策略〉，《臺灣經濟預測與政策》，30卷2期，頁99-122。

(三十五)劉幸義

(2000)，〈由法理學角度論「緊急命令制度」本身的合法性問題〉，《月旦法學雜誌》，56期，頁18-26。

(三十六)戴秀雄

(2003)，〈非核家園時代之核子災害損害賠償制度建構〉，《臺灣本土法學雜誌》，53期，頁148-167。

(三十七)戴政龍

(2003)，〈檢視SARS期間封院與強制隔離措施的正當性〉，《全國律師》，7卷10期，頁31-36。

(三十八)蕭肅科

(2003)，〈SARS全球化與風險管理〉，《社區發展季刊》，104期，頁189-202。

(三十九)顏厥安

(2000)，〈緊急命令的性質－一個初步看法〉，《台灣本土法學》，6期，頁92-95。

(2001)，〈道德、政治與法律--由對現代性法學之觀察反思緊急命令體制〉，《國立臺灣大學法學論叢》，30卷6期，頁1-28。

(2004)，〈疫情法域〉，收於：顏厥安，《鼠肝與蟲臂的管制：法理學與生命倫理論文集》，元照，初版，頁209-218。

(四十)蘇貞昌

(1996)，〈慘痛的教訓談賀伯風災的反省與啓示〉，《月旦法學雜誌》，19期，頁44。

(四十一)國立臺灣大學法律學院等主辦

(2000)，《緊急命令與災後重建學術研討會》，初版，臺北：國立臺灣大學法律學院。

〈緊急命令之憲法問題研討會〉

(2001)，《台灣本土法學雜誌》，6期，頁103-130。

〈震災重建法案相關法律問題研討會議題討論〉

(2000)，，《臺灣本土法學雜誌》，6期，頁131-158。

〈SARS相關法律問題議題討論〉

(2003)，《台灣本土法學雜誌》，49期，頁54-84。

二、英文

(一)Ackerman, Bruce

(2004), "The Emergency Constitution," 113 *Yale L.J.* 1029.

(二)Adler, David Gray

緊急狀態法制之探討

(2002), “The Steel Seizure Case and Inherent Presidential Power,”
19 *Const. Comment.* 155.

(三) Berkowitz, Peter

(2005), *Terrorism, the Laws of War, and the Constitution: Debating the Enemy Combatant Cases*. Hoover Institution Press.

(四) Bragg, III, Alfred O. & Tucker, David G.

(2001), “Florida’s Law of Storms: Emergency Management, Local Government and the Police Power,” 30 *Stetson L. Rev.* 837, 840.

(五) Brikland, T. A.

(1997), *After Disaster: Agenda Setting, Public Policy and Focusing Events*. Georgetown University Press.

(六) Bucklin, Steven J.

(2002), *To Preserve these Rights: The Constitution and National Emergencies*, 47 *S.D. L. Rev.* 85.

(七) Chesney, Robert M.

(2003), “Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique,” 101 *Mich. L. Rev.* 1408.

(八) Cohen, J. E.

(1999), *Presidential Responsiveness and Public Policy-Making*. The University of Michigan Press.

(九) Cole, David

(2003), *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*. The New Press.

(2003), “Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis,” 101 *Mich. L. Rev.* 2565.

(2004), “The Priority of Morality: The Emergency Constitution’s Blind Spot,” 113 *Yale L.J.* 1753.

(十) Cole, David & Dempsey, James X.

(2006), *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*. The New Press, 3d ed.

(十一) Cotter, Cornelius P.

(1953), “Constitutionalizing Emergency Powers,” 5 *Stan. L. Rev.* 382.

DeMerieux, Margaret (1994) “The Regimes for States of Emergency in Commonwealth Caribbean Constitutions,” 3 *J. Transnat’l L. & Pol’y* 103.

(十二) Dyzenhaus, David

(2004), “Intimations of Legality amid the Clash of Arms,” 2 *Int’l J. Const. L.* 244.

(2006), *The Constitution of Law: Legality in a Time of Emergency*. Cambridge University Press.

(十三) Edwards, George E.

(2006), “International Human Rights Law Violations Before, During, and After Hurricane Katrina: An International Law Framework for Analysis,” 31 *T. Marshall L. Rev.* 353.

(十四) Elster, Jon

(2004), “Comments on the Paper by Ferejohn and Pasquino,” 2 *Int’l J. Const. L.* 240.

(十五) Ferejohn, John & Pasquino, Pasquale

緊急狀態法制之探討

(2004), “The Law of the Exception: A Typology of Emergency Powers,” 2 *Int'l J. Const. L.* 210.

(十六)Finn, John E.

(1991), *Constitutions in Crisis: Political Violence and the Rule of Law*. New York: Oxford University Press.

(十七)Ganev, Venelin I.

(1997), “Emergency Powers and the New East European Constitutions,” 45 *Am. J. Comp. L.* 585.

(十八)Gerber, Michael

(1990), “The Anti-Terrorism Act of 1987: Sabotaging the United Nations and Holding the Constitution Hostage,” 65 *N.Y.U. L. Rev.* 364.

(十九)Grinstein, Joseph

(1996), “Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism,” 105 *Yale L.J.* 1347.

(二十)Gross, Oren

(2003), “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?,” 112 *Yale L.J.* 1011.

(二十一)Harris, Edward A.

(1992), “Living with the Enemy Terrorism and the Limits of Constitutionalism,” 92 *Colum. L. Rev.* 984.

(二十二)Harris, George C.

(2003), “Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security,” 36 *Cornell Int'l L.J.* 135. (book review)

(二十三)Herman, M. Howitt & Leonard, B. "Dutch"

(2006), "Katrina and the Core Challenges of Disaster Response,"
30-WTR Fletcher F. World Aff. 215.

(二十四)Hilsee, Todd B. et al

(2006), "Hurricanes, Mobility, and Due Process: The
"Desire-to-Inform" Requirement for Effective Class Action Notice is
Highlighted by Katrina," *80 Tul. L. Rev.* 1771.

(二十五)Issacharoff, Samuel & Pildes, Richard H.

(2004), "Emergency Contexts without Emergency Powers: The
United States' Constitutional Approach to Rights During Wartime," *2
Int'l J. Const. L.* 296.

(二十六)Levinson, Sanford

(2006), "Constitutional Norms in a State of Permanent
Emergency," *40 Ga. L. Rev.* 699.

(二十七)Lobel, Jules

(1989), "Emergency Power and the Decline of Liberalism," *98 Yale
L.J.* 1385.

(二十八)Manning, John F.

(2004) "Editor's Note: The Constitution in Times of Emergency,"
113 Yale L.J. 1751.

(二十九)Margulies, Peter

(2006), "Beyond Absolutism: Legal Institutions in the War on
Terror," *60 U. Miami L. Rev.* 309.

(三十)McCormick, John P.

緊急狀態法制之探討

(1997), “The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers,” 10 *Can. J.L. & Juris.* 163.

(三十一)McDonnell, James F

(2004), *Constitutional Issues In Federal Management Of Domestic Terrorism Incidents.* Universe.

(三十二)Mendes, Errol P.

(2002), “Between Crime and War: Terrorism, Democracy and the Constitution,” 14 *Nat'l J. Const. L.* 71.

(三十三)Meyerson, Michael I.

(2002), “The War on Terrorism and the Constitution,” 35-*DEC Md. B.J.* 16.

(三十四)Negretto, Gabriel L. & José Antonio Aguilar Rivera

(2000), “Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship,” 21 *Cardozo L. Rev.* 1797.

(三十五)Norman, Keith B.

(2005), “Hurricane Katrina and the Practice of Law,” 66 *Ala. Law.* 416.

(三十六)Platt, R. H.

(1999), *Disaster and Democracy: The Politics of Extreme Natural Events.* Washington. Island Press.

(三十七)Poluka, Joseph G.

(2005), “The Patriot Act: Indispensable Tool against Terror,” 76 *Pa. B.A. Q.* 33.

(三十八)Posner, Eric A.,

(2002), “Fear And The Regulatory Model Of Counterterrorism”, 25 *Harv. J. L. Pub. & Pol’y* 681.

(三十九)Rhee, Robert J.

(2006), “Catastrophic Risk and Governance after Hurricane Katrina: A Postscript to Terrorism Risk in a Post-9/11 Economy,” 38 *Ariz. St. L.J.* 581.

(四十)Roots, Roger I.

(2000), “Government by Permanent Emergency: The Forgotten History of the New Deal Constitution,” 33 *Suffolk U. L. Rev.* 259.

(四十一)Sabsay, Daniel A.

(2003), “Constitution and Environment in Relation to Sustainable Development,” 21 *Pace Envtl. L. Rev.* 155.

(四十二)Sajó, András

(2006), “From Militant Democracy to the Preventive State?,” 27 *Cardozo L. Rev.* 2255.

(四十三)Scheppele, Kim Lane

(2004), “Law in a Time of Emergency: States of Exception and the Temptations of 9/11,” 6 *U. Pa. J. Const. L.* 1001.

(四十四)Scheuerman, William E.

(2006), “Time to Look Abroad? The Legal Regulation of Emergency Powers,” 40 *Ga. L. Rev.* 863.

(四十五)Shapiro, Jay

(2002), “Terrorism, the Constitution, and the Courts,” 18 *N.Y.L. Sch. J. Hum. Rts.* 189.

(四十六)Sirkin, Susannah

緊急狀態法制之探討

(2006), “The Debacle of Hurricane Katrina: A Human Rights Response,” 30-*WTR Fletcher F. World Aff.* 223.

(四十七)Smolla, Rodney A.

(2003), “Assassination, the War on Terrorism, and the Constitution,” 37 *U. Rich. L. Rev.* 663.

(四十八)Soltan, K. E.

(1993), “What is the New Constitutionalism,” in *A New Constitutionalism: Designing Political Institutions for a Good Society* (S. L. Elkin & K. E. Soltan ed). Chicago: The University of Chicago Press.

(四十九)Svenson, Ernest

(2006), “Disaster Planning for Lawyers: Lessons form Katrina,” 49-*MAY Advocate (Idaho)* 10.

(五十)Taylor, Paul

(2002), “Alternatives to a Constitutional Amendment: How Congress May Provide for the Quick, Temporary Filling of House Member Seats in Emergencies by Statute,” 10 *J.L. & Pol'y* 373.

(五十一)Tribe, Laurence H., & Gudridge, Patrick O.

(2004), “The Anti-Emergency Constitution,” 113 *Yale L.J.* 1801.

(五十二)Tushnet, Mark

(2003), “Defending Korematsu?: Reflections on Civil Liberties in Wartime,” 2003 *Wis. L. Rev.* 273

(五十三)Weeden, L. Darnell

(2006), “Hurricane Katrina: First Amendment Censorship and the News Media,” 31 *T. Marshall L. Rev.* 479.

(五十四)Wilson, Elizabeth A.

(2006), "The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of The U.S. Constitution in The Guantánamo Detainee Litigation," 8 *U. Pa. J. Const. L.* 165.

三、法文

(一)CANTEGREIL (J.)

(2005), « Terrorisme et libertés. La voie française après le 11 septembre », *En Temps réel*, janvier.

(二)CHANTEBOUT (B.)

(1998), *Droit constitutionnel et science politique*, 15^e éd., Armand Colin.

(三)CHRESTIA (P.)

(2006), « La loi du 23 janvier 2006 relative à la lutte contre le terrorisme : premiers observations », *Recueil Dalloz*, n° 21, p.p.1409-1413.

(四)FAVOREU (L.) (cord.)

(2000), *Droit constitutionnel*, 3^e éd., Dalloz.

(五)FRANK (C.)

(2000), *Droit constitutionnel*, 2^e éd., PUF, 2001.

(六)GICQUEL (J.)

(2005), *Droit constitutionnel et institutions politiques*, 20^e éd., Montchrestien.

(七)LEBRETON (G.)

(1999), *Libertés publiques & droits de l'homme*, 4^e éd., Armand Colin.

(八) MAZEAUD (P.)

(2006), « La lutte contre le terrorisme dans la jurisprudence du Conseil constitutionnel », www.conseil-constitutionnel.fr/divers/documents.

(九) MORANGE (J.)

(1995), *Droits de l'homme et libertés publiques*, 3^e éd., PUF.

ROBERT (J.)

(1994), *Droits de l'homme et libertés fondamentales*, Montchrestien.

(十) SECRETARIAT GENERAL DE LA DEFANSE NATIONALE

(2006), *La France face au terrorisme. Livre blanc du Gouvernement sur la sécurité intérieure face au terrorisme*, La documentation française.

四、網路資源

(一) <http://www.gpoaccess.gov/plaws/index.html>

(二) <http://www.gpoaccess.gov/index.html>

(三) <http://www.loc.gov/law/public/law.html>

(四) http://www.floridadisaster.org/BRM/Stafford%20Act%202000/DMA2K%20IA/Impacts%20of%20DMA2K%20on%20FEMA%20IA_files/frame.htm

(五) <http://www.co.grays-harbor.wa.us/WebHomePage/info/DEM/HazMitPlan/dma.htm>

(六) <http://www.gpoaccess.gov/uscode/browse.html>

(七) <http://caselaw.lp.findlaw.com/casecode/uscodes/toc.html>

(八) <http://www.lifeandliberty.gov/highlights.htm>

- (九)<http://www.fema.gov/plan/mitplanning/DMA.shtm>
- (十)http://en.wikipedia.org/wiki/Disaster_Mitigation_Act_of_2000
- (十一)<http://jobfunctions.bnet.com/whitepaper.aspx?docid=64281>
- (十二)http://en.wikipedia.org/wiki/National_Emergencies_Act
- (十三)
- <http://www.marad.dot.gov/publications/complaw03/National%20Emergency%20Act.htm>
- (十四)<http://www.whitehouse.gov/deptofhomeland/analysis/>
- (十五)http://en.wikipedia.org/wiki/Homeland_Security_Act
- (十六)http://www.dhs.gov/xabout/laws/law_regulation_rule_0011.shtm
- (十七)
- <http://www.treas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/>
- (十八)http://en.wikipedia.org/wiki/Terrorism_Risk_Insurance_Act
- (十九)
- <http://www.ustreas.gov/offices/domestic-finance/financial-institution/terrorism-insurance/>
- (二十)http://www.gpoaccess.gov/serialset/creports/intel_reform.html
- (二十一)
- http://en.wikipedia.org/wiki/International_Emergency_Economic_Powers_Act
- (二十二)
- <http://www.answers.com/topic/international-emergency-economic-powers-act>

緊急狀態法制之探討

(二十三)http://www.pegc.us/detainee_act_2005.html

(二十四)http://www.ncsl.org/statefed/humserv/TANF_ERRAct2005.htm

(二十五)<http://www.theorator.com/bills109/hr3672.html>

(二十六)<http://www.irs.gov/newsroom/article/0,,id=149391,00.html>

(二十七)<http://www.govtrack.us/congress/bill.xpd?bill=h109-3971>

(二十八)

http://www.washingtonwatch.com/bills/show/109_PL_109-91.html

(二十九)<http://www.theorator.com/bills109/hr3971.html>

(三十)<http://www.govtrack.us/congress/bill.xpd?bill=s109-1777>

(三十一)<http://www.theorator.com/bills109/s1777.html>

(三十二)<http://big5.huaxia.com/tw/sdbd/zq/2005/00349670.html>

(三十三)<http://www.gio.gov.tw/ct.asp?xItem=20159&ctNode=3906>

(三十四)<http://www.libertytimes.com.tw/2005/new/nov/14/today-p1.htm>

(三十五)<http://www.epochtimes.com/b5/5/4/12/n886228.htm>

五、法律

(一)Anti-terrorism Act, [S.C. 2001, c. 41]

(二)Emergencies Act, [R.S.C. 1985, c. 22 (4th Supp.)]

附錄一

聯合國安理會第1373（2001）號決議

2001年9月28日安全理事會第4385次會議透過

安全理事會，

重申其1999年10月19日第1269（1999）號和2001年9月12日第1368（2001）號決議，

又重申譴責2001年9月11日在紐約、華盛頓特區和賓州發生的恐怖主義攻擊，並表示決心防止一切此種行爲，

這種行爲，如同任何國際恐怖主義行爲，對國際和平與安全構成威脅，

再次申明《聯合國憲章》所確認並經第1368（2001）號決議重申的單獨或集體自衛的固有權利，

重申必須根據《聯合國憲章》以一切手段打擊恐怖主義行爲對國際和平與安全造成的威脅，

深為關切在世界各地區，以不容忍或極端主義為動機的恐怖主義行爲有所增加，

呼籲各國緊急合作，防止和制止恐怖主義行爲，包括透過加強合作和充分執行關於恐怖主義的各項國際公約，

確認各國為補充國際合作，有必要在其領土內透過一切合法手段採取更多措施，防止和制止資助和籌備任何恐怖主義行爲，

重申大會1970年10月的宣言（第2625（XXV）號決議）所確定並經安全理事會1998年8月13日第1189（1998）號決議重申的原則，即每個國家都有義務不在另一國家組織、煽動、協助或參加恐怖主義行爲，或默許在本國境內為犯下這種行爲而進行有組織的活動，

緊急狀態法制之探討

根據《聯合國憲章》第七章採取行動，

1. 決定所有國家應：

(1) 防止和制止資助恐怖主義行爲；

(2) 將下述行爲定爲犯罪：本國國民或在本國領土內，以任何手段直接間接和故意提供或籌集資金，意圖將這些資金用于恐怖主義行爲或知曉資金將用于此種行爲；

(3) 立即凍結犯下或企圖犯下恐怖主義行爲或參與或協助犯下恐怖主義行爲的個人、這種人擁有或直接間接控制的實體以及代表這種人和實體或按其指示行事的個人和實體的資金和其他金融資產或經濟資源，包括由這種人及有關個人和實體擁有或直接間接控制的財產所衍生或產生的資金；

(4) 禁止本國國民或本國領土內任何個人和實體直接間接爲犯下或企圖犯下或協助或參與犯下恐怖主義行爲的個人、這種人直接間接擁有或控制的實體以及代表這種人或按其指示行事的個人和實體提供任何資金、金融資產或經濟資源或金融或其他有關服務；

2. 還決定所有國家應：

(1) 不向參與恐怖主義行爲的實體或個人主動或被動提供任何形式的支持，包括制止恐怖主義集團招募成員和消除向恐怖分子供應武器；

(2) 採取必要步驟，防止犯下恐怖主義行爲，包括透過交流情報向其他國家提供預警；

(3) 對於資助、計畫、支持或犯下恐怖主義行爲或提供安全翼庇所的人拒絕給予安全翼庇；

(4) 防止資助、計畫、協助或犯下恐怖主義行爲的人爲敵對其他國家或其公民的目的利用本國領土；

(5) 確保把參與資助、計畫、籌備或犯下恐怖主義行爲或參與支持恐怖主義行爲的任何人繩之以法，確保除其他懲治措施以外，在國

內法規中確定此種恐怖主義行爲是嚴重刑事罪行，並確保懲罰充分反映此種恐怖主義行爲的嚴重性；

(6) 在涉及資助或支持恐怖主義行爲的刑事調查或刑事訴訟中互相給予最大程度的協助，包括協助取得本國掌握的、訴訟所必需的證據；

(7) 透過有效的邊界管製和對簽發身分證和旅行信任狀的控制，並透過防止假造、偽造或冒用身分證和旅行信任狀，防止恐怖分子和恐怖主義集團的移動；

3. 呼籲所有國家：

(1) 找出辦法加緊和加速交流行動情報，尤其是下列情報：恐怖主義分子或網路的行動或移動；偽造或變造的旅行信任狀；販運軍火、爆炸物或敏感材料；恐怖主義集團使用通訊技術；以及恐怖主義集團擁有大規模毀滅性武器所造成的威脅；

(2) 按照國際和國內法交流情報，並在行政和司法事項上合作，以防止犯下恐怖主義行爲；

(3) 特別是透過雙邊和多邊安排和協議，合作防止和制止恐怖主義攻擊並採取行動對付犯下此種行爲者；

(4) 盡快成爲關於恐怖主義的國際公約和議定書、包括1999年12月9日《制止資助恐怖主義的國際公約》的締約國；

(5) 加強合作，全面執行關於恐怖主義的國際公約和議定書以及安全理事會第1269（1999）號和第1368（2001）號決議；

(6) 在給予難民地位前，依照本國法律和國際法的有關規定、包括國際人權標準採取適當措施，以確保尋求庇護者未曾計畫、協助或參與恐怖主義行爲；

(7) 依照國際法，確保難民地位不被恐怖主義組織或協助恐怖主義行爲者濫用，並且不承認被指控爲恐怖份子者以出於政治動機的主張爲理由而拒絕引渡的的請求；

緊急狀態法制之探討

4. 關切地注意到國際恐怖主義與跨國有組織犯罪、非法藥物、洗錢、非法販運軍火、非法運送核、化學、生物和其他潛在致命材料之間的密切聯繫，在這方面並強調必須加緊協調國家、分區域、區域和國際各級的努力，以加強對國際安全所受到的這一嚴重挑戰和威脅的全球回應；

5. 宣佈恐怖主義行為以及方法違反聯合國宗旨和原則。資助、規劃和煽動恐怖主義行為也違反聯合國的宗旨和原則；

6. 決定按照其暫行議事規則第28條設立一個由安理會全體成員組成的安全理事會委員會，在適當專家的協助下監測本決議的執行情況，籲請所有國家至遲於本決議透過之日後90天，並於以後按照委員會提出的時間表，向委員會報告本國為執行本決議而採取的步驟；

7. 指示委員會與秘書長協商，界定其任務，在本決議透過後30天內提出一項工作方案，並考慮其所需支助；

8. 表示決心按照《憲章》規定的職責採取一切必要步驟，以確保本決議得到全面執行；

9. 決定繼續處理此案。

附錄二：加拿大緊急法(Emergency Act)

Canada >> Statutes and Regulations >> Consolidated Statutes of Canada >>
Emergencies Act, [R.S.C. 1985, c. 22 (4th Supp.)]

Emergencies Act

R.S., 1985, c. 22 (4th Supp.)

[1988, c. 29, assented to 21st July, 1988]

An Act to authorize the taking of special temporary measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof

Preamble

WHEREAS the safety and security of the individual, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government;

AND WHEREAS the fulfilment of those obligations in Canada may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor in Council should be authorized, subject to the supervision of Parliament, to take special temporary measures that may not be appropriate in normal times;

AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights and must have regard to the International Covenant on Civil and Political Rights, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency;

緊急狀態法制之探討

NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the Emergencies Act.

APPLICATION AND CONSTRUCTION

Binding on Her Majesty

2. (1) This Act is binding on Her Majesty in right of Canada or a province.

Federal jurisdiction

(2) For greater certainty, nothing in this Act derogates from the authority of the Government of Canada to deal with emergencies on any property, territory or area in respect of which the Parliament of Canada has jurisdiction.

National emergency

3. For the purposes of this Act, a “national emergency” is an urgent and critical situation of a temporary nature that

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.

Construction

4. Nothing in this Act shall be construed or applied so as to confer on the Governor in Council the power to make orders or regulations

(a) altering the provisions of this Act; or

(b) providing for the detention, imprisonment or internment of Canadian citizens or permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

R.S., 1985, c. 22 (4th Supp.), s. 4; 2001, c. 27, s. 248.

PART I

PUBLIC WELFARE EMERGENCY

Interpretation

Definitions

5. In this Part,

“declaration of a public welfare emergency”

« déclaration de sinistre »

“declaration of a public welfare emergency” means a proclamation issued pursuant to subsection 6(1);

“public welfare emergency”

« sinistre »

“public welfare emergency” means an emergency that is caused by a real or imminent

(a) fire, flood, drought, storm, earthquake or other natural phenomenon,

(b) disease in human beings, animals or plants, or

(c) accident or pollution

緊急狀態法制之探討

and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.

Declaration of a Public Welfare Emergency

6. (1) When the Governor in Council believes, on reasonable grounds, that a public welfare emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 14, may, by proclamation, so declare.

Contents

(2) A declaration of a public welfare emergency shall specify

(a) concisely the state of affairs constituting the emergency;

(b) the special temporary measures that the Governor in Council anticipates may be necessary for dealing with the emergency; and

(c) if the direct effects of the emergency do not extend to the whole of Canada, the area of Canada to which the direct effects of the emergency extend.

Effective date

7. (1) A declaration of a public welfare emergency is effective on the day on which it is issued, but a motion for confirmation of the declaration shall be laid before each House of Parliament and be considered in accordance with section 58.

Expiration of declaration

(2) A declaration of a public welfare emergency expires at the end of ninety days unless the declaration is previously revoked or continued in accordance with this Act.

Orders and regulations

8. (1) While a declaration of a public welfare emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency:

- (a) the regulation or prohibition of travel to, from or within any specified area, where necessary for the protection of the health or safety of individuals;
- (b) the evacuation of persons and the removal of personal property from any specified area and the making of arrangements for the adequate care and protection of the persons and property;
- (c) the requisition, use or disposition of property;
- (d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;
- (e) the regulation of the distribution and availability of essential goods, services and resources;
- (f) the authorization and making of emergency payments;
- (g) the establishment of emergency shelters and hospitals;
- (h) the assessment of damage to any works or undertakings and the repair, replacement or restoration thereof;
- (i) the assessment of damage to the environment and the elimination or alleviation of the damage; and
- (j) the imposition
 - (i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or
 - (ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,for contravention of any order or regulation made under this section.

Restriction

(2) Where a declaration of a public welfare emergency specifies that the direct effects of the emergency extend only to a specified area of Canada, the power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation, may be exercised or performed only with respect to that area.

緊急狀態法制之探討

Idem

(3) The power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation,

(a) shall be exercised or performed

(i) in a manner that will not unduly impair the ability of any province to take measures, under an Act of the legislature of the province, for dealing with an emergency in the province, and

(ii) with the view of achieving, to the extent possible, concerted action with each province with respect to which the power, duty or function is exercised or performed; and

(b) shall not be exercised or performed for the purpose of terminating a strike or lock-out or imposing a settlement in a labour dispute.

Control or direction of police force

9. (1) Nothing in a declaration of a public welfare emergency or in any order or regulation made pursuant thereto shall be construed or applied so as to derogate from, or to authorize the derogation from, the control or direction of the government of a province or a municipality over any police force over which it normally has control or direction.

R.C.M.P.

(2) Where the Royal Canadian Mounted Police is used or employed in a province or municipality pursuant to an arrangement under section 20 of the Royal Canadian Mounted Police Act, subsection (1) applies in respect of the Royal Canadian Mounted Police, subject to the terms and conditions of the arrangement.

Revocation, Continuation and Amendment of Declaration

Revocation by Parliament

10. Parliament may revoke a declaration of a public welfare emergency in accordance with section 58 or 59.

Revocation by Governor in Council

11. The Governor in Council may, by proclamation, revoke a declaration of a public welfare emergency either generally or with respect to any area of Canada effective on such day as is specified in the proclamation.

Continuation by Governor in Council

12. (1) At any time before a declaration of a public welfare emergency would otherwise expire, the Governor in Council, after such consultation as is required by section 14, may, by proclamation, continue the declaration either generally or with respect to any area of Canada for such period, not exceeding ninety days, as is specified in the proclamation if the Governor in Council believes, on reasonable grounds, that the emergency will continue to exist or that the direct effects of the emergency will continue to extend to that area, as the case may be.

Review of orders and regulations

(2) Before issuing a proclamation continuing a declaration of a public welfare emergency, the Governor in Council shall review all current orders and regulations made under section 8 to determine if the Governor in Council believes, on reasonable grounds, that they continue to be necessary for dealing with the emergency and shall revoke or amend them to the extent that they do not so continue.

Multiple continuations

(3) A declaration of a public welfare emergency may be continued more than once pursuant to subsection (1).

緊急狀態法制之探討

Effective date

(4) A proclamation continuing a declaration of a public welfare emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

Amendment by Governor in Council

13. (1) Where the Governor in Council

(a) has issued a declaration of a public welfare emergency specifying that the direct effects of the emergency extend only to a specified area of Canada, and

(b) believes, on reasonable grounds, that the direct effects of the emergency have extended to any other area of Canada or to the rest of Canada,

the Governor in Council, after such consultation as is required by section 14, may, by proclamation, amend the declaration to specify that other area as an area of Canada to which the direct effects of the emergency extend or to remove the existing specification, as the case may be.

Effective date

(2) A proclamation amending a declaration of a public welfare emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

Consultation

14. (1) Subject to subsection (2), before the Governor in Council issues, continues or amends a declaration of a public welfare emergency, the lieutenant governor in council of each province in which the direct effects of the emergency occur shall be consulted with respect to the proposed action.

Indication

(2) The Governor in Council may not issue a declaration of a public welfare emergency where the direct effects of the emergency are confined to, or occur principally in, one province unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it.

Effect of Expiration or Revocation

15. (1) Where, pursuant to this Act, a declaration of a public welfare emergency expires either generally or with respect to any area of Canada, all orders and regulations made pursuant to the declaration or all orders and regulations so made, to the extent that they apply with respect to that area, as the case may be, expire on the day on which the declaration expires.

Effect of revocation of declaration

(2) Where, pursuant to this Act, a declaration of a public welfare emergency is revoked either generally or with respect to any area of Canada, all orders and regulations made pursuant to the declaration or all orders and regulations so made, to the extent that they apply with respect to that area, as the case may be, are revoked effective on the revocation of the declaration.

Effect of revocation of continuation

(3) Where, pursuant to this Act, a proclamation continuing a declaration of a public welfare emergency either generally or with respect to any area of Canada is revoked after the time the declaration would, but for the proclamation, have otherwise expired either generally or with respect to that area,

(a) the declaration and all orders and regulations made pursuant to the declaration, or

緊急狀態法制之探討

(b) the declaration and all orders and regulations made pursuant to the declaration to the extent that the declaration, orders and regulations apply with respect to that area,

as the case may be, are revoked effective on the revocation of the proclamation.

Effect of revocation of amendment

(4) Where, pursuant to this Act, a proclamation amending a declaration of a public welfare emergency is revoked, all orders and regulations made pursuant to the amendment and all orders and regulations to the extent that they apply pursuant to the amendment are revoked effective on the revocation of the proclamation.

PART II

PUBLIC ORDER EMERGENCY

Interpretation

Definitions

16. In this Part,

“declaration of a public order emergency”

« déclaration d'état d'urgence »

“declaration of a public order emergency” means a proclamation issued pursuant to subsection 17(1);

“public order emergency”

« état d'urgence »

“public order emergency” means an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency;

“threats to the security of Canada”

« menaces envers la sécurité du Canada »

“threats to the security of Canada” has the meaning assigned by section 2 of the Canadian Security Intelligence Service Act.

Declaration of a Public Order Emergency

17. (1) When the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 25, may, by proclamation, so declare.

Contents

(2) A declaration of a public order emergency shall specify

(a) concisely the state of affairs constituting the emergency;

(b) the special temporary measures that the Governor in Council anticipates may be necessary for dealing with the emergency; and

(c) if the effects of the emergency do not extend to the whole of Canada, the area of Canada to which the effects of the emergency extend.

Effective date

18. (1) A declaration of a public order emergency is effective on the day on which it is issued, but a motion for confirmation of the declaration shall be laid before each House of Parliament and be considered in accordance with section 58.

Expiration of declaration

(2) A declaration of a public order emergency expires at the end of thirty days unless the declaration is previously revoked or continued in accordance with this Act.

Orders and regulations

19. (1) While a declaration of a public order emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency:

緊急狀態法制之探討

- (a) the regulation or prohibition of
 - (i) any public assembly that may reasonably be expected to lead to a breach of the peace,
 - (ii) travel to, from or within any specified area, or
 - (iii) the use of specified property;
- (b) the designation and securing of protected places;
- (c) the assumption of the control, and the restoration and maintenance, of public utilities and services;
- (d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered; and
- (e) the imposition
 - (i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or
 - (ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,for contravention of any order or regulation made under this section.

Restriction

(2) Where a declaration of a public order emergency specifies that the effects of the emergency extend only to a specified area of Canada, the power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation, may be exercised or performed only with respect to that area.

Idem

(3) The power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation, shall be exercised or performed

(a) in a manner that will not unduly impair the ability of any province to take measures, under an Act of the legislature of the province, for dealing with an emergency in the province; and

(b) with the view of achieving, to the extent possible, concerted action with each province with respect to which the power, duty or function is exercised or performed.

Control or direction of police force

20. (1) Nothing in a declaration of a public order emergency or in any order or regulation made pursuant thereto shall be construed or applied so as to derogate from, or to authorize the derogation from, the control or direction of the government of a province or a municipality over any police force over which it normally has control or direction.

R.C.M.P.

(2) Where the Royal Canadian Mounted Police is used or employed in a province or municipality pursuant to an arrangement under section 20 of the Royal Canadian Mounted Police Act, subsection (1) applies in respect of the Royal Canadian Mounted Police, subject to the terms and conditions of the arrangement.

Revocation, Continuation and Amendment of Declaration

Revocation by Parliament

21. Parliament may revoke a declaration of a public order emergency in accordance with section 58 or 59.

Revocation by Governor in Council

22. The Governor in Council may, by proclamation, revoke a declaration of a public order emergency either generally or with respect to any area of Canada effective on such day as is specified in the proclamation.

緊急狀態法制之探討

Continuation by Governor in Council

23. (1) At any time before a declaration of a public order emergency would otherwise expire, the Governor in Council, after such consultation as is required by section 25, may, by proclamation, continue the declaration either generally or with respect to any area of Canada for such period, not exceeding thirty days, as is specified in the proclamation if the Governor in Council believes, on reasonable grounds, that the emergency will continue to exist or that the effects of the emergency will continue to extend to that area, as the case may be.

Review of orders and regulations

(2) Before issuing a proclamation continuing a declaration of a public order emergency, the Governor in Council shall review all current orders and regulations made under section 19 to determine if the Governor in Council believes, on reasonable grounds, that they continue to be necessary for dealing with the emergency and shall revoke or amend them to the extent that they do not so continue.

Multiple continuations

(3) A declaration of a public order emergency may be continued more than once pursuant to subsection (1).

Effective date

(4) A proclamation continuing a declaration of a public order emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

Amendment by Governor in Council

24. (1) Where the Governor in Council

(a) has issued a declaration of a public order emergency specifying that the effects of the emergency extend only to a specified area of Canada, and

(b) believes, on reasonable grounds, that the effects of the emergency have extended to any other area of Canada or to the rest of Canada,

the Governor in Council, after such consultation as is required by section 25, may, by proclamation, amend the declaration to specify that other area as an area of Canada to which the effects of the emergency extend or to remove the existing specification, as the case may be.

Effective date

(2) A proclamation amending a declaration of a public order emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

Consultation

25. (1) Subject to subsections (2) and (3), before the Governor in Council issues, continues or amends a declaration of a public order emergency, the lieutenant governor in council of each province in which the effects of the emergency occur shall be consulted with respect to the proposed action.

Idem

(2) Where the effects of a public order emergency extend to more than one province and the Governor in Council is of the opinion that the lieutenant governor in council of a province in which the effects of the emergency occur cannot, before the issue or amendment of a declaration of a public order emergency, be adequately consulted without unduly jeopardizing the effectiveness of the proposed action, the lieutenant governor in council of that province may be consulted with respect to the action after the declaration is issued or amended and before the motion for confirmation of the declaration or amendment is laid before either House of Parliament.

緊急狀態法制之探討

Indication

(3) The Governor in Council may not issue a declaration of a public order emergency where the effects of the emergency are confined to one province, unless the lieutenant governor in council of the province has indicated to the Governor in Council that the emergency exceeds the capacity or authority of the province to deal with it.

Effect of expiration of declaration

26. (1) Where, pursuant to this Act, a declaration of a public order emergency expires either generally or with respect to any area of Canada, all orders and regulations made pursuant to the declaration or all orders and regulations so made, to the extent that they apply with respect to that area, as the case may be, expire on the day on which the declaration expires.

Effect of revocation of declaration

(2) Where, pursuant to this Act, a declaration of a public order emergency is revoked either generally or with respect to any area of Canada, all orders and regulations made pursuant to the declaration or all orders and regulations so made, to the extent that they apply with respect to that area, as the case may be, are revoked effective on the revocation of the declaration.

Effect of revocation of continuation

(3) Where, pursuant to this Act, a proclamation continuing a declaration of a public order emergency either generally or with respect to any area of Canada is revoked after the time the declaration would, but for the proclamation, have otherwise expired either generally or with respect to that area,

(a) the declaration and all orders and regulations made pursuant to the declaration, or

(b) the declaration and all orders and regulations made pursuant to the declaration to the extent that the declaration, orders and regulations apply with respect to that area,

as the case may be, are revoked effective on the revocation of the proclamation.

Effect of revocation of amendment

(4) Where, pursuant to this Act, a proclamation amending a declaration of a public order emergency is revoked, all orders and regulations made pursuant to the amendment and all orders and regulations to the extent that they apply pursuant to the amendment are revoked effective on the revocation of the proclamation.

PART III

INTERNATIONAL EMERGENCY

Interpretation

Definitions

27. In this Part,

“declaration of an international emergency”

« déclaration d'état de crise internationale »

“declaration of an international emergency” means a proclamation issued pursuant to subsection 28(1);

“international emergency”

« état de crise internationale »

“international emergency” means an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency.

Declaration of an International Emergency

28. (1) When the Governor in Council believes, on reasonable grounds, that an international emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 35, may, by proclamation, so declare.

緊急狀態法制之探討

Contents

(2) A declaration of an international emergency shall specify

(a) concisely the state of affairs constituting the emergency; and

(b) the special temporary measures that the Governor in Council anticipates may be necessary for dealing with the emergency.

Effective date

29. (1) A declaration of an international emergency is effective on the day on which it is issued, but a motion for confirmation of the declaration shall be laid before each House of Parliament and be considered in accordance with section 58.

Expiration of declaration

(2) A declaration of an international emergency expires at the end of sixty days unless the declaration is previously revoked or continued in accordance with this Act.

Orders and regulations

30. (1) While a declaration of an international emergency is in effect, the Governor in Council may make such orders or regulations with respect to the following matters as the Governor in Council believes, on reasonable grounds, are necessary for dealing with the emergency:

(a) the control or regulation of any specified industry or service, including the use of equipment, facilities and inventory;

(b) the appropriation, control, forfeiture, use and disposition of property or services;

(c) the authorization and conduct of inquiries in relation to defence contracts or defence supplies as defined in the Defence Production Act or to hoarding, overcharging, black marketing or fraudulent operations in respect of scarce commodities, including the conferment of powers under the Inquiries Act on any person authorized to conduct such an inquiry;

(d) the authorization of the entry and search of any dwelling-house, premises, conveyance or place, and the search of any person found therein, for any thing that may be evidence relevant to any matter that is the subject of an inquiry referred to in paragraph (c), and the seizure and detention of any such thing;

(e) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;

(f) the designation and securing of protected places;

(g) the regulation or prohibition of travel outside Canada by Canadian citizens or permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act and of admission into Canada of other persons;

(h) the removal from Canada of persons, other than

(i) Canadian citizens,

(ii) permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, and

(iii) protected persons within the meaning of subsection 95(2) of that Act who are not inadmissible under that Act on grounds of

(A) security, violating human or international rights or serious criminality, or

(B) criminality and who have not been convicted of any offence under any Act of Parliament for which a term of imprisonment of more than six months has been imposed, or five years or more may be imposed;

(i) the control or regulation of the international aspects of specified financial activities within Canada;

(j) the authorization of expenditures for dealing with an international emergency in excess of any limit set by an Act of Parliament and the setting of a limit on such expenditures;

(k) the authorization of any minister of the Crown to discharge specified responsibilities respecting the international emergency or to take specified actions of a political, diplomatic or economic nature for dealing with the emergency; and

緊急狀態法制之探討

(1) the imposition

- (i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or
 - (ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment,
- for contravention of any order or regulation made under this section.

Restriction

- (2) The power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation,
- (a) shall be exercised or performed
 - (i) in a manner that will not unduly impair the ability of any province to take measures, under an Act of the legislature of the province, for dealing with an emergency in the province, and
 - (ii) with the view of achieving, to the extent possible, concerted action with each province with respect to which the power, duty or function is exercised or performed; and
 - (b) shall not be exercised or performed for the purpose of censoring, suppressing or controlling the publication or communication of any information regardless of its form or characteristics.

R.S., 1985, c. 22 (4th Supp.), s. 30; 1992, c. 49, s. 125; 2001, c. 27, s. 249.

Control or direction of police force

31. (1) Nothing in a declaration of an international emergency or in any order or regulation made pursuant thereto shall be construed or applied so as to derogate from, or to authorize the derogation from, the control or direction of the government of a province or a municipality over any police force over which it normally has control or direction.

R.C.M.P.

(2) Where the Royal Canadian Mounted Police is used or employed in a province or municipality pursuant to an arrangement under section 20 of the Royal Canadian Mounted Police Act, subsection (1) applies in respect of the Royal Canadian Mounted Police, subject to the terms and conditions of the arrangement.

Revocation and Continuation of Declaration

Revocation by Parliament

32. Parliament may revoke a declaration of an international emergency in accordance with section 58 or 59.

Revocation by Governor in Council

33. The Governor in Council may, by proclamation, revoke a declaration of an international emergency effective on such day as is specified in the proclamation.

Continuation by Governor in Council

34. (1) At any time before a declaration of an international emergency would otherwise expire, the Governor in Council, after such consultation as is required by section 35, may, by proclamation, continue the declaration for such period, not exceeding sixty days, as is specified in the proclamation if the Governor in Council believes, on reasonable grounds, that the emergency will continue to exist.

Review of orders and regulations

(2) Before issuing a proclamation continuing a declaration of an international emergency, the Governor in Council shall review all current orders and regulations made under section 30 to determine if the Governor in Council believes, on reasonable grounds, that they continue to be necessary for dealing with the emergency and shall revoke or amend them to the extent that they do not so continue.

緊急狀態法制之探討

Multiple continuations

(3) A declaration of an international emergency may be continued more than once pursuant to subsection (1).

Effective date

(4) A proclamation continuing a declaration of an international emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

Consultation

35. Before the Governor in Council issues or continues a declaration of an international emergency, the lieutenant governor in council of each province shall be consulted with respect to the proposed action to the extent that, in the opinion of the Governor in Council, it is appropriate and practicable to do so in the circumstances.

Effect of Expiration or Revocation

Effect of expiration of declaration

36. (1) Where, pursuant to this Act, a declaration of an international emergency expires, all orders and regulations made pursuant to the declaration expire on the day on which the declaration expires.

Effect of revocation of declaration

(2) Where, pursuant to this Act, a declaration of an international emergency is revoked, all orders and regulations made pursuant to the declaration are revoked effective on the revocation of the declaration.

Effect of revocation of continuation

(3) Where, pursuant to this Act, a proclamation continuing a declaration of an international emergency is revoked after the time the declaration would, but for the proclamation, have otherwise expired, the declaration and all orders and regulations made pursuant to the declaration are revoked effective on the revocation of the proclamation.

PART IV

WAR EMERGENCY

Interpretation

Definitions

37. In this Part,

“declaration of a war emergency”

« déclaration d'état de guerre »

“declaration of a war emergency” means a proclamation issued pursuant to subsection 38(1);

“war emergency”

« état de guerre »

“war emergency” means war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency.

Declaration of a War Emergency

38. (1) When the Governor in Council believes, on reasonable grounds, that a war emergency exists and necessitates the taking of special temporary measures for dealing with the emergency, the Governor in Council, after such consultation as is required by section 44, may, by proclamation, so declare.

緊急狀態法制之探討

Contents

(2) A declaration of a war emergency shall specify the state of affairs constituting the emergency to the extent that, in the opinion of the Governor in Council, it is possible to do so without jeopardizing any special temporary measures proposed to be taken for dealing with the emergency.

Effective date

39. (1) A declaration of a war emergency is effective on the day on which it is issued, but a motion for confirmation of the declaration shall be laid before each House of Parliament and be considered in accordance with section 58.

Expiration of declaration

(2) A declaration of a war emergency expires at the end of one hundred and twenty days unless the declaration is previously revoked or continued in accordance with this Act.

Orders and Regulations

40. (1) While a declaration of a war emergency is in effect, the Governor in Council may make such orders or regulations as the Governor in Council believes, on reasonable grounds, are necessary or advisable for dealing with the emergency.

No conscription by regulation

(2) The power under subsection (1) to make orders and regulations may not be exercised for the purpose of requiring persons to serve in the Canadian Forces.

Punishment

(3) The Governor in Council may make regulations providing for the imposition
(a) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or

(b) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment, for contravention of any order or regulation made under subsection (1).

Restriction

(4) The power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation, shall be exercised or performed with the view of achieving, to the extent possible, concerted action with each province with respect to which the power, duty or function is exercised or performed.

Revocation and Continuation of Declaration

Revocation by Parliament

41. Parliament may revoke a declaration of a war emergency in accordance with section 58 or 59.

Revocation by Governor in Council

42. The Governor in Council may, by proclamation, revoke a declaration of a war emergency effective on such day as is specified in the proclamation.

Continuation by Governor in Council

43. (1) At any time before a declaration of a war emergency would otherwise expire, the Governor in Council, after such consultation as is required by section 44, may, by proclamation, continue the declaration for such period, not exceeding one hundred and twenty days, as is specified in the proclamation if the Governor in Council believes, on reasonable grounds, that the emergency will continue to exist.

緊急狀態法制之探討

Review of orders and regulations

(2) Before issuing a proclamation continuing a declaration of a war emergency, the Governor in Council shall review all current orders and regulations made under section 40 to determine if the Governor in Council believes, on reasonable grounds, that they continue to be necessary or advisable for dealing with the emergency and shall revoke or amend them to the extent that they do not so continue.

Multiple continuations

(3) A declaration of a war emergency may be continued more than once pursuant to subsection (1).

Effective date

(4) A proclamation continuing a declaration of a war emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

Consultation

44. Before the Governor in Council issues or continues a declaration of a war emergency, the lieutenant governor in council of each province shall be consulted with respect to the proposed action to the extent that, in the opinion of the Governor in Council, it is appropriate and practicable to do so in the circumstances.

Effect of Expiration or Revocation

Effect of expiration of declaration

45. (1) Where, pursuant to this Act, a declaration of a war emergency expires, all orders and regulations made pursuant to the declaration expire on the day on which the declaration expires.

Effect of revocation of declaration

(2) Where, pursuant to this Act, a declaration of a war emergency is revoked, all orders and regulations made pursuant to the declaration are revoked effective on the revocation of the declaration.

Effect of revocation of continuation

(3) Where, pursuant to this Act, a proclamation continuing a declaration of a war emergency is revoked after the time the declaration would, but for the proclamation, have otherwise expired, the declaration and all orders and regulations made pursuant to the declaration are revoked effective on the revocation of the proclamation.

PART V

COMPENSATION

Interpretation

Definitions

46. In this Part,

“compensation”

« indemnisation »

“compensation” means compensation under subsection 48(1);

“Crown”

« État »

“Crown” means Her Majesty in right of Canada;

“Minister”

« ministre »

“Minister” means such member of the Queen’s Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this Part.

緊急狀態法制之探討

Liability

Protection from personal liability

47. (1) No action or other proceeding for damages lies or shall be instituted against a Minister, servant or agent of the Crown, including any person providing services pursuant to an order or regulation made under subsection 8(1), 19(1), 30(1) or 40(1), for or in respect of any thing done or omitted to be done, or purported to be done or omitted to be done, in good faith under any of Parts I to IV or any proclamation, order or regulation issued or made thereunder.

Crown not relieved of liability

(2) Subsection (1) does not relieve the Crown of liability for the acts or omissions described therein and the Crown is liable under the Crown Liability Act or any other law as if that subsection had not been enacted.

Compensation

48. (1) Subject to subsection (2) and the regulations made under section 49, the Minister shall award reasonable compensation to any person who suffers loss, injury or damage as a result of any thing done, or purported to be done, under any of Parts I to IV or any proclamation, order or regulation issued or made thereunder.

Release

(2) No compensation shall be paid to a person unless that person, in consideration of the compensation, signs, in a form provided by the Minister, a release of any right of action that the person may have against the Crown as a result of any thing done, or purported to be done, under any of Parts I to IV or any proclamation, order or regulation issued or made thereunder.

Subrogation

(3) The Crown is subrogated to all rights of any person to whom compensation is paid to recover damages in respect of the loss, injury or damage for which the compensation is paid and may maintain an action in the name of that person or in the name of the Crown against any person against whom the action lies.

Application of recovered sums

(4) Any sum recovered by the Crown pursuant to an action under subsection (3) shall be applied

(a) first, to payment of the costs actually incurred in the action and in levying execution, and

(b) second, to reimbursement of the Crown for the compensation paid to the person whose rights were subrogated,

and the balance, if any, shall be paid to that person.

Settlement

(5) No settlement or release bars the rights of the Crown under subsection (3) unless the Minister has concurred therein.

Regulations

49. The Governor in Council may make regulations

(a) prescribing the form and manner of making applications for compensation, the information and evidence to be submitted in connection therewith and the procedure to be followed in the consideration of applications for compensation;

(b) prescribing the period within which applications for compensation must be made;

(c) prescribing the criteria to be used in determining the eligibility of any person for compensation;

(d) prescribing the methods and criteria to be used in assessing any loss, injury or damage for which compensation shall be paid;

緊急狀態法制之探討

- (e) prescribing the maximum amount of compensation that may be paid to any person either generally or with respect to any particular loss, injury or damage;
- (f) prescribing the terms and conditions for the payment of compensation;
- (g) providing for the payment of compensation in a lump sum or in periodic payments;
- (h) providing for pro rata payments of compensation;
- (i) establishing priorities among persons applying for compensation on the basis of classes of persons or classes of loss, injury or damage or otherwise;
- (j) respecting the giving of notices to persons affected by applications for compensation; and
- (k) generally, for carrying into effect the purposes and provisions of this Part.

Appeals

Assessor and Deputy Assessors

50. (1) The Governor in Council shall, from among the judges of the Federal Court, appoint an Assessor and such number of Deputy Assessors as the Governor in Council considers necessary to hear and determine appeals under this Part and, subject to this Part, may prescribe their jurisdiction.

Acting assessor

(2) The Governor in Council shall, from among the judges of the Federal Court, appoint an acting assessor to act in the place of the Assessor in the event of the Assessor's absence or incapacity.

Deputy Assessor

(3) The Assessor may designate a Deputy Assessor to hear and determine any appeal under this Part and, where the Assessor does so, the references in sections 52 and 53 to the "Assessor" shall be construed as including references to the "Deputy Assessor".

Appeal

51. (1) Any person who has applied for compensation and is not satisfied with the decision of the Minister thereon may appeal the decision to the Assessor.

Limitation period

(2) No appeal may be made under this section more than three months after the day on which the person applying for compensation receives notice of the Minister's decision thereon or such longer period as the Assessor may, either before or after the expiration of that period of three months, allow for special reasons.

Powers of Assessor

52. (1) On the hearing of an appeal under this Part, the Assessor may

- (a) confirm the decision of the Minister;
- (b) notwithstanding the maximum amount, if any, of compensation that may be paid to the person appealing, vary the decision of the Minister; or
- (c) refer the matter back to the Minister for such further action as the Assessor may direct, including the calculation of compensation without regard to the maximum amount, if any, that may otherwise be paid.

Costs

(2) In any appeal under this Part, costs may be awarded to or against the Crown.

Decision final

(3) The decision of the Assessor on any appeal under this Part is final and conclusive and, except for judicial review under the Federal Courts Act, is not subject to appeal to or review by any court.

Payment

(4) Where the Assessor varies a decision of the Minister by awarding compensation or increasing the amount of compensation awarded by the Minister or,

緊急狀態法制之探討

on a matter referred back for further action, the Minister increases the amount of compensation previously awarded, the Minister shall pay that compensation or increased compensation, as the case may be.

R.S., 1985, c. 22 (4th Supp.), s. 52; 1993, c. 34, s. 61; 2002, c. 8, s. 182.

Sittings and hearings

53. (1) The Assessor may sit and hear appeals at any place or places, and shall arrange for such sittings and hearings as may be required.

Expenses

(2) The Assessor is entitled to be paid such travel allowances as are paid for attendances as a judge of the Federal Court under the Judges Act.

Procedure

54. The Assessor may, with the approval of the Governor in Council, make such rules respecting the conduct of appeals and the procedure for the bringing of appeals as the Assessor deems necessary to enable the discharge of the Assessor's duties under this Act.

Registrar

55. The Governor in Council may appoint a registrar of appeals and such other persons as the Governor in Council considers necessary to carry out the purposes of this Part.

Payment

Payment out of C.R.F.

56. Compensation and costs awarded against the Crown under this Part shall be paid out of the Consolidated Revenue Fund.

PART VI

PARLIAMENTARY SUPERVISION

Interpretation

Definitions

57. In this Part,

“declaration of emergency”

« déclaration de situation de crise »

“declaration of emergency” means a proclamation issued pursuant to subsection 6(1), 17(1), 28(1) or 38(1);

“Parliamentary Review Committee”

« comité d’examen parlementaire »

“Parliamentary Review Committee” means the committee referred to in subsection 62(1);

“sitting day”

« jour de séance »

“sitting day”, in respect of a House of Parliament, means a day on which that House is sitting.

Consideration of Declaration of Emergency

Tabling in Parliament when sitting

58. (1) Subject to subsection (4), a motion for confirmation of a declaration of emergency, signed by a minister of the Crown, together with an explanation of the reasons for issuing the declaration and a report on any consultation with the lieutenant governors in council of the provinces with respect to the declaration, shall be laid

緊急狀態法制之探討

before each House of Parliament within seven sitting days after the declaration is issued.

Summoning Parliament or House

(2) If a declaration of emergency is issued during a prorogation of Parliament or when either House of Parliament stands adjourned, Parliament or that House, as the case may be, shall be summoned forthwith to sit within seven days after the declaration is issued.

Summoning Parliament

(3) If a declaration of emergency is issued at a time when the House of Commons is dissolved, Parliament shall be summoned to sit at the earliest opportunity after the declaration is issued.

Tabling in Parliament after summoned

(4) Where Parliament or a House of Parliament is summoned to sit in accordance with subsection (2) or (3), the motion, explanation and report described in subsection (1) shall be laid before each House of Parliament or that House of Parliament, as the case may be, on the first sitting day after Parliament or that House is summoned.

Consideration

(5) Where a motion is laid before a House of Parliament as provided in subsection (1) or (4), that House shall, on the sitting day next following the sitting day on which the motion was so laid, take up and consider the motion.

Vote

(6) A motion taken up and considered in accordance with subsection (5) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

Revocation of declaration

(7) If a motion for confirmation of a declaration of emergency is negated by either House of Parliament, the declaration, to the extent that it has not previously expired or been revoked, is revoked effective on the day of the negative vote and no further action under this section need be taken in the other House with respect to the motion.

Revocation of Declaration of Emergency

Motion for revocation

59. (1) Where a motion, for the consideration of the Senate or the House of Commons, to the effect that

(a) a declaration of emergency under Part I or II be revoked either generally or with respect to any area of Canada, or

(b) a declaration of emergency under Part III or IV be revoked, signed by not less than ten members of the Senate or twenty members of the House of Commons, as the case may be, is filed with the Speaker thereof, that House of Parliament shall take up and consider the motion within three sitting days after it is filed.

Vote

(2) A motion taken up and considered in accordance with subsection (1) shall be debated without interruption for not more than ten hours and, on the expiration of the tenth hour or at such earlier time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

緊急狀態法制之探討

Revocation of declaration

(3) If a motion debated in accordance with subsection (2) is adopted by the House, the declaration, to the extent that it has not previously expired or been revoked, is revoked in accordance with the motion, effective on the day specified in the motion, which day may not be earlier than the day of the vote adopting the motion.

Consideration of Continuation or Amendment of Declaration of Emergency

Motion for confirmation of proclamation continuing a declaration

60. (1) A motion for confirmation of a proclamation continuing a declaration of emergency and of any orders and regulations named in the motion pursuant to subsection (3), signed by a minister of the Crown, together with an explanation of the reasons for issuing the proclamation, a report on any consultation with the lieutenant governors in council of the provinces with respect to the proclamation and a report on the review of orders and regulations conducted before the issuing of the proclamation, shall be laid before each House of Parliament within seven sitting days after the proclamation is issued.

Motion for confirmation of proclamation amending a declaration

(2) A motion for confirmation of a proclamation amending a declaration of emergency, signed by a minister of the Crown, together with an explanation of the reasons for issuing the proclamation and a report on any consultation with the lieutenant governors in council of the provinces with respect to the proclamation, shall be laid before each House of Parliament within seven sitting days after the proclamation is issued.

Orders and regulations named

(3) A motion for confirmation of a proclamation continuing a declaration of emergency shall name the orders and regulations in force on the issuing of the proclamation that the Governor in Council believed, on reasonable grounds, continued

at that time to be necessary or, in the case of a proclamation issued pursuant to subsection 43(1), advisable, for dealing with the emergency.

Consideration

(4) Where a motion is laid before a House of Parliament as provided in subsection (1) or (2), that House shall, on the sitting day next following the sitting day on which the motion was so laid, take up and consider the motion.

Vote

(5) A motion taken up and considered in accordance with subsection (4) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

Revocation of proclamation

(6) If a motion for confirmation of a proclamation is negated by either House of Parliament, the proclamation, to the extent that it has not previously expired or been revoked, is revoked effective on the day of the negative vote and no further action under this section need be taken in the other House with respect to the motion.

Revocation of orders or regulations

(7) If a motion for confirmation of a proclamation continuing a declaration of emergency is amended by either House of Parliament by the deletion therefrom of an order or regulation named in the motion pursuant to subsection (3), the order or regulation is revoked effective on the day on which the motion, as amended, is adopted.

Orders and Regulations

緊急狀態法制之探討

Tabling in Parliament

61. (1) Subject to subsection (2), every order or regulation made by the Governor in Council pursuant to this Act shall be laid before each House of Parliament within two sitting days after it is made.

Reference to Committee

(2) Where an order or regulation made pursuant to this Act is exempted from publication in the Canada Gazette by regulations made under the Statutory Instruments Act, the order or regulation, in lieu of being laid before each House of Parliament as required by subsection (1), shall be referred to the Parliamentary Review Committee within two days after it is made or, if the Committee is not then designated or established, within the first two days after it is designated or established.

Motion for revocation or amendment

(3) Where a motion, for the consideration of the Senate or the House of Commons, to the effect that an order or regulation laid before it pursuant to subsection (1) be revoked or amended, signed by not less than ten members of the Senate or twenty members of the House of Commons, as the case may be, is filed with the Speaker thereof, that House of Parliament shall take up and consider the motion within three sitting days after it is filed.

Vote

(4) A motion taken up and considered in accordance with subsection (3) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

Motion for concurrence

(5) If a motion debated in accordance with subsection (4) is adopted by the House, a message shall forthwith be sent from that House informing the other House

that the motion has been so adopted and requesting that the motion be concurred in by that other House.

Consideration

(6) Where a request for concurrence in a motion is made pursuant to subsection (5), the House to which the request is made shall take up and consider the motion within three sitting days after the request is made.

Vote on motion for concurrence

(7) A motion taken up and considered in accordance with subsection (6) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

Revocation or amendment of order or regulation

(8) If a motion taken up and considered in accordance with subsection (6) is concurred in, the order or regulation is revoked or amended in accordance with the motion, effective on the day specified in the motion, which day may not be earlier than the day of the vote of concurrence.

Parliamentary Review Committee

Review by Parliamentary Review Committee

62. (1) The exercise of powers and the performance of duties and functions pursuant to a declaration of emergency shall be reviewed by a committee of both Houses of Parliament designated or established for that purpose.

Membership

(2) The Parliamentary Review Committee shall include at least one member of the House of Commons from each party that has a recognized membership of twelve or

緊急狀態法制之探討

more persons in that House and at least one senator from each party in the Senate that is represented on the committee by a member of the House of Commons.

Oath of secrecy

(3) Every member of the Parliamentary Review Committee and every person employed in the work of the Committee shall take the oath of secrecy set out in the schedule.

Meetings in private

(4) Every meeting of the Parliamentary Review Committee held to consider an order or regulation referred to it pursuant to subsection 61(2) shall be held in private.

Revocation or amendment of order or regulation

(5) If, within thirty days after an order or regulation is referred to the Parliamentary Review Committee pursuant to subsection 61(2), the Committee adopts a motion to the effect that the order or regulation be revoked or amended, the order or regulation is revoked or amended in accordance with the motion, effective on the day specified in the motion, which day may not be earlier than the day on which the motion is adopted.

Report to Parliament

(6) The Parliamentary Review Committee shall report or cause to be reported the results of its review under subsection (1) to each House of Parliament at least once every sixty days while the declaration of emergency is in effect and, in any case,

(a) within three sitting days after a motion for revocation of the declaration is filed under subsection 59(1);

(b) within seven sitting days after a proclamation continuing the declaration is issued; and

(c) within seven sitting days after the expiration of the declaration or the revocation of the declaration by the Governor in Council.

Inquiry

63. (1) The Governor in Council shall, within sixty days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency.

Report to Parliament

(2) A report of an inquiry held pursuant to this section shall be laid before each House of Parliament within three hundred and sixty days after the expiration or revocation of the declaration of emergency.

PART VII

CONSEQUENTIAL AND RELATED PROVISIONS

64. to 80. [Amendments and repeal]

SCHEDULE

(Subsection 62(3))

OATH OF SECRECY

I,, swear that I will not, without due authority, disclose or make known to any person any document or information acquired by me by reason of the duties performed by me on behalf of or under the direction of a Parliamentary Review Committee established pursuant to the Emergencies Act. So help me God.

[About CanLII] [Conditions of Use] [Advanced search] [Help] [Français]

[Privacy Policy] [Mailing Lists] [Technical Library]

[Contact CanLII]

緊急狀態法制之探討

附錄三：美國國家緊急法(National Emergencies Act)

National Emergencies Act 1976

50 U.S.C.A. <section> 1601

UNITED STATES CODE ANNOTATED

TITLE 50. WAR AND NATIONAL DEFENSE

CHAPTER 34--NATIONAL EMERGENCIES

SUBCHAPTER I--TERMINATING EXISTING DECLARED EMERGENCIES

<section> 1601. Termination of existing declared emergencies

(a) All powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency, as defined in section 105 of Title 5, as a result of the existence of any declaration of national emergency in effect on September 14, 1976, are terminated two years from September 14, 1976. Such termination shall not affect--

(1) any action taken or proceeding pending not finally concluded or determined on such date;

緊急狀態法制之探討

(2) any action or proceeding based on any act committed prior to such date;

or

(3) any rights or duties that matured or penalties that were incurred prior to such date.

(b) For the purpose of this section, the words "any national emergency in effect" means a general declaration of emergency made by the President.

50 U.S.C.A. <section> 1621

UNITED STATES CODE ANNOTATED

TITLE 50. WAR AND NATIONAL DEFENSE

CHAPTER 34--NATIONAL EMERGENCIES

SUBCHAPTER II--DECLARATIONS OF FUTURE NATIONAL
EMERGENCIES

**<section> 1621. Declaration of national emergency by President;
publication in Federal Register; effect on other laws; superseding
legislation**

(a) With respect to Acts of Congress authorizing the exercise, during the

period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.

(b) Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this chapter. No law enacted after September 14, 1976, shall supersede this subchapter unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter.

50 U.S.C.A. <section> 1622

UNITED STATES CODE ANNOTATED

TITLE 50. WAR AND NATIONAL DEFENSE

CHAPTER 34--NATIONAL EMERGENCIES

SUBCHAPTER II--DECLARATIONS OF FUTURE NATIONAL
EMERGENCIES

<section> 1622. National emergencies

(a) Termination methods

Any national emergency declared by the President in accordance with this subchapter shall terminate if--

(1) there is enacted into law a joint resolution terminating the emergency;

or

(2) the President issues a proclamation terminating the emergency.

Any national emergency declared by the President shall be terminated on the date specified in any joint resolution referred to in clause (1) or on the date specified in a proclamation by the President terminating the emergency as provided in clause (2) of this subsection, whichever date is earlier, and any powers or authorities exercised by reason of said emergency shall cease to be exercised after such specified date, except that such termination shall not affect--

(A) any action taken or proceeding pending not finally concluded or determined on such date;

(B) any action or proceeding based on any act committed prior to such date;

or

(C) any rights or duties that matured or penalties that were incurred prior to such date.

(b) Termination review of national emergencies by Congress

Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.

(c) Joint resolution; referral to Congressional committees; conference committee in event of disagreement; filing of report; termination procedure deemed part of rules of House and Senate

(1) A joint resolution to terminate a national emergency declared by the President shall be referred to the appropriate committee of the House of

緊急狀態法制之探討

Representatives or the Senate, as the case may be. One such joint resolution shall be reported out by such committee together with its recommendations within fifteen calendar days after the day on which such resolution is referred to such committee, unless such House shall otherwise determine by the yeas and nays.

(2) Any joint resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days after the day on which such resolution is reported, unless such House shall otherwise determine by yeas and nays.

(3) Such a joint resolution passed by one House shall be referred to the appropriate committee of the other House and shall be reported out by such committee together with its recommendations within fifteen calendar days after the day on which such resolution is referred to such committee and shall thereupon become the pending business of such House and shall be voted upon within three calendar days after the day on which such resolution is reported,

unless such House shall otherwise determine by yeas and nays.

(4) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such joint resolution within six calendar days after the day on which managers on the part of the Senate and the House have been appointed. Notwithstanding any rule in either House concerning the printing of conference reports or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed in the House in which such report is filed first. In the event the conferees are unable to agree within forty-eight hours, they shall report back to their respective Houses in disagreement.

(5) Paragraphs (1)-(4) of this subsection, subsection (b) of this section, and section 1651(b) of this title are enacted by Congress--

(A) as an exercise of the rulemaking power of the Senate and the House of

緊急狀態法制之探討

Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in the House in the case of resolutions described by this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(d) Automatic termination of national emergency; continuation notice from President to Congress; publication in Federal Register

Any national emergency declared by the President in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such

emergency is to continue in effect after such anniversary.

50 U.S.C.A. <section> 1641

UNITED STATES CODE ANNOTATED

TITLE 50. WAR AND NATIONAL DEFENSE

CHAPTER 34--NATIONAL EMERGENCIES

SUBCHAPTER IV--ACCOUNTABILITY AND REPORTING REQUIREMENTS

OF PRESIDENT

<section> 1641. Accountability and reporting requirements of

President

(a) Maintenance of file and index of Presidential orders, rules and regulations during national emergency

When the President declares a national emergency, or Congress declares war,

the President shall be responsible for maintaining a file and index of all

significant orders of the President, including Executive orders and

proclamations, and each Executive agency shall maintain a file and index of

all rules and regulations, issued during such emergency or war issued pursuant

to such declarations.

緊急狀態法制之探討

(b) Presidential orders, rules and regulations; transmittal to Congress

All such significant orders of the President, including Executive orders, and such rules and regulations shall be transmitted to the Congress promptly under means to assure confidentiality where appropriate.

(c) Expenditures during national emergency; Presidential reports to Congress

When the President declares a national emergency or Congress declares war, the President shall transmit to Congress, within ninety days after the end of each six-month period after such declaration, a report on the total expenditures incurred by the United States Government during such six-month period which are directly attributable to the exercise of powers and authorities conferred by such declaration. Not later than ninety days after the termination of each such emergency or war, the President shall transmit a final report on all such expenditures.

50 U.S.C.A. <section> 1651

UNITED STATES CODE ANNOTATED

TITLE 50. WAR AND NATIONAL DEFENSE

CHAPTER 34--NATIONAL EMERGENCIES

SUBCHAPTER V--APPLICATION TO POWERS AND AUTHORITIES OF

OTHER PROVISIONS OF LAW

AND ACTIONS TAKEN THEREUNDER

<section> 1651. Other laws, powers and authorities conferred thereby,

and actions taken thereunder; Congressional studies

(a) The provisions of this chapter shall not apply to the following

provisions of law, the powers and authorities conferred thereby, and actions

taken thereunder:

(1) Act of June 30, 1949 (41 U.S.C. 252);

(2) Section 3727(a) to (e)(1) of Title 31;

(3) Section 3737 of the Revised Statutes, as amended (41 U.S.C. 15);

(4) Public Law 85-804 (Act of Aug. 28, 1958, 72 Stat. 972; 50 U.S.C. 1431 et

seq.);

(5) Section 2304(a)(1) of Title 10; [FN1]

緊急狀態法制之探討

[(6), (7) Redesignated (4), (5)]

(b) Each committee of the House of Representatives and the Senate having jurisdiction with respect to any provision of law referred to in subsection (a) of this section shall make a complete study and investigation concerning that provision of law and make a report, including any recommendations and proposed revisions such committee may have, to its respective House of Congress within two hundred and seventy days after September 14, 1976.

附錄四：美國愛國者法(USA PATRIOT ACT) 條文結構
及部分條文

UNITED STATES PUBLIC LAWS

107th Congress - First Session

Convening January, 2001

PL 107-56 (HR 3162)

October 26, 2001

UNITING AND STRENGTHENING AMERICA BY PROVIDING
APPROPRIATE TOOLS REQUIRED TO
INTERCEPT AND OBSTRUCT TERRORISM (USA **PATRIOT** ACT) ACT OF
2001

An Act To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States
of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

<< 18 USCA § 1 NOTE >>

(a) SHORT TITLE.--This Act may be cited as the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001".

(b) TABLE OF CONTENTS.--The table of contents for this Act is as follows:

Sec. 1. Short title and table of contents.

Sec. 2. Construction; severability.

TITLE I--ENHANCING DOMESTIC SECURITY AGAINST TERRORISM

Sec. 101. Counterterrorism fund.

Sec. 102. Sense of Congress condemning discrimination against Arab and Muslim Americans.

Sec. 103. Increased funding for the technical support center at the Federal Bureau of Investigation.

Sec. 104. Requests for military assistance to enforce prohibition in certain emergencies.

Sec. 105. Expansion of National Electronic Crime Task Force Initiative.

Sec. 106. Presidential authority.

TITLE II--ENHANCED SURVEILLANCE PROCEDURES

Sec. 201. Authority to intercept wire, oral, and electronic communications relating to terrorism.

Sec. 202. Authority to intercept wire, oral, and electronic communications relating to computer fraud and abuse offenses.

Sec. 203. Authority to share criminal investigative information.

Sec. 204. Clarification of intelligence exceptions from limitations on interception and disclosure of wire, oral, and electronic communications.

Sec. 205. Employment of translators by the Federal Bureau of Investigation.

Sec. 206. Roving surveillance authority under the Foreign Intelligence Surveillance Act of 1978.

Sec. 207. Duration of FISA surveillance of non-United States persons who are agents of a foreign power.

Sec. 208. Designation of judges.

Sec. 209. Seizure of voice-mail messages pursuant to warrants.

Sec. 210. Scope of subpoenas for records of electronic communications.

緊急狀態法制之探討

Sec. 211. Clarification of scope.

Sec. 212. Emergency disclosure of electronic communications to protect life and limb.

Sec. 213. Authority for delaying notice of the execution of a warrant.

Sec. 214. Pen register and trap and trace authority under FISA.

Sec. 215. Access to records and other items under the Foreign Intelligence Surveillance Act.

Sec. 216. Modification of authorities relating to use of pen registers and trap and trace devices.

Sec. 217. Interception of computer trespasser communications.

Sec. 218. Foreign intelligence information.

Sec. 219. Single-jurisdiction search warrants for terrorism.

Sec. 220. Nationwide service of search warrants for electronic evidence.

Sec. 221. Trade sanctions.

Sec. 222. Assistance to law enforcement agencies.

Sec. 223. Civil liability for certain unauthorized disclosures.

Sec. 224. Sunset.

Sec. 225. Immunity for compliance with FISA wiretap.

TITLE III--INTERNATIONAL MONEY LAUNDERING ABATEMENT AND
ANTI-TERRORIST FINANCING ACT OF 2001

Sec. 301. Short title.

Sec. 302. Findings and purposes.

Sec. 303. 4-year congressional review; expedited consideration.

Subtitle A--International Counter Money Laundering and Related Measures

Sec. 311. Special measures for jurisdictions, financial institutions, or international transactions of primary money laundering concern.

Sec. 312. Special due diligence for correspondent accounts and private banking accounts.

Sec. 313. Prohibition on United States correspondent accounts with foreign shell banks.

Sec. 314. Cooperative efforts to deter money laundering.

Sec. 315. Inclusion of foreign corruption offenses as money laundering crimes.

Sec. 316. Anti-terrorist forfeiture protection.

Sec. 317. Long-arm jurisdiction over foreign money launderers.

緊急狀態法制之探討

Sec. 318. Laundering money through a foreign bank.

Sec. 319. Forfeiture of funds in United States interbank accounts.

Sec. 320. Proceeds of foreign crimes.

Sec. 321. Financial institutions specified in subchapter II of chapter 53 of title 31, United States code.

Sec. 322. Corporation represented by a fugitive.

Sec. 323. Enforcement of foreign judgments.

Sec. 324. Report and recommendation.

Sec. 325. Concentration accounts at financial institutions.

Sec. 326. Verification of identification.

Sec. 327. Consideration of anti-money laundering record.

Sec. 328. International cooperation on identification of originators of wire transfers.

Sec. 329. Criminal penalties.

Sec. 330. International cooperation in investigations of money laundering, financial crimes, and the finances of terrorist groups.

Subtitle B--Bank Secrecy Act Amendments and Related Improvements

Sec. 351. Amendments relating to reporting of suspicious activities.

Sec. 352. Anti-money laundering programs.

Sec. 353. Penalties for violations of geographic targeting orders and certain recordkeeping requirements, and lengthening effective period of geographic targeting orders.

Sec. 354. Anti-money laundering strategy.

Sec. 355. Authorization to include suspicions of illegal activity in written employment references.

Sec. 356. Reporting of suspicious activities by securities brokers and dealers; investment company study.

Sec. 357. Special report on administration of bank secrecy provisions.

Sec. 358. Bank secrecy provisions and activities of United States intelligence agencies to fight international terrorism.

Sec. 359. Reporting of suspicious activities by underground banking systems.

Sec. 360. Use of authority of United States Executive Directors.

Sec. 361. Financial crimes enforcement network.

Sec. 362. Establishment of highly secure network.

緊急狀態法制之探討

Sec. 363. Increase in civil and criminal penalties for money laundering.

Sec. 364. Uniform protection authority for Federal Reserve facilities.

Sec. 365. Reports relating to coins and currency received in nonfinancial trade or business.

Sec. 366. Efficient use of currency transaction report system.

Subtitle C--Currency Crimes and Protection

Sec. 371. Bulk cash smuggling into or out of the United States.

Sec. 372. Forfeiture in currency reporting cases.

Sec. 373. Illegal money transmitting businesses.

Sec. 374. Counterfeiting domestic currency and obligations.

Sec. 375. Counterfeiting foreign currency and obligations.

Sec. 376. Laundering the proceeds of terrorism.

Sec. 377. Extraterritorial jurisdiction.

TITLE IV--PROTECTING THE BORDER

Subtitle A--Protecting the Northern Border

Sec. 401. Ensuring adequate personnel on the northern border.

Sec. 402. Northern border personnel.

Sec. 403. Access by the Department of State and the INS to certain identifying information in the criminal history records of visa applicants and applicants for admission to the United States.

Sec. 404. Limited authority to pay overtime.

Sec. 405. Report on the integrated automated fingerprint identification system for ports of entry and overseas consular posts.

Subtitle B--Enhanced Immigration Provisions

Sec. 411. Definitions relating to terrorism.

Sec. 412. Mandatory detention of suspected terrorists; habeas corpus; judicial review.

Sec. 413. Multilateral cooperation against terrorists.

Sec. 414. Visa integrity and security.

Sec. 415. Participation of Office of Homeland Security on Entry-Exit Task Force.

Sec. 416. Foreign student monitoring program.

Sec. 417. Machine readable passports.

緊急狀態法制之探討

Sec. 418. Prevention of consulate shopping.

Subtitle C--Preservation of Immigration Benefits for Victims of Terrorism

Sec. 421. Special immigrant status.

Sec. 422. Extension of filing or reentry deadlines.

Sec. 423. Humanitarian relief for certain surviving spouses and children.

Sec. 424. "Age-out" protection for children.

Sec. 425. Temporary administrative relief.

Sec. 426. Evidence of death, disability, or loss of employment.

Sec. 427. No benefits to terrorists or family members of terrorists.

Sec. 428. Definitions.

TITLE V--REMOVING OBSTACLES TO INVESTIGATING TERRORISM

Sec. 501. Attorney General's authority to pay rewards to combat terrorism.

Sec. 502. Secretary of State's authority to pay rewards.

Sec. 503. DNA identification of terrorists and other violent offenders.

Sec. 504. Coordination with law enforcement.

Sec. 505. Miscellaneous national security authorities.

Sec. 506. Extension of Secret Service jurisdiction.

Sec. 507. Disclosure of educational records.

Sec. 508. Disclosure of information from NCES surveys.

TITLE VI--PROVIDING FOR VICTIMS OF TERRORISM, PUBLIC SAFETY

OFFICERS, AND THEIR FAMILIES

Subtitle A--Aid to Families of Public Safety Officers

Sec. 611. Expedited payment for public safety officers involved in the prevention, investigation, rescue, or recovery efforts related to a terrorist attack.

Sec. 612. Technical correction with respect to expedited payments for heroic public safety officers.

Sec. 613. Public safety officers benefit program payment increase.

Sec. 614. Office of Justice programs.

Subtitle B--Amendments to the Victims of Crime Act of 1984

Sec. 621. Crime victims fund.

Sec. 622. Crime victim compensation.

Sec. 623. Crime victim assistance.

Sec. 624. Victims of terrorism.

TITLE VII--INCREASED INFORMATION SHARING FOR CRITICAL
INFRASTRUCTURE PROTECTION

Sec. 701. Expansion of regional information sharing system to facilitate Federal-State-local law enforcement response related to terrorist attacks.

TITLE VIII--STRENGTHENING THE CRIMINAL LAWS AGAINST
TERRORISM

Sec. 801. Terrorist attacks and other acts of violence against mass transportation systems.

Sec. 802. Definition of domestic terrorism.

Sec. 803. Prohibition against harboring terrorists.

Sec. 804. Jurisdiction over crimes committed at U.S. facilities abroad.

Sec. 805. Material support for terrorism.

Sec. 806. Assets of terrorist organizations.

Sec. 807. Technical clarification relating to provision of material support to terrorism.

Sec. 808. Definition of Federal crime of terrorism.

Sec. 809. No statute of limitation for certain terrorism offenses.

Sec. 810. Alternate maximum penalties for terrorism offenses.

Sec. 811. Penalties for terrorist conspiracies.

Sec. 812. Post-release supervision of terrorists.

Sec. 813. Inclusion of acts of terrorism as racketeering activity.

Sec. 814. Deterrence and prevention of cyberterrorism.

Sec. 815. Additional defense to civil actions relating to preserving records in response to Government requests.

Sec. 816. Development and support of cybersecurity forensic capabilities.

Sec. 817. Expansion of the biological weapons statute.

TITLE IX--IMPROVED INTELLIGENCE

Sec. 901. Responsibilities of Director of Central Intelligence regarding foreign intelligence collected under Foreign Intelligence Surveillance Act of 1978.

Sec. 902. Inclusion of international terrorist activities within scope of foreign intelligence under National Security Act of 1947.

Sec. 903. Sense of Congress on the establishment and maintenance of intelligence relationships to acquire information on terrorists and terrorist organizations.

緊急狀態法制之探討

Sec. 904. Temporary authority to defer submittal to Congress of reports on intelligence and intelligence-related matters.

Sec. 905. Disclosure to Director of Central Intelligence of foreign intelligence-related information with respect to criminal investigations.

Sec. 906. Foreign terrorist asset tracking center.

Sec. 907. National Virtual Translation Center.

Sec. 908. Training of government officials regarding identification and use of foreign intelligence.

TITLE X--MISCELLANEOUS

Sec. 1001. Review of the department of justice.

Sec. 1002. Sense of congress.

Sec. 1003. Definition of "electronic surveillance".

Sec. 1004. Venue in money laundering cases.

Sec. 1005. First responders assistance act.

Sec. 1006. Inadmissibility of aliens engaged in money laundering.

Sec. 1007. Authorization of funds for dea police training in south and central asia.

Sec. 1008. Feasibility study on use of biometric identifier scanning system with access to the fbi integrated automated fingerprint identification system at overseas consular posts and points of entry to the United States.

Sec. 1009. Study of access.

Sec. 1010. Temporary authority to contract with local and State governments for performance of security functions at United States military installations.

Sec. 1011. Crimes against charitable americans.

Sec. 1012. Limitation on issuance of hazmat licenses.

Sec. 1013. Expressing the sense of the senate concerning the provision of funding for bioterrorism preparedness and response.

Sec. 1014. Grant program for State and local domestic preparedness support.

Sec. 1015. Expansion and reauthorization of the crime identification technology act for antiterrorism grants to States and localities.

Sec. 1016. Critical infrastructures protection.

<< 18 USCA § 1 NOTE >>

SEC. 2. CONSTRUCTION; SEVERABILITY.

緊急狀態法制之探討

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed *276 severable from this Act and shall not affect the remainder thereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

TITLE I--ENHANCING DOMESTIC SECURITY AGAINST TERRORISM

<< 28 USCA § 524 NOTE >>

SEC. 101. COUNTERTERRORISM FUND.

(a) ESTABLISHMENT; AVAILABILITY.--There is hereby established in the Treasury of the United States a separate fund to be known as the "Counterterrorism Fund", amounts in which shall remain available without fiscal year limitation--

(1) to reimburse any Department of Justice component for any costs incurred in connection with--

(A) reestablishing the operational capability of an office or facility that has been damaged or destroyed as the result of any domestic or international terrorism incident;

(B) providing support to counter, investigate, or prosecute domestic or international terrorism, including, without limitation, paying rewards in connection with these activities; and

(C) conducting terrorism threat assessments of Federal agencies and their facilities; and

(2) to reimburse any department or agency of the Federal Government for any costs incurred in connection with detaining in foreign countries individuals accused of acts of terrorism that violate the laws of the United States.

(b) NO EFFECT ON PRIOR APPROPRIATIONS.--Subsection (a) shall not be construed to affect the amount or availability of any appropriation to the Counterterrorism Fund made before the date of the enactment of this Act.

SEC. 102. SENSE OF CONGRESS CONDEMNING DISCRIMINATION AGAINST ARAB AND MUSLIM AMERICANS.

(a) FINDINGS.--Congress makes the following findings:

(1) Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American.

緊急狀態法制之探討

(2) The acts of violence that have been taken against Arab and Muslim Americans since the September 11, 2001, attacks against the United States should be and are condemned by all Americans who value freedom.

(3) The concept of individual responsibility for wrongdoing is sacrosanct in American society, and applies equally to all religious, racial, and ethnic groups.

(4) When American citizens commit acts of violence against those who are, or are perceived to be, of Arab or Muslim descent, they should be punished to the full extent of the law.

(5) Muslim Americans have become so fearful of harassment that many Muslim women are changing the way they dress to avoid becoming targets.

(6) Many Arab Americans and Muslim Americans have acted heroically during the attacks on the United States, including Mohammed Salman Hamdani, a 23-year-old New Yorker of Pakistani descent, who is believed to have gone *277 to the World Trade Center to offer rescue assistance and is now missing.

(b) SENSE OF CONGRESS.--It is the sense of Congress that--

(1) the civil rights and civil liberties of all Americans, including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety;

(2) any acts of violence or discrimination against any Americans be condemned; and

(3) the Nation is called upon to recognize the patriotism of fellow citizens from all ethnic, racial, and religious backgrounds.

SEC. 103. INCREASED FUNDING FOR THE TECHNICAL SUPPORT CENTER AT THE FEDERAL BUREAU OF INVESTIGATION.

There are authorized to be appropriated for the Technical Support Center established in section 811 of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132) to help meet the demands for activities to combat terrorism and support and enhance the technical support and tactical operations of the FBI, \$200,000,000 for each of the fiscal years 2002, 2003, and 2004.

<< 18 USCA § 2332e >>

SEC. 104. REQUESTS FOR MILITARY ASSISTANCE TO ENFORCE PROHIBITION IN CERTAIN EMERGENCIES.

Section 2332e of title 18, United States Code, is amended--

(1) by striking "2332c" and inserting "2332a"; and

(2) by striking "chemical".

<< 18 USCA § 3036 NOTE >>

SEC. 105. EXPANSION OF NATIONAL ELECTRONIC CRIME TASK FORCE INITIATIVE.

The Director of the United States Secret Service shall take appropriate actions to develop a national network of electronic crime task forces, based on the New York Electronic Crimes Task Force model, throughout the United States, for the purpose of preventing, detecting, and investigating various forms of electronic crimes, including potential terrorist attacks against critical infrastructure and financial payment systems.

SEC. 106. PRESIDENTIAL AUTHORITY.

Section 203 of the International Emergency Powers Act (50 U.S.C. 1702) is amended--

(1) in subsection (a)(1)--

<< 50 USCA § 1702 >>

(A) at the end of subparagraph (A) (flush to that subparagraph), by striking "; and" and inserting a comma and the following:

"by any person, or with respect to any property, subject to the jurisdiction of the United States;";

<< 50 USCA § 1702 >>

(B) in subparagraph (B)--

(i) by inserting ", block during the pendency of an investigation" after "investigate"; and

(ii) by striking "interest;" and inserting "interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and";

<< 50 USCA § 1702 >>

(C) by striking "by any person, or with respect to any property, subject to the jurisdiction of the United States'; and

<< 50 USCA § 1702 >>

(D) by inserting at the end the following:

"(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time,

緊急狀態法制之探討

and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes."; and

<< 50 USCA § 1702 >>

(2) by inserting at the end the following:

"(c) CLASSIFIED INFORMATION.--In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review."

TITLE II--ENHANCED SURVEILLANCE PROCEDURES

SEC. 201. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO TERRORISM.

Section 2516(1) of title 18, United States Code, is amended--

<< 18 USCA § 2516 >>

(1) by redesignating paragraph (p), as so redesignated by section 434(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104- 132; 110 Stat. 1274), as paragraph (r); and

<< 18 USCA § 2516 >>

(2) by inserting after paragraph (p), as so redesignated by section 201(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208; 110 Stat. 3009-565), the following new paragraph:

"(q) any criminal violation of section 229 (relating to chemical weapons); or sections 2332, 2332a, 2332b, 2332d, 2339A, or 2339B of this title (relating to terrorism); or".

<< 18 USCA § 2516 >>

SEC. 202. AUTHORITY TO INTERCEPT WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS RELATING TO COMPUTER FRAUD AND ABUSE OFFENSES.

Section 2516(1)(c) of title 18, United States Code, is amended by striking "and section 1341 (relating to mail fraud)," and inserting "section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to computer fraud and abuse),".

SEC. 203. AUTHORITY TO SHARE CRIMINAL INVESTIGATIVE INFORMATION.

(a) AUTHORITY TO SHARE GRAND JURY INFORMATION.--

<< FRCRP Rule 6 >>

(1) IN GENERAL.--Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended to read as follows:

"(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

"(I) when so directed by a court preliminarily to or in connection with a judicial proceeding;

"(II) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

"(III) when the disclosure is made by an attorney for the government to another Federal grand jury;

"(IV) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State

criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such law; or

"(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.

"(ii) If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

"(iii) Any Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

緊急狀態法制之探討

"(iv) In clause (i)(V) of this subparagraph, the term 'foreign intelligence information' means--

"(I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against--

"(aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

"(cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power; or

"(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to--

"(aa) the national defense or the security of the United States; or

"(bb) the conduct of the foreign affairs of the United States.".

<< FRCRP Rule 6 >>

(2) CONFORMING AMENDMENT.--Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure is amended by striking "(e)(3)(C)(i)" and inserting "(e)(3)(C)(i)(I)".

(b) AUTHORITY TO SHARE ELECTRONIC, WIRE, AND ORAL INTERCEPTION INFORMATION.--

<< 18 USCA § 2517 >>

(1) LAW ENFORCEMENT.--Section 2517 of title 18, United States Code, is amended by inserting at the end the following:

"(6) Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (19) of section 2510 of this title), to assist the official who is to receive that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information."

(2) DEFINITION.--Section 2510 of title 18, United States Code, is amended by--

緊急狀態法制之探討

<< 18 USCA § 2510 >>

(A) in paragraph (17), by striking "and" after the semicolon;

<< 18 USCA § 2510 >>

(B) in paragraph (18), by striking the period and inserting "; and"; and

<< 18 USCA § 2510 >>

(C) by inserting at the end the following:

"(19) 'foreign intelligence information' means--

"(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against--

"(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

"(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

"(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to--

"(i) the national defense or the security of the United States; or

"(ii) the conduct of the foreign affairs of the United States.".

<< 18 USCA § 2517 NOTE >>

(c) PROCEDURES.--The Attorney General shall establish procedures for the disclosure of information pursuant to section 2517(6) ***281** and Rule 6(e)(3)(C)(i)(V) of the Federal Rules of Criminal Procedure that identifies a United States person, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)).

<< 50 USCA § 403-5d >>

(d) FOREIGN INTELLIGENCE INFORMATION.--

(1) IN GENERAL.--Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the

緊急狀態法制之探討

performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(2) DEFINITION.--In this subsection, the term "foreign intelligence information" means--

(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against--

(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to--

(i) the national defense or the security of the United States; or

(ii) the conduct of the foreign affairs of the United States.

<< 18 USCA § 2511 >>

SEC. 204. CLARIFICATION OF INTELLIGENCE EXCEPTIONS FROM LIMITATIONS ON INTERCEPTION AND DISCLOSURE OF WIRE, ORAL, AND ELECTRONIC COMMUNICATIONS.

Section 2511(2)(f) of title 18, United States Code, is amended--

(1) by striking "this chapter or chapter 121" and inserting "this chapter or chapter 121 or 206 of this title"; and

(2) by striking "wire and oral" and inserting "wire, oral, and electronic".

<< 28 USCA § 532 NOTE >>

SEC. 205. EMPLOYMENT OF TRANSLATORS BY THE FEDERAL BUREAU OF INVESTIGATION.

(a) AUTHORITY.--The Director of the Federal Bureau of Investigation is authorized to expedite the employment of personnel as translators to support counterterrorism investigations and operations without regard to applicable Federal personnel requirements and limitations.

(b) SECURITY REQUIREMENTS.--The Director of the Federal Bureau of Investigation shall establish such security requirements as are necessary for the personnel employed as translators under subsection (a).

緊急狀態法制之探討

(c) REPORT.--The Attorney General shall report to the Committees on the Judiciary of the House of Representatives and the Senate on--

(1) the number of translators employed by the FBI and other components of the Department of Justice;

(2) any legal or practical impediments to using translators employed by other Federal, State, or local agencies, on a full, part-time, or shared basis; and

(3) the needs of the FBI for specific translation services in certain languages, and recommendations for meeting those needs.

<< 50 USCA § 1805 >>

SEC. 206. ROVING SURVEILLANCE AUTHORITY UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978.

Section 105(c)(2)(B) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(c)(2)(B)) is amended by inserting ", or in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person, such other persons," after "specified person".

SEC. 207. DURATION OF FISA SURVEILLANCE OF NON-UNITED STATES PERSONS WHO ARE AGENTS OF A FOREIGN POWER.

(a) DURATION.--

<< 50 USCA § 1805 >>

(1) SURVEILLANCE.--Section 105(e)(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(e)(1)) is amended by--

(A) inserting "(A)" after "except that"; and

(B) inserting before the period the following: ", and (B) an order under this Act for a surveillance targeted against an agent of a foreign power, as defined in section 101(b)(1)(A) may be for the period specified in the application or for 120 days, whichever is less".

<< 50 USCA § 1824 >>

(2) PHYSICAL SEARCH.--Section 304(d)(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1824(d)(1)) is amended by--

(A) striking "forty-five" and inserting "90";

(B) inserting "(A)" after "except that"; and

(C) inserting before the period the following: ", and (B) an order under this section for a physical search targeted against an agent of a foreign power as defined in section 101(b)(1)(A) may be for the period specified in the application or for 120 days, whichever is less".

(b) EXTENSION.--

緊急狀態法制之探討

<< 50 USCA § 1805 >>

(1) IN GENERAL.--Section 105(d)(2) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(d)(2)) is amended by--

(A) inserting "(A)" after "except that"; and

(B) inserting before the period the following: ", and (B) an extension of an order under this Act for a surveillance targeted against an agent of a foreign power as defined in section 101(b)(1)(A) may be for a period not to exceed 1 year".

<< 50 USCA § 1824 >>

(2) DEFINED TERM.--Section 304(d)(2) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1824(d)(2)) is amended by inserting after "not a United States person," the following: "or against an agent of a foreign power as defined in section 101(b)(1)(A),".

<< 50 USCA § 1803 >>

SEC. 208. DESIGNATION OF JUDGES.

Section 103(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803(a)) is amended by--

(1) striking "seven district court judges" and inserting "11 district court judges"; and

(2) inserting "of whom no fewer than 3 shall reside within 20 miles of the District of Columbia" after "circuits".

SEC. 209. SEIZURE OF VOICE-MAIL MESSAGES PURSUANT TO WARRANTS.

Title 18, United States Code, is amended--

(1) in section 2510--

<< 18 USCA § 2510 >>

(A) in paragraph (1), by striking beginning with "and such" and all that follows through "communication"; and

<< 18 USCA § 2510 >>

(B) in paragraph (14), by inserting "wire or" after "transmission of"; and

<< 18 USCA § 2703 >>

(2) in subsections (a) and (b) of section 2703--

(A) by striking "CONTENTS OF ELECTRONIC" and inserting "CONTENTS OF WIRE OR ELECTRONIC" each place it appears;

(B) by striking "contents of an electronic" and inserting "contents of a wire or electronic" each place it appears; and

緊急狀態法制之探討

(C) by striking "any electronic" and inserting "any wire or electronic" each place it appears.

SEC. 210. SCOPE OF SUBPOENAS FOR RECORDS OF ELECTRONIC COMMUNICATIONS.

Section 2703(c)(2) of title 18, United States Code, as redesignated by section 212, is amended--

<< 18 USCA § 2703 >>

(1) by striking "entity the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber" and inserting the following: "entity the--

"(A) name;

"(B) address;

"(C) local and long distance telephone connection records, or records of session times and durations;

"(D) length of service (including start date) and types of service utilized;

"(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

"(F) means and source of payment for such service (including any credit card or bank account number),

of a subscriber"; and

<< 18 USCA § 2703 >>

(2) by striking "and the types of services the subscriber or customer utilized,".

SEC. 211. CLARIFICATION OF SCOPE.

Section 631 of the Communications Act of 1934 (47 U.S.C. 551) is amended--

(1) in subsection (c)(2)--

<< 47 USCA § 551 >>

(A) in subparagraph (B), by striking "or";

<< 47 USCA § 551 >>

(B) in subparagraph (C), by striking the period at the end and inserting "; or"; and

<< 47 USCA § 551 >>

(C) by inserting at the end the following:

緊急狀態法制之探討

"(D) to a government entity as authorized under chapters 119, 121, or 206 of title 18, United States Code, except that such disclosure shall not include records revealing cable subscriber selection of video programming from a cable operator."; and

<< 47 USCA § 551 >>

(2) in subsection (h), by striking "A governmental entity" and inserting "Except as provided in subsection (c)(2)(D), a governmental entity".

SEC. 212. EMERGENCY DISCLOSURE OF ELECTRONIC COMMUNICATIONS TO PROTECT LIFE AND LIMB.

(a) DISCLOSURE OF CONTENTS.--

(1) IN GENERAL.--Section 2702 of title 18, United States Code, is amended--

<< 18 USCA § 2702 >>

(A) by striking the section heading and inserting the following:

"§ 2702. Voluntary disclosure of customer communications or records";

(B) in subsection (a)--

<< 18 USCA § 2702 >>

(i) in paragraph (2)(A), by striking "and" at the end;

<< 18 USCA § 2702 >>

(ii) in paragraph (2)(B), by striking the period and inserting "; and";

and

<< 18 USCA § 2702 >>

(iii) by inserting after paragraph (2) the following:

"(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.";

<< 18 USCA § 2702 >>

(C) in subsection (b), by striking "EXCEPTIONS.--A person or entity" and inserting "EXCEPTIONS FOR DISCLOSURE OF COMMUNICATIONS.-- A provider described in subsection (a)";

(D) in subsection (b)(6)--

<< 18 USCA § 2702 >>

(i) in subparagraph (A)(ii), by striking "or";

<< 18 USCA § 2702 >>

(ii) in subparagraph (B), by striking the period and inserting "; or"; and

<< 18 USCA § 2702 >>

(iii) by adding after subparagraph (B) the following:

"(C) if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay."; and

<< 18 USCA § 2702 >>

(E) by inserting after subsection (b) the following:

"(c) EXCEPTIONS FOR DISCLOSURE OF CUSTOMER RECORDS.--A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))--

"(1) as otherwise authorized in section 2703;

"(2) with the lawful consent of the customer or subscriber;

"(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

"(4) to a governmental entity, if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information; or

"(5) to any person other than a governmental entity."

<< 18 USCA prec. § 2701 >>

(2) TECHNICAL AND CONFORMING AMENDMENT.--The table of sections for chapter 121 of title 18, United States Code, is amended by striking the item relating to section 2702 and inserting the following:

"2702. Voluntary disclosure of customer communications or records."

(b) REQUIREMENTS FOR GOVERNMENT ACCESS.--

(1) IN GENERAL.--Section 2703 of title 18, United States Code, is amended--

<< 18 USCA § 2703 >>

(A) by striking the section heading and inserting the following:

"§ 2703. Required disclosure of customer communications or records";

<< 18 USCA § 2703 >>

(B) in subsection (c) by redesignating paragraph (2) as paragraph (3);

(C) in subsection (c)(1)--

<< 18 USCA § 2703 >>

(i) by striking "(A) Except as provided in subparagraph (B), a provider of electronic communication service or remote computing service may" and inserting "A

緊急狀態法制之探討

governmental entity may require a provider of electronic communication service or remote computing service to";

<< 18 USCA § 2703 >>

(ii) by striking "covered by subsection (a) or (b) of this section) to any person other than a governmental entity.

"(B) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to a governmental entity' and inserting ')";

<< 18 USCA § 2703 >>

(iii) by redesignating subparagraph (C) as paragraph (2);

<< 18 USCA § 2703 >>

(iv) by redesignating clauses (i), (ii), (iii), and (iv) as subparagraphs (A), (B), (C), and (D), respectively;

<< 18 USCA § 2703 >>

(v) in subparagraph (D) (as redesignated) by striking the period and inserting "; or"; and

<< 18 USCA § 2703 >>

(vi) by inserting after subparagraph (D) (as redesignated) the following:

"(E) seeks information under paragraph (2)."; and

<< 18 USCA § 2703 >>

(D) in paragraph (2) (as redesignated) by striking "subparagraph (B)" and insert "paragraph (1)".

<< 18 USCA prec. § 2701 >>

(2) TECHNICAL AND CONFORMING AMENDMENT.--The table of sections for chapter 121 of title 18, United States Code, is amended by striking the item relating to section 2703 and inserting the following:

"2703. Required disclosure of customer communications or records."

SEC. 213. AUTHORITY FOR DELAYING NOTICE OF THE EXECUTION OF A WARRANT.

Section 3103a of title 18, United States Code, is amended--

<< 18 USCA § 3103a >>

(1) by inserting "(a) IN GENERAL.--" before "In addition"; and

<< 18 USCA § 3103a >>

(2) by adding at the end the following:

緊急狀態法制之探討

"(b) DELAY.--With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if--

"(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705);

"(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and

"(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.".

SEC. 214. PEN REGISTER AND TRAP AND TRACE AUTHORITY UNDER FISA.

(a) APPLICATIONS AND ORDERS.--Section 402 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1842) is amended--

<< 50 USCA § 1842 >>

(1) in subsection (a)(1), by striking "for any investigation to gather foreign intelligence information or information concerning international terrorism" and inserting "for any investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution";

<< 50 USCA § 1842 >>

(2) by amending subsection (c)(2) to read as follows:

"(2) a certification by the applicant that the information likely to be obtained is foreign intelligence information not concerning a United States person or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.";

<< 50 USCA § 1842 >>

(3) by striking subsection (c)(3); and

<< 50 USCA § 1842 >>

(4) by amending subsection (d)(2)(A) to read as follows:

"(A) shall specify--

"(i) the identity, if known, of the person who is the subject of the investigation;

"(ii) the identity, if known, of the person to whom is leased or in whose name is listed the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied;

"(iii) the attributes of the communications to which the order applies, such as the number or other identifier, and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied and, in the case of a trap and trace device, the geographic limits of the trap and trace order.".

(b) AUTHORIZATION DURING EMERGENCIES.--Section 403 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1843) is amended--

<< 50 USCA § 1843 >>

(1) in subsection (a), by striking "foreign intelligence information or information concerning international terrorism" and inserting "foreign intelligence

information not concerning a United States person or information to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution"; and

<< 50 USCA § 1843 >>

(2) in subsection (b)(1), by striking "foreign intelligence information or information concerning international terrorism" and inserting "foreign intelligence information not concerning a United States person or information to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution".

SEC. 215. ACCESS TO RECORDS AND OTHER ITEMS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.

<< 50 USCA §§ 1861, 1862, 1863 >>

Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) is amended by striking sections 501 through 503 and inserting the following:

<< 50 USCA § 1861 >>

緊急狀態法制之探討

"SEC. 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS.

"(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

"(2) An investigation conducted under this section shall--

"(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

"(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

"(b) Each application under this section--

"(1) shall be made to--

"(A) a judge of the court established by section 103(a); or

"(B) a United States Magistrate Judge under chapter 43 of title 28, United States Code, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and

"(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

"(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section.

"(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).

"(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

"(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production.

緊急狀態法制之探討

Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

<< 50 USCA § 1862 >>

"SEC. 502. CONGRESSIONAL OVERSIGHT.

"(a) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests for the production of tangible things under section 402.

"(b) On a semiannual basis, the Attorney General shall provide to the Committees on the Judiciary of the House of Representatives and the Senate a report setting forth with respect to the preceding 6-month period--

"(1) the total number of applications made for orders approving requests for the production of tangible things under section 402; and

"(2) the total number of such orders either granted, modified, or denied."

SEC. 216. MODIFICATION OF AUTHORITIES RELATING TO USE OF PEN REGISTERS AND TRAP AND TRACE DEVICES.

<< 18 USCA § 3121 >>

(a) GENERAL LIMITATIONS.--Section 3121(c) of title 18, United States Code, is amended--

(1) by inserting "or trap and trace device" after "pen register";

(2) by inserting ", routing, addressing," after "dialing"; and

(3) by striking "call processing" and inserting "the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications".

(b) ISSUANCE OF ORDERS.--

<< 18 USCA § 3123 >>

(1) IN GENERAL.--Section 3123(a) of title 18, United States Code, is amended to read as follows:

"(a) IN GENERAL.--

"(1) ATTORNEY FOR THE GOVERNMENT.--Upon an application made under section 3122(a)(1), the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device anywhere within the United States, if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation. The order, upon service of that order,

緊急狀態法制之探討

shall apply to any person or entity providing wire or electronic communication service in the United States whose assistance may facilitate the execution of the order. Whenever such an order is served on any person or entity not specifically named in the order, upon request of such person or entity, the attorney for the Government or law enforcement or investigative officer that is serving the order shall provide written or electronic certification that the order applies to the person or entity being served.

"(2) STATE INVESTIGATIVE OR LAW ENFORCEMENT OFFICER.--Upon an application made under section 3122(a)(2), the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device within the jurisdiction of the court, if the court finds that the State law enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.

"(3)(A) Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public, the agency shall ensure that a record will be maintained which will identify--

"(i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network;

"(ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information;

"(iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and

"(iv) any information which has been collected by the device.

To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of such device.

"(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof)."

(2) CONTENTS OF ORDER.--Section 3123(b)(1) of title 18, United States Code, is amended--

<< 18 USCA § 3123 >>

(A) in subparagraph (A)--

(i) by inserting "or other facility" after "telephone line"; and

緊急狀態法制之探討

(ii) by inserting before the semicolon at the end "or applied"; and

<< 18 USCA § 3123 >>

(B) by striking subparagraph (C) and inserting the following:

"(C) the attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied, and, in the case of an order authorizing installation and use of a trap and trace device under subsection (a)(2), the geographic limits of the order; and".

<< 18 USCA § 3123 >>

(3) NONDISCLOSURE REQUIREMENTS.--Section 3123(d)(2) of title 18, United States Code, is amended--

(A) by inserting "or other facility" after "the line"; and

(B) by striking ", or who has been ordered by the court" and inserting "or applied, or who is obligated by the order".

(c) DEFINITIONS.--

<< 18 USCA § 3127 >>

(1) COURT OF COMPETENT JURISDICTION.--Section 3127(2) of title 18, United States Code, is amended by striking subparagraph (A) and inserting the following:

"(A) any district court of the United States (including a magistrate judge of such a court) or any United States court of appeals having jurisdiction over the offense being investigated; or".

<< 18 USCA § 3127 >>

(2) PEN REGISTER.--Section 3127(3) of title 18, United States Code, is amended--

(A) by striking "electronic or other impulses" and all that follows through "is attached" and inserting "dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication"; and

<< 18 USCA § 3127 >>

(B) by inserting "or process" after "device" each place it appears.

(3) TRAP AND TRACE DEVICE.--Section 3127(4) of title 18, United States Code, is amended--

緊急狀態法制之探討

(A) by striking "of an instrument" and all that follows through the semicolon and inserting "or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication;"; and

(B) by inserting "or process" after "a device".

<< 18 USCA § 3127 >>

(4) CONFORMING AMENDMENT.--Section 3127(1) of title 18, United States Code, is amended--

(A) by striking "and"; and

(B) by inserting ", and 'contents' " after "electronic communication service".

<< 18 USCA § 3124 >>

(5) TECHNICAL AMENDMENT.--Section 3124(d) of title 18, United States Code, is amended by striking "the terms of".

<< 18 USCA § 3124 >>

(6) CONFORMING AMENDMENT.--Section 3124(b) of title 18, United States Code, is amended by inserting "or other facility" after "the appropriate line".

SEC. 217. INTERCEPTION OF COMPUTER TRESPASSER
COMMUNICATIONS.

Chapter 119 of title 18, United States Code, is amended--

(1) in section 2510--

<< 18 USCA § 2510 >>

(A) in paragraph (18), by striking "and" at the end;

<< 18 USCA § 2510 >>

(B) in paragraph (19), by striking the period and inserting a semicolon;

and

<< 18 USCA § 2510 >>

(C) by inserting after paragraph (19) the following:

"(20) 'protected computer' has the meaning set forth in section 1030; and

"(21) 'computer trespasser'--

"(A) means a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer; and

緊急狀態法制之探討

"(B) does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer."; and

<< 18 USCA § 2511 >>

(2) in section 2511(2), by inserting at the end the following:

"(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if--

"(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

"(II) the person acting under color of law is lawfully engaged in an investigation;

"(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and

"(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.".

<< 50 USCA § 1823 >>

SEC. 218. FOREIGN INTELLIGENCE INFORMATION.

Sections 104(a)(7)(B) and section 303(a)(7)(B) (50 U.S.C. 1804(a)(7)(B) and 1823(a)(7)(B)) of the Foreign Intelligence Surveillance Act of 1978 are each amended by striking "the purpose" and inserting "a significant purpose".

<< FRCRP Rule 41 >>

SEC. 219. SINGLE-JURISDICTION SEARCH WARRANTS FOR TERRORISM.

Rule 41(a) of the Federal Rules of Criminal Procedure is amended by inserting after "executed" the following: "and (3) in an investigation of domestic terrorism or international terrorism (as defined in section 2331 of title 18, United States Code), by a Federal magistrate judge in any district in which activities related to the terrorism may have occurred, for a search of property or for a person within or outside the district".

SEC. 220. NATIONWIDE SERVICE OF SEARCH WARRANTS FOR ELECTRONIC EVIDENCE.

(a) IN GENERAL.--Chapter 121 of title 18, United States Code, is amended--

<< 18 USCA § 2703 >>

緊急狀態法制之探討

(1) in section 2703, by striking "under the Federal Rules of Criminal Procedure" every place it appears and inserting "using the procedures described in the Federal Rules of *292 Criminal Procedure by a court with jurisdiction over the offense under investigation"; and

(2) in section 2711--

<< 18 USCA § 2711 >>

(A) in paragraph (1), by striking "and";

<< 18 USCA § 2711 >>

(B) in paragraph (2), by striking the period and inserting "; and"; and

<< 18 USCA § 2711 >>

(C) by inserting at the end the following:

"(3) the term 'court of competent jurisdiction' has the meaning assigned by section 3127, and includes any Federal court within that definition, without geographic limitation."

<< 18 USCA § 2703 >>

(b) CONFORMING AMENDMENT.--Section 2703(d) of title 18, United States Code, is amended by striking "described in section 3127(2)(A)".

SEC. 221. TRADE SANCTIONS.

(a) IN GENERAL.--The Trade Sanctions Reform and Export Enhancement Act of 2000 (Public Law 106-387; 114 Stat. 1549A-67) is amended--

<< 22 USCA § 7203 >>

(1) by amending section 904(2)(C) to read as follows:

"(C) used to facilitate the design, development, or production of chemical or biological weapons, missiles, or weapons of mass destruction.";

<< 22 USCA § 7205 >>

(2) in section 906(a)(1)--

(A) by inserting ", the Taliban or the territory of Afghanistan controlled by the Taliban," after "Cuba"; and

(B) by inserting ", or in the territory of Afghanistan controlled by the Taliban," after "within such country"; and

<< 22 USCA § 7205 >>

(3) in section 906(a)(2), by inserting ", or to any other entity in Syria or North Korea" after "Korea".

<< 22 USCA § 7210 >>

緊急狀態法制之探討

(b) APPLICATION OF THE TRADE SANCTIONS REFORM AND EXPORT ENHANCEMENT ACT. -- Nothing in the Trade Sanctions Reform and Export Enhancement Act of 2000 shall limit the application or scope of any law establishing criminal or civil penalties, including any Executive order or regulation promulgated pursuant to such laws (or similar or successor laws), for the unlawful export of any agricultural commodity, medicine, or medical device to--

(1) a foreign organization, group, or person designated pursuant to Executive Order No. 12947 of January 23, 1995, as amended;

(2) a Foreign Terrorist Organization pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132);

(3) a foreign organization, group, or person designated pursuant to Executive Order No. 13224 (September 23, 2001);

(4) any narcotics trafficking entity designated pursuant to Executive Order No. 12978 (October 21, 1995) or the Foreign Narcotics Kingpin Designation Act (Public Law 106-120); or

(5) any foreign organization, group, or persons subject to any restriction for its involvement in weapons of mass destruction or missile proliferation.

<< 18 USCA § 3124 NOTE >>

SEC. 222. ASSISTANCE TO LAW ENFORCEMENT AGENCIES.

Nothing in this Act shall impose any additional technical obligation or requirement on a provider of a wire or electronic communication service or other person to furnish facilities or technical assistance. A provider of a wire or electronic communication service, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to section 216 shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance.

SEC. 223. CIVIL LIABILITY FOR CERTAIN UNAUTHORIZED DISCLOSURES.

(a) Section 2520 of title 18, United States Code, is amended--

<< 18 USCA § 2520 >>

(1) in subsection (a), after "entity", by inserting ", other than the United States,";

<< 18 USCA § 2520 >>

(2) by adding at the end the following:

"(f) ADMINISTRATIVE DISCIPLINE.--If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or

緊急狀態法制之探討

agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination."; and

<< 18 USCA § 2520 >>

(3) by adding a new subsection (g), as follows:

"(g) IMPROPER DISCLOSURE IS VIOLATION.--Any willful disclosure or use by an investigative or law enforcement officer or governmental entity of information beyond the extent permitted by section 2517 is a violation of this chapter for purposes of section 2520(a).".

(b) Section 2707 of title 18, United States Code, is amended--

<< 18 USCA § 2707 >>

(1) in subsection (a), after "entity", by inserting ", other than the United States,";

<< 18 USCA § 2707 >>

(2) by striking subsection (d) and inserting the following:

"(d) ADMINISTRATIVE DISCIPLINE.--If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination."; and

<< 18 USCA § 2707 >>

(3) by adding a new subsection (g), as follows:

緊急狀態法制之探討

"(g) IMPROPER DISCLOSURE.--Any willful disclosure of a 'record', as that term is defined in section 552a(a) of title 5, United States Code, obtained by an investigative or law enforcement officer, or a governmental entity, pursuant to section 2703 of this title, or *294 from a device installed pursuant to section 3123 or 3125 of this title, that is not a disclosure made in the proper performance of the official functions of the officer or governmental entity making the disclosure, is a violation of this chapter. This provision shall not apply to information previously lawfully disclosed (prior to the commencement of any civil or administrative proceeding under this chapter) to the public by a Federal, State, or local governmental entity or by the plaintiff in a civil action under this chapter."

(c)(1) Chapter 121 of title 18, United States Code, is amended by adding at the end the following:

<< 18 USCA § 2712 >>

"§ 2712. Civil actions against the United States

"(a) IN GENERAL.--Any person who is aggrieved by any willful violation of this chapter or of chapter 119 of this title or of sections 106(a), 305(a), or 405(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U. S.C. 1801 et seq.) may commence an action in United States District Court against the United States to recover money damages. In any such action, if a person who is aggrieved

successfully establishes such a violation of this chapter or of chapter 119 of this title or of the above specific provisions of title 50, the Court may assess as damages--

"(1) actual damages, but not less than \$10,000, whichever amount is greater;
and

"(2) litigation costs, reasonably incurred.

"(b) PROCEDURES.--(1) Any action against the United States under this section may be commenced only after a claim is presented to the appropriate department or agency under the procedures of the Federal Tort Claims Act, as set forth in title 28, United States Code.

"(2) Any action against the United States under this section shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. The claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation.

"(3) Any action under this section shall be tried to the court without a jury.

"(4) Notwithstanding any other provision of law, the procedures set forth in section 106(f), 305(g), or 405(f) of the Foreign Intelligence Surveillance Act of 1978

緊急狀態法制之探討

(50 U.S.C. 1801 et seq.) shall be the exclusive means by which materials governed by those sections may be reviewed.

"(5) An amount equal to any award against the United States under this section shall be reimbursed by the department or agency concerned to the fund described in section 1304 of title 31, United States Code, out of any appropriation, fund, or other account (excluding any part of such appropriation, fund, or account that is available for the enforcement of any Federal law) that is available for the operating expenses of the department or agency concerned.

"(c) ADMINISTRATIVE DISCIPLINE.--If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or

agency concerned and shall provide the Inspector General with the reasons for such determination.

"(d) EXCLUSIVE REMEDY.--Any action against the United States under this subsection shall be the exclusive remedy against the United States for any claims within the purview of this section.

"(e) STAY OF PROCEEDINGS.--(1) Upon the motion of the United States, the court shall stay any action commenced under this section if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related investigation or the prosecution of a related criminal case. Such a stay shall toll the limitations periods of paragraph (2) of subsection (b).

"(2) In this subsection, the terms 'related criminal case' and 'related investigation' mean an actual prosecution or investigation in progress at the time at which the request for the stay or any subsequent motion to lift the stay is made. In determining whether an investigation or a criminal case is related to an action commenced under this section, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the 2 proceedings, without requiring that any one or more factors be identical.

"(3) In requesting a stay under paragraph (1), the Government may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter

緊急狀態法制之探討

that may adversely affect a related investigation or a related criminal case. If the Government makes such an ex parte submission, the plaintiff shall be given an opportunity to make a submission to the court, not ex parte, and the court may, in its discretion, request further information from either party."

<< 18 USCA prec. § 2701 >>

(2) The table of sections at the beginning of chapter 121 is amended to read as follows:

"2712. Civil action against the United States."

<< 18 USCA § 2510 NOTE >>

SEC. 224. SUNSET.

(a) IN GENERAL.--Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

(b) EXCEPTION.--With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or

potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect.

SEC. 225. IMMUNITY FOR COMPLIANCE WITH FISA WIRETAP.

<< 50 USCA § 1805 >>

Section 105 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S. C. 1805) is amended by inserting after subsection (g) the following:

(h) No cause of action shall lie in any court against any provider of a wire or electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance in accordance with a court order or request for emergency assistance under this Act."

緊急狀態法制之探討

附錄五：各國憲法有關緊急狀態之規定（英文）

China

Article 67 [Functions and Powers]

The Standing Committee of the National People's Congress exercises the following functions and powers:

20. to decide on entering the state of emergency throughout the country or in particular provinces, autonomous regions, or municipalities directly under the Central Government; and

Article 80 [Functions and Powers]

The President of the People's Republic of China, in pursuance of decisions of the National People's Congress and its Standing Committee, promulgates statutes, appoints and removes the Premier, Vice Premiers, State Councillors, Ministers in charge of ministries or commissions, and the Auditor General and the Secretary General of the State Council; confers state medals and titles of honor; issues orders of special pardons; proclaims entering of the state of emergency; proclaims a state of war; and issues mobilization orders.

Article 89 [Functions and Powers]

The State Council exercises the following functions and powers:

16. in accordance with the provisions of law, to decide on entering the state of emergency in parts of provinces, autonomous regions, and municipalities directly under the Central Government;

Denmark

Section 23 [Provisional Laws]

In an emergency the King may when the Parliament cannot assemble, issue provisional laws, provided that they shall not be at variance with the Constitution Act, and that they shall always immediately on the assembling of the Parliament be submitted to it for approval or rejection.

France

Article 16 [State of Emergency]

(1) When the institutions of the Republic, the independence of the nation, the integrity of its territory, or the fulfillment of its international commitments are under grave and immediate threat and when the proper functioning of the constitutional governmental authorities is interrupted, the President of the Republic shall take the measures demanded by these circumstances after official consultation with the Prime Minister, the Presidents of the Assemblies, and the Constitutional Council.

(2) He shall inform the nation of these measures by a message.

(3) These measures must be prompted by a will to ensure within the shortest possible time that the constitutional governmental authorities have the means of fulfilling their duties. The Constitutional Council shall be consulted with regard to such measures.

(4) Parliament shall meet *ipso jure*.

(5) The National Assembly may not be dissolved during the exercise of emergency powers.

Article 36 [Declaration of Martial War]

(1) Martial law shall be declared in a meeting of the Council of Ministers.

(2) Parliament alone may authorize its extension beyond twelve days.

Finland

Section 23 Basic rights and liberties in situations of emergency

Such provisional exceptions to basic rights and liberties that are compatible with Finland's international obligations concerning human rights and that are deemed necessary in the case of an armed attack against Finland or if there exists an emergency that threatens the nation and which according to an Act is so serious that it can be compared with an armed attack may be provided by an Act.

Hungary

Article 8 [Human rights]

(1) The Republic of Hungary recognizes inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State.

(2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.

(3) {...}

(4) During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights specified in Articles 54 -56, Paragraphs (2)-(4) of Article 57, Article 60, Articles 66-69 and Article 70E.

Article 19 [Powers and representation]

(g) decide on the declaration of a state of war and on the conclusion of peace;

h) declare a state of national crisis and establish the National Defense Council, in the case of war, or imminent danger of armed attack by a foreign power (danger of war);

i) declare a state of emergency, in the case of armed actions aimed at overturning constitutional order or at the acquisition of exclusive control of public power, in the case of acts of violence committed by force of arms or by armed groups which gravely endanger lives and property on a mass scale, and in the event of natural or industrial disaster;

(4) A majority of two-thirds of the votes of the Members of Parliament shall be required for the decisions specified in points g), h) and i) of Paragraph. 3.

Article 19A [State of war, national crisis or emergency]

(1) Should the Parliament be obstructed in reaching such decisions, the President of the Republic shall have the right to declare a state of war, a state of national crisis and establish the National Defense Council, or to declare a state of emergency.

(2) The Parliament shall be considered to be obstructed in reaching such decisions, if it is not in session and convening it is impossible due to lack of time or due to the

緊急狀態法制之探討

events responsible for the declaration of the state of war, state of national crisis or state of emergency.

(3) The Speaker of Parliament, the President of the Constitutional Court and the Prime Minister shall jointly determine whether the Parliament is obstructed, and whether a declaration of a state of war, a state of national crisis or a state of emergency is justified.

(4) At its first meeting following the end of the obstruction, the Parliament shall review the justification of the declaration of a state of war, state of national crisis or state of emergency, and shall rule on the legality of the measures taken. A majority of two-thirds of the votes of the Members of Parliament is required for this decision.

Article 19C [Use of armed forces, emergency measures]

(1) Should Parliament be obstructed upon declaration of a state of emergency, the President of the Republic shall decide on the use of the armed forces under Subsection (2) of Section 40B.

(2) The President of the Republic shall introduce emergency measures, which are defined in a separate law, by decree during a state of emergency.

(3) The President of the Republic shall immediately inform the Speaker of Parliament of any emergency measures that have been introduced. The Parliament or, should the Parliament be obstructed, the Parliamentary Defense Committee shall remain in session during a state of emergency. The Parliament, or the Parliamentary Defense Committee, shall have the right to suspend emergency measures introduced by the President of the Republic.

(4) Emergency measures introduced by decree shall remain in force for a period of thirty days, unless the Parliament or, should the Parliament be obstructed, the Parliamentary Defense Committee extends their validity.

(5) In other respects the regulations pertaining to a state of national crisis shall apply to a state of emergency.

Article 19D [The law on the state of crisis or emergency]

A majority of two-thirds of the votes of the Members of Parliament present is required

to pass the law specifying the detailed regulations to be applied during a state of national crisis and a state of emergency.

Article 28A [Interdictions of dissolution]

(1) During a state of national crisis or a state of emergency the Parliament may neither declare its dissolution nor be dissolved.

(2) Should a term of Parliament expire during a state of national crisis or a state of emergency, its mandate shall be extended until the cessation of the state of national crisis or state of emergency.

(3) During a state of war, the danger of war or an emergency, the President of the Republic may reconvene a Parliament which has declared its dissolution or which has been dissolved. The Parliament itself shall pass a resolution on the extension of its mandate.

an one-quarter of all eligible voters have given the same answer in the referendum.

India

Article 352 Proclamation of Emergency

(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation.

Explanation: A proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.

(2) A Proclamation issued under clause (1) may be varied or revoked by a subsequent Proclamation.

(3) The President shall not issue a Proclamation under clause (1) or a Proclamation

緊急狀態法制之探討

varying such Proclamation unless the decision of the Union cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under article 75) that such a Proclamation may be issued has been communicated to him in writing.

(4) Every Proclamation issued under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of one month unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People has been dissolved, or the dissolution of the House of the People takes place during the period of one month referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution, unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(5) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (4):

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which it would otherwise have ceased to operate under this clause:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States but no resolution with

respect to the continuance in force of such Proclamation has been passed by the house of the people during the said period, the proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days, a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

(6) For the purposes of clauses (4) and (5), a resolution may be passed by either House of Parliament only by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.

(7) Notwithstanding anything contained in the foregoing clauses, the President shall revoke a Proclamation issued under clause (1) or a Proclamation varying such Proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such Proclamation.

(8) Where a notice in writing signed by not less than one-tenth of the total number of members of the House of the People has been given, of their intention to move a resolution for disapproving, or, as the case may be, for disapproving the continuance in force of, a Proclamation issued under clause (1) or a Proclamation varying such Proclamation, -

(a) to the Speaker, if the House is in session; or

(b) to the President, if the House is not in session, a special sitting on the House shall be held within fourteen days from the date on which such notice is received by the Speaker, or, as the case may be, by the President, for the purpose of considering such resolution.

(9) The power conferred on the President by this article shall include the power to issue different Proclamations on different grounds, being war or external aggression or armed rebellion or imminent danger of war or external aggression or armed rebellion, whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation.

Article 356 Provisions in case of failure of constitutional machinery in States

(1) If the President, on receipt of a report from the Governor of a State or otherwise, is

緊急狀態法制之探討

satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation -

- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;
- (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
- (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before

each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has

been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the Proclamation:

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People:

Provided also that in the case of the Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab the reference in the first proviso to this clause to "three years" shall be construed as a reference to Five years.

(5) Notwithstanding anything contained in clause (4), a resolution with respect to the continuance in force of a Proclamation approved under clause (3) for any period beyond the expiration of one year from the date of issue of such Proclamation shall not be passed by either House of Parliament unless -

(a) a Proclamation of Emergency is in operation, in the whole of India or, as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under clause (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of

the State concerned:

Provided that nothing in this clause shall apply to the Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab.

Article 359 Suspension of the enforcement of the rights conferred by Part III during emergencies

(1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(1A) While an order made under clause (1) mentioning any of the rights conferred by Part III (except articles 20 and 21) is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent

to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect:

Provided that where a Proclamation of Emergency is in operation only in any part of the territory of India, any such law may be made, or any such executive action may be taken, under this article in relation to or in any State or Union territory in which or in any part of which the Proclamation of Emergency is not in operation, if and in so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation.

(1B) Nothing in clause (1A) shall apply -

(a) to any law which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made; or

(b) to any executive action taken otherwise than under a law containing such a recital.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India:

Provided that where a Proclamation of Emergency is in operation only in a part of the territory of India, any such order shall not extend to any other part of the territory of India unless the President, being satisfied that the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of Indian in which the Proclamation of Emergency is in operation, considers such extension to be necessary.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

Article 360 Provisions as to financial emergency

(1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

(2) A Proclamation issued under clause (1) -

(a) may be revoked or varied by a subsequent Proclamation;

(b) shall be laid before each House of Parliament;

(c) shall cease to operate at the expiration of two months, unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the proclamation shall cease to operate at the expiration of thirty days from the date on which the house of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) During the period any such Proclamation as is mentioned in clause (1) is in operation, the executive authority of the Union shall extend to the giving of directions

緊急狀態法制之探討

to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything in this constitution -

(a) any such direction may include -

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) a provision requiring all Money Bills or other Bills to which the provisions of article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State;

(b) it shall be competent for the President during the period any Proclamation issued under this article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

Israel - Basic Law: The Government

Section 49 Declaration of a state of emergency

(a) Should the Knesset ascertain that the State is in a state of emergency, it may, of its own initiative or, pursuant to a Government proposal, declare that a state of emergency exists.

(b) The declaration will remain in force for the period prescribed therein, but may not exceed one year; the Knesset may make a renewed declaration of a state of emergency as stated.

(c) Should the Government ascertain that a state of emergency exists in the State and that its urgency necessitates the declaration of a state of emergency, even before it becomes possible to convene the Knesset, it may declare a state of emergency. The declaration's validity shall expire upon 7 days from its proclamation, if not previously approved or revoked by the Knesset, pursuant to a decision by a majority of its members; should the Knesset fail to convene, the Government may make a renewed declaration of a state of emergency as stated in this subsection.

(d) The Knesset and Governmental declarations of a state of emergency will be

published in Reshumot; should publication in Reshumot not be possible, another appropriate manner will be adopted, provided that notification thereof be published in Reshumot at the earliest possible date.

(e) The Knesset may at all times revoke the declaration of the state of emergency; notification of its revocation will be published in Reshumot.

Section 50 State of emergency

(a) During a state of emergency the Government may make emergency regulations for the defence of the State, public security and the maintenance of supplies and essential services; emergency regulations will be submitted to the Foreign Affairs and Security Committee at the earliest possible date after their enactment.

(b) Should the Prime Minister deem it impossible to convene the Knesset, given the existence of an immediate and critical need to make emergency regulations, he may make such regulations or empower a Minister to make them.

(c) Emergency regulations may alter any law temporarily suspend its effect or introduce conditions, and may also impose or increase taxes or other compulsory payments unless there be another provision by law.

(d) Emergency regulations may not prevent recourse to legal action, or prescribe retroactive punishment or allow infringement upon human dignity.

(e) Emergency regulations shall not be enacted, nor shall arrangements, measures and powers be implemented in their wake, except to the extent warranted by the state of emergency.

(f) The force of emergency regulations shall expire three months after the day of their enactment unless their force is extended by law, or they are revoked by the Knesset by law, or pursuant to a decision of a majority of the members of Knesset.

(g) Emergency regulations shall come into force on the day of their publication in Reshumot; should publication in Reshumot not be possible another appropriate means of publication will be adopted provided that they be published in Reshumot as soon as possible.

(h) Should the state of emergency cease to exist, the regulations enacted will remain in force for the duration of the prescribed period, however not longer than for 60 days

緊急狀態法制之探討

after the termination of the state of emergency; state of emergency regulations whose force was lengthened by law shall remain in force.

Italy

Article 77 [Law Decrees]

(1) The government may not issue decrees with the force of law unless empowered by a proper delegation of the chambers.

(2) As an exception by necessity and urgency, government may issue provisional measures with the force of law and submits them on the same day to the chambers for confirmation; if the chambers are not in session, they have to be summoned for that purpose within five days.

(3) Legal decrees lose effect at the date of issue if they are not confirmed within sixty days of their publication. However, chambers may sanction rights and obligations arising out of decrees are not confirmed.

Netherlands

Article 103

(1) The cases in which a state of emergency, as defined by Act of Parliament, may be declared by Royal Decree in order to maintain internal or external security shall be specified by Act of Parliament. The consequences of such a declaration shall be governed by Act of Parliament.

(2) Such a declaration may depart from the provisions of the Constitution relating to the powers of the executive bodies of the provinces, municipalities, and water control boards, the basic rights laid down in Article 6, insofar as the exercise of the right contained in this article other than in buildings and enclosed places is concerned, Articles 7, 8, 9, 12 (2), 13 and 113 (1) and (3).

(3) Immediately after the declaration of a state of emergency and whenever it considers it necessary, until such time as the state of emergency is terminated by Royal Decree, the Parliament shall decide the duration of the state of emergency. The two Chambers of the Parliament shall consider and decide upon the matter in joint session.

Poland

Article 228 []

(1) In situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a state of natural disaster.

(2) Extraordinary measures may be introduced only by regulation, issued upon the basis of statute, and which shall additionally require to be publicized.

(3) The principles for activity by organs of public authority as well as the degree to which the freedoms and rights of persons and citizens may be subject to limitation for the duration of a period requiring any extraordinary measures shall be established by statute.

(4) A statute may specify the principles, scope and manner of compensating for loss of property resulting from limitation of the freedoms and rights of persons and citizens during a period requiring introduction of extraordinary measures.

(5) Actions undertaken as a result of the introduction of any extraordinary measure shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State.

(6) During a period of introduction of extraordinary measures, the following shall not be subject to change: the Constitution, the Acts on Elections to the House of Representatives (*Sejm*), the Senate and organs of local self-governments, the Act on Elections to the Presidency, as well as statutes on extraordinary measures.

(7) During a period of introduction of extraordinary measures, as well as within the period of 90 days following its termination, the term of office of the House of

緊急狀態法制之探討

Representatives (*Sejm*) may not be shortened, nor may a nationwide referendum, nor elections to the House of Representatives (*Sejm*), Senate, organs of local self-government nor elections for the Presidency be held, and the term of office of such organs shall be appropriately prolonged. Elections to organs of local self-government shall be possible only in those places where the extraordinary measures have not been introduced.

Article 230 []

(1) In the case of threats to the constitutional order of the State, to security of the citizenry or public order, the President of the Republic may, on request of the Council of Ministers, introduce for a definite period no longer than 90 days, a state of emergency in a part of or upon the whole territory of the State.

(2) Extension of a state of emergency may be made once only for a period no longer than 60 days and with the consent of the House of Representatives (*Sejm*).

Article 231 []

The President of the Republic shall submit the regulation on the introduction of martial law or a state of emergency to the House of Representatives (*Sejm*) within 48 hours of signing such regulation. The House of Representatives (*Sejm*) shall immediately consider the regulation of the President. The House of Representatives (*Sejm*), by an absolute majority of votes taken in the presence of at least half the statutory number of Deputies, may annul the regulation of the President.

Article 233 []

(1) The statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights specified in Articles 30 (the dignity of the person), 34, 36 (citizenship), 38 (protection of life), 39, 40, 41 (4) (humane treatment), 42 (ascription of criminal responsibility), 45 (access to a court), 47 (personal rights), 53 (conscience and religion), 63 (petitions), as well as Articles 48 and 72 (family and children).

(2) Limitation of the freedoms and rights of persons and citizens only by reason of race, gender, language, faith or lack of it, social origin, ancestry or property shall be

prohibited.

(3) The statute specifying the scope of limitation of the freedoms and rights of persons and citizens during states of natural disasters may limit the freedoms and rights specified in Articles 22 (freedom of economic activity), 41 (1), (3), and (5) (personal freedom), 50 (inviolability of the home), 52 (1) (freedom of movement and sojourn on the territory of the Republic of Poland), 59 (3) (the right to strike), 64 (the right of ownership), 65 (1) (freedom to work), 66 (1) (the right to safe and hygienic conditions of work) as well as Article 66 (2) (the right to rest).

Romania

Article 89 [Dissolution of Government]

(1) After consultation with the Presidents of both Chambers and the leaders of the Parliamentary groups, the President of Romania may dissolve the Parliament, if no vote of confidence has been obtained to form a government within 60 days after the first request was made, and only after rejection of at least two requests for investiture.

(2) During the same year, Parliament can be dissolved only once.

(3) Parliament cannot be dissolved during the last six months of the term of office of the President of Romania, nor can it be dissolved during a state of siege or emergency.

Article 93 [Siege, Emergency]

(1) The President of Romania shall, according to the law, institute the state of siege or emergency in the whole or part of the country, and shall request Parliament approval of the measure thus adopted within five days from adoption.

(2) If Parliament does not sit in a session, it shall be convened *de jure* within 48 hours from the institution of the state of siege or emergency, and shall function throughout this state.

Article 99

(1) In the exercise of his powers, the President of Romania shall issue decrees which shall be published in the Official Gazette of Romania. Absence of publicity entails the

緊急狀態法制之探討

non-existence of a decree.

(2) The decrees issued by the President of Romania in the exercise of his powers, as provided for under Article 91 (1) and (2), 92 (2) and (3), 93 (1), and 94 (a), (b) and (d) shall be countersigned by the Prime Minister.

Spain

Article 30 [Military, Civilian, Emergency Duties]

(1) Citizens have the right and the duty to defend Spain.

(2) The law shall determine the military obligations of Spaniards and shall regulate, with all due guarantees, conscientious objection as well as other causes for exemption from compulsory military service, and it may, when appropriate, impose a substitute social service.

(3) A civilian service may be established for the accomplishment of objectives of general interest.

(4) The duties of citizens in cases of serious risk, catastrophe, or public calamity may be regulated by law.

Article 55 [Emergency, Siege, Terrorism]

(1) The rights recognized in Articles 17, 18 (2) and (3), 19, 20 (1)(a) and (d) and (5), 21, 28 (2), and Article 37 (2) may be suspended when a state of emergency or siege is declared under the terms provided in the Constitution. Article 17 (3) is exempted from that which was established previously in the event of the declaration of a state of emergency.

(2) An organic law may determine the manner and the cases in which, in an individual manner and with the necessary judicial intervention and adequate parliamentary control, the rights recognized in Article 17 (2) and 18 (2) and (3) may be suspended for certain persons with respect to investigations having to do with the activities of armed bands or terrorist elements. The unwarranted or abusive utilization of the powers recognized in said organic law will result in criminal responsibility as a violation of the rights and liberties recognized by the laws.

Slovenia

Article 16 (Temporary Suspension and Restriction of Rights)

(1) Human rights and fundamental freedoms provided by this Constitution may exceptionally be temporarily suspended or restricted during a war and state of emergency. Human rights and fundamental freedoms may be suspended or restricted only for the duration of the war or state of emergency, but only to the extent required by such circumstances and inasmuch as the measures adopted do not create inequality based solely on race, national origin, sex, language, religion, political or other conviction, material standing, birth, education, social status or any other personal circumstance.

(2) The provision of the preceding paragraph does not allow any temporary suspension or restriction of the rights provided by Articles 17, 18, 21, 27, 28, 29 and 41.

Article 81 (Term of the National Assembly)

(2) If the term of the National Assembly expires during a war or state of emergency, its term shall expire six months after the end of the war or state of emergency, or earlier if the National Assembly itself so decides.

Article 92 (War and State of Emergency)

(1) A state of emergency shall be declared whenever a great and general danger threatens the existence of the state. The declaration of war or state of emergency, urgent measures and their repeal shall be decided upon by the National Assembly on the proposal of the Government.

(2) The National Assembly decides on the use of the defence forces.

(3) In the event that the National Assembly is unable to convene, the President of the Republic shall decide on matters from the first and second paragraphs of this article. Such decisions must be submitted for confirmation to the National Assembly immediately upon it next convening.

Slovakia

Article 102

The president

1) declares a state of emergency on the basis of a constitutional law,

(**Article 84** (3) The agreement of at least a three-fifths majority of all deputies is required to pass and amend the Constitution and constitutional laws, to elect and recall the president, and to declare war on another state.)

South Africa

Section 37 States of emergency

(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when -

(a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

(b) the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -

(a) prospectively; and

(b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of -

- (a) a declaration of a state of emergency;
 - (b) any extension of a declaration of a state of emergency; or
 - (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.
- (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that -
- (a) the derogation is strictly required by the emergency; and
 - (b) the legislation -
 - (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
 - (ii) conforms to subsection (5); and
 - (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.
- (5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -
- (a) indemnifying the state, or any person, in respect of any unlawful act;
 - (b) any derogation from this section; or
 - (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

Section Number	Section Title	Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex religion or language

緊急狀態法制之探討

10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: -subsection (1)(d) and (e); -the rights in subparagraphs (i) and (ii) of subsection (1)(g); and -subsection 1(i) in respect of children of 15 years and younger
35	Arrested, detained and accused persons	With respect to: -subsections (1)(a), (b) and (c) and (2)(d); -the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) -subsection (4); and -subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

(a) An adult family member or friend of the detainee must be contacted as soon as

reasonably possible, and informed that the person has been detained.

(b) A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

(c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

(d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

(e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

(f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.

(g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

(h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

緊急狀態法制之探討

Bangladesh

141A

1) If the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency:

(2) A Proclamation of Emergency-

(a) may be revoked by a subsequent Proclamation;

(b) shall be laid before Parliament;

(c) shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament:

Provided that if any such Proclamation is issued at a time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of one hundred and twenty days referred to in sub-clause (c), the Proclamation shall cease to operate at the expiration of thirty days from the date on which Parliament first meets after its re-constitution, unless before that expiration of the meets after its re-constitution, unless before that expiration of the said period of thirty days a resolution approving the Proclamation has been passed by Parliament.

(3) A Proclamation of Emergency declaring that the security of Bangladesh, or any part thereof, is threatened by war or external aggression or by internal disturbance may be made before the actual occurrence of war or any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

141B

While a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of this Constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetence, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

141C

(1) While a Proclamation of Emergency is in operation, the President may, ⁸⁹[on the written advice of the Prime Minister, by order], declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made under this article may extend to the whole of Bangladesh or any part thereof.

(3) Every order made under this article shall, as soon as may be, be laid before Parliament.]

Sri Lanka

Public Security.

155. (1) The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament.

(2) The power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall

緊急狀態法制之探討

include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution.

(3) The provisions of any law relating to public security, empowering the President to make emergency regulations which have the legal effect of over-riding, amending or suspending the operation of the provisions of any law, shall not come into operation, except upon the making of a Proclamation under such law, bringing such provisions into operation.

⁴⁷[(3a) Nothing in the preceding provisions of this Constitution shall be deemed to prohibit the making of emergency regulations, under the Public Security Ordinance or the law for the time being in force relating to public security, with respect to any matter set out in the Ninth Schedule or having the effect of overriding, amending or suspending the operation of a statute made by a Provincial Council.]

(4) Upon the making of such a Proclamation, the occasion thereof shall, subject to the other provisions of this Article, be forthwith communicated to Parliament and, accordingly-

(i) if such Proclamation is issued after the dissolution of Parliament such Proclamation shall operate as a summoning of Parliament to meet on the tenth day after such Proclamation, unless the Proclamation; appoints an earlier date for the meeting which shall not be less than three days from the date of the Proclamation and the Parliament so summoned shall be kept in session until the expiry, or revocation of such or any further Proclamation or until the conclusion of the General Election whichever event occurs earlier and shall thereupon stand dissolved;

(ii) if Parliament is at the date of the making of such Proclamation, separated by any such adjournment or prorogation as will not expire within ten days, a Proclamation shall be issued for the meeting of Parliament within ten days.

(5) Where the provisions of any law relating to public security have been brought into operation by the making of a Proclamation under such law, such Proclamation

shall, subject to the succeeding provisions of this Article, be in operation for a period of one month from the date of the making thereof, but without prejudice to the earlier revocation of such Proclamation or to the making of a further Proclamation at or before the end of that period.

(6) Where such provisions as are referred to in paragraph (3) of this Article, of any law relating to public security, have been brought into operation by the making of a Proclamation under such law, such Proclamation shall expire after a period of fourteen days from the date on which such provisions shall have come into operation, unless such Proclamation is approved by a resolution of Parliament:

Provided that if -

(a) Parliament stands dissolved at the date of the making of such Proclamation, or

(b) Parliament is at such date separated by any such adjournment or prorogation as is referred to in paragraphs (4)(ii) of this Article; or

(c) Parliament does not meet when summoned to meet as provided in paragraphs (4) (i) and (4) (ii) of this Article,

then such Proclamation shall expire at the end of ten days after the date on which Parliament shall next meet and sit, unless approved by a resolution at such meeting of Parliament.

(7) Upon the revocation of a Proclamation referred to in paragraph (6) of this Article within a period of fourteen days from the date on which the provisions of any law relating to public security shall have come into operation or upon the expiry of such a Proclamation in accordance with the provisions of paragraph (6), no Proclamation made within thirty days next ensuing shall come into operation until the making thereof shall have been approved by a resolution of Parliament.

(8) If Parliament does not approve any Proclamation bringing such provisions as are referred to in paragraph (3) of this Article into operation, such Proclamation shall,

緊急狀態法制之探討

immediately upon such disapproval, cease to be valid and of any force in law but without prejudice to anything lawfully done thereunder.

(9) If the making of a Proclamation cannot be communicated to and approved by Parliament by reason of the fact that parliament does not meet when summoned, nothing ⁵⁰[contained in paragraph (6) or (7) of this Article,] shall affect the validity or operation of such Proclamation:

Provided that in such event, Parliament shall again be summoned to meet as early as possible thereafter.

Malasiya

149.

(1) If an act of parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

150.

(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

(2) A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.

(2A) The power conferred on the Yang di-Pertuan Agong by this Article shall include the power to issue different Proclamations on different grounds or in different circumstances, whether or not there is a Proclamation or Proclamations already issued by the Yang di-Pertuan Agong under Clause (1) and such Proclamation or Proclamations are in operation.

(2B) If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.

緊急狀態法制之探討

(2C) An ordinance promulgated under Clause (2B) shall have the same force and effect as an Act of Parliament, and shall continue in full force and effect as if it is an Act of Parliament until it is revoked or annulled under Clause (3) or until it lapses under Clause (7); and the power of the Yang di-Pertuan Agong to promulgate ordinances under Clause (2B) may be exercised in relation to any matter with respect to which Parliament has power to make laws regardless of the legislative or other procedures required to be followed, or the proportion of the total votes required to be had, in either House of Parliament.

(3) A Proclamation of Emergency and any ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2B).

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extent to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to

Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or custom in the State of Sabah or Sarawak; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.

(8) Notwithstanding anything in this Constitution-

(a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of-

(i) a Proclamation under Clauses (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);

(ii) the continued operation of such Proclamation;

(iii) any ordinance promulgated under Clause (2B); or

(iv) the continuation in force of any such ordinance.

(9) For the purpose of this Article the Houses of Parliament shall be regarded as sitting only if the members of each House are respectively assembled together and carrying out the business of the House.

緊急狀態法制之探討

151.

(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention-

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

(b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.

(2) An advisory board constituted for the purposes of this Article shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Supreme Court or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members, who shall be appointed by the Yang di-Pertuan Agong after consultation with the Lord President of the Supreme Court.

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

Indonesia

Article 12

The President declares the state of emergency. The conditions for such a declaration and the measures to deal with the emergency shall be governed by law.

Article 22

1. In the event of a compelling emergency, the President has the right to issue government regulations in lieu of laws.

2. Such regulations shall have the consent of the Dewan Perwakilan Rakyat during its subsequent session.

3. Where the approval of the Dewan is not obtained, the government regulations shall be revoked.

South Korea

Article 76 [Emergency Powers]

(1) In time of internal turmoil, external menace, natural calamity, or a grave financial or economic crisis, the President may take in respect to them the minimum necessary financial and economic actions or issue orders having the effect of law, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.

(2) In case of major hostilities affecting national security, the President may issue orders having the effect of law, only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly.

(3) In the case of actions taken or orders issued under paragraphs (1) and (2), the President promptly notifies the National Assembly and obtains its approval.

(4) If no approval is obtained, the actions or orders lose effect. In that case, laws which were amended or abolished by the orders in question automatically regain their original effect at the moment the orders fail to obtain approval.

(5) The President has to publicize, without delay, developments under paragraphs (3) and (4).

Article 77 [Martial Law]

(1) When it is required to cope with a military necessity or to maintain the public

緊急狀態法制之探討

safety and order by mobilization of the military forces in time of war, armed conflict or similar national emergency, the President may proclaim martial law under the conditions as prescribed by law.

(2) Martial law takes one of two types: extraordinary martial law and precautionary martial law.

(3) Under extraordinary martial law, special measures may be taken with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or the powers of the Executive and the Judiciary under the conditions as prescribed by law.

(4) When the President has proclaimed martial law, he has to notify the National Assembly without delay.

(5) When the National Assembly requests the lifting of martial law with the concurrent vote of a majority of the total members of the National Assembly, the President has to comply.

附錄六

期末報告審查意見及修訂對照表

審查意見	修訂對照
一、研究內容（一）：肯定報告內文第四章之分析	維持原分析
一、研究內容（二）：提及報告內文之部分文字或日期有漏誤之處	已於報告內文第15頁、第80頁、第93-95頁、第122頁作相應修改。
一、研究內容（三）：提及報告第五章應舉反恐法制外的例證	已於報告內文第123頁及125頁作增補，並於第五章作整體性加強。
一、研究內容（四）：提及關於國會監督委員會組成方式之適當性	已於報告內文第123-124頁作相應修改並補充說明。
二、研究發現：肯定本報告之研究發現	維持原研究發現
三、政策建議（一）：肯定本報告所提之政策建議	維持原政策建議
三、政策建議（二）：建議將國防全民動員體系與反恐、災防等體系間的整合列入組織與政策整合機制之討論，並作深入探究	已於報告內文第137頁作補充說明及討論，惟國防全民動員體系與反恐或災防體系整合之改革討論與設計所涉議題相當複雜，其深入之探究及分析，甚至作成相關之完整改革建議，恐非本計畫得以完成。
三、政策建議（三）：肯定本報告所提因應措施	維持原提因應措施
四、提要格式之修正並加註關鍵詞	已參照修改，見第V及VI頁