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HUMAN RIGHTS IN THE CONTEXT OF COUNTER-TERRORISM MEASURES: UNITED STATES OF AMERICA

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***Annotation.** The terror attacks of September 11, 2001, facilitated a transformation in federal Governance in the United States of America (hereinafter – the USA). The events of that day showed that the counter-terrorism system of the USA was ineffective. Law enforcement agencies failed to prevent terrorist attacks and thus changes were necessary. The most significant transformations were the following: dozens of new laws were passed; the bureaucracy of the US Government was reorganized; a war was launched to eliminate a sanctuary that had existed for half a decade in Afghanistan; the wall that had existed between domestic law enforcement and foreign intelligence was torn down; the rules by which US domestic agencies could collect information, tap phones, and tap email were changed; the efforts of the USA to secure its borders were totally transformed; transportation security was dramatically enhanced.*

All measures adopted during that first year after the terrorist attacks were implemented very quickly and without careful consideration of the costs and benefits. However, for the USA the year right after September 11 was not a period for thinking twice. It was the year of relentless offensive action against the threats that the USA faced. President Bush announced that the USA will follow a pre-emptive strategy of going after terrorists and the regimes that support them before they attack, not waiting to be attacked. Aforesaid changes greatly affected conditions of human rights in the USA. This article examines the effect on human rights by the new US counter-terrorism measures.

Critics of the reform raise concerns that the rights of innocent people have been violated by the necessary steps taken by the law enforcement agents in order to fight terrorism. In the first part of the article, the influence of counter-terrorism legislation on human rights is explored, and in the second part, military commissions and the rights of non-citizens are examined. The third part discusses recent changes in the counter-terrorism strategy of the USA.

Keywords: *human rights, terrorism, counter-terrorism, law enforcement, intelligence, legislation of the USA.*

Introduction

It is hard to imagine the impact that September 11, 2001 attacks (hereinafter – 9/11) had on the American psyche and on American politics. The United States had never been attacked in that way before and, unlike European countries, the USA had no experience of devastation of such scale, at home and in modern times. These events had a profound psychological impact on the American people and American leaders and, in particular, on President Bush.

Moreover, in substantive terms 9/11 precipitated a transformation in federal Governance in the United States. The most significant changes were these: dozens of new laws passed; the bureaucracy of the US Government was reorganized; a war was launched to eliminate a sanctuary that had existed for half a decade in Afghanistan; the wall that had existed between domestic law enforcement and foreign intelligence was torn down; the rules by which the US domestic agencies could collect information, tap phones, and tap email were changed; the efforts of the USA to secure its borders were totally transformed; transportation security was dramatically enhanced. The highest priority for the President Bush and his Administration was the prevention of subsequent attacks against the United States.

It is important to recognize that more than one solution exists for dealing with terrorism phenomenon. What works in one place or time could fail in another place or time. Terrorism is far too complex for one solution to be effective in dealing with all the possible threats. Among the more obvious possible responses to the threat of terrorism are: the provision of greater security, better detection and prevention: disrupting finances; repression; retaliation or punishment of foreign supporters of dissident groups; pre-emptive action; granting concessions and instituting reforms; diplomatic approaches and cooperation.¹

New types of threats require new capabilities. Together with pre-emptive strikes against Al Qaeda and the Taliban in Afghanistan, the US Authorities started the reform of Counter-Terrorism system. 9/11 events showed that the system was ineffective. Law enforcement agencies failed to prevent terrorist attacks. The changes had to be done.

1 Lutz, J.M.; Lutz, B.J. *Global Terrorism*. New York (N.Y.): Routledge: Taylor & Francis Group, 2008, p. 261.

All measures adopted during the first year after 9/11 were implemented very quickly and without careful consideration of the costs and benefits. But for the United States the year right after 9/11 was not a period of thinking twice. It was the year of relentless offensive action against the threats that the USA faced.² President Bush announced that the USA will follow a pre-emptive strategy of going after terrorists and the regimes that support them before they attack, not waiting to be attacked.³

The changes in counter-terrorism system greatly affected conditions of human rights. This problem is studied in this article. The mentioned issue was analyzed previously by such American scholars as Sue Mahan and Pamala L. Griset⁴, Cindy C. Combs⁵ and Christopher C. Harmon,⁶ but it was not explored in the articles of Lithuanian scientists. Some Lithuanian authors have studied counter-terrorism measures,⁷ but the issue was not discussed from the aspect of human rights.

The aim of this article is to examine the changes of counter-terrorism system of the USA and to explore what influence it had on human rights, in consideration of the new counter-terrorism measures after 9/11. The tasks of the article – to review the US legal acts in the field of counter-terrorism, adopted after 9/11; to analyze the new powers received by the US law enforcement agencies in the area of counter-terrorism; to study influence of counter-terrorism legislation on human rights. The following investigative methods are applied – systematic analysis, document analysis, comparative and generalization method.

1. Influence of Counter-Terrorism Legislation on Human Rights

Many nations consider terrorism as a criminal act. Outlawing terrorism implies faith in the legal system, and antiterrorism legislation in democratic countries generally incorporates constitutional rights and judicial review. Critics of the US government's counter-terrorism policy have long argued that lawmakers overrate terrorist threats to achieve their political goals with the result that civil liberties are sacrificed without an increase of public safety.⁸

Shortly after 9/11 attacks, on October 26, the United States Congress enacted and President Bush signed The Uniting and Strengthening America by Providing Appropria-

2 Hamilton, D.S. *Terrorism and International Relations*. Washington: Center for Transatlantic Relations, 2006, p. 190.

3 Viotti, P.R. *American Foreign Policy and National Security*. Upper Saddle River (New Jersey): Pearson: Prentice-Hall, 2005, p. 244.

4 Mahan, S.; Griset, P. L. *Terrorism in Perspective*. Los Angeles: Sage Publications, 2008.

5 Combs, C. C. *Terrorism in the Twenty-First Century*. New Jersey: Pearson Education, 2003.

6 Harmon, C. C. *Terrorism Today*. New York (N.Y.): Routledge: Taylor & Francis Group, 2008.

7 Gutauskas, A.; Kalesnykas, R.; Petrošius, D. Terorizmas ir jo prevencijos Lietuvoje problema. [Gutauskas, A.; Kalesnykas, R.; Petrosius, D. Terrorism and Problematic of its Prevention in Lithuania]. *Jurisprudencija*. 2004, 63 (55): 24-45.

8 Mahan, S.; Griset, P. L., *op. cit.*, p. 326.

te Tools Required to Intercept and Obstruct Terrorism Act of 2001 (hereinafter – Patriot Act) (*Public Law No. 107-56*), significantly expanding the ability of the US law enforcement agents to investigate and prosecute persons who engage in acts of terrorism.

This allowed to detain hundreds of people who were held without formal charges for an extended period of time, while evidence was sought for connection to the September events.⁹ The Patriot Act also authorized new forms of surveillance of the US citizens. For these reasons, the Patriot Act became a target of criticism. Critics of this legislative act fear that new powers, derived on the basis of this act, will be used against the US citizens.¹⁰ The supporters of the Patriot Act say it was necessary to deter terrorism.¹¹ There is a big concern that in the future attacks on much bigger scale can occur, even with involvement of weapons of mass destruction (hereinafter – WMD), and thus law enforcement agents must prevent it. 9/11 attacks killed almost 300 people, while a detonated atomic bomb could kill 100 000 and an efficient biological attack might kill a million.¹²

The Patriot Act significantly expanded law enforcement's investigative powers under the Foreign Intelligence Surveillance Act of 1978 (FISA) (50 U.S.C. ch. 36), which separated two types of electronic surveillance. FISA was designed to preserve Fourth Amendment protection for the US citizens in criminal cases while allowing much lower standards of proof for obtaining court orders for surveillance of foreign nationals.¹³ Detentions of Arabs and Muslims started to occur after 9/11; during the most extensive criminal investigation in the US history, federal investigators ultimately detained more than 1000 foreigners, most of them immigrants and visitors from Arab and Muslim nations. Many Middle Eastern Muslim men endured lengthy detention without charges or lawyers, which prompted some observers to claim racism. Although the Patriot Act included provisions on respecting rights of Arab and Muslim people, there were also provisions, which allowed detention of immigrants up to 6 months. Government officials justified the detentions as a necessary response to an extraordinary situation, and they noted that federal agents were merely enforcing the existing laws. Justice Department announced that after 9/11 attacks, No. 1 priority was “*to prevent any further terrorist attacks*”.¹⁴ Attorney General John Ashcroft in response to worries over individual rights in a free society told a Senate panel: “*To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve.*”¹⁵

Bush administration announced that it had rewritten the detention rules so as to allow the indefinite detention of immigrants, suspected of crimes during the national

9 Combs, C. C., p. 238.

10 Civil Liberties and Civil Rights. *Annual Editions: Homeland Security, 2004/2005*. Guilford: McGraw-Hill: Dushkin, 2004, p. 147.

11 Johnson, C. Director of FBI Urges Renewal of Patriot Act. *The Washington Post*. March 26, 2009, p. A08.

12 Goodin, R.E. *What's Wrong with Terrorism*. Cambridge: Polity Press, 2006, p. 137.

13 Mahan, S.; Griset, P. L., p. 328.

14 *Ibid.*, p. 330.

15 Duncan, R.; Goddard, J. *Contemporary America*. Houndmills: Palgrave Macmillan, 2005, p. 264.

emergency. This was largely criticized by human rights groups. It is important that the indefinite detention of immigrants is consistent with the Supreme Court rulings. In 1999 the Supreme Court held that immigrants singled out for deportation because they were associated with a terrorist organization had no right to challenge their deportation on the US Constitution First Amendment grounds.¹⁶ The Supreme Court based its ruling on the 1996 antiterrorism legislation and the argument that aliens do not enjoy the constitutional rights granted to the US citizens. Human rights advocates argued that noncitizens should be afforded the basic legal protections of the US Constitution.¹⁷ There is a need to protect the natural rights of all human beings, regardless of their citizenship. Among these are the right to be formally charged, the right to confront accusers, the right to present evidence, and the right to require rigorous standards of proof.

The new legislation set aside legal protections of civil liberties and allowed officials to arrest suspects, snoop, secretly enter people's homes without notice, freeze banks assets, request personal records from any source – and it is a crime for the source to notify the person whose records have been investigated.¹⁸

The radical power established in the Patriot Act created a state of exception. This legislation was introduced with a great haste and passed with little debate, just six weeks after 9/11 attacks; therefore it was influenced by fear and threat of new terrorist attacks.¹⁹ A public survey organized by ABC News – Washington post shortly after 9/11 events revealed that the majority of the population supported the larger powers, which would be given to the law enforcement agencies to combat terrorism.²⁰

Most Americans agree that security must trump liberty for the time being. But this massive post-September 11 outpouring of public and international support for combating terrorism will inevitably wane. Ultimately, getting homeland security right is not about constructing barricades to fend off terrorists. It is about identifying and taking the steps necessary to allow the United States to remain an open, prosperous, free, and globally engaged society.²¹

There is an inherent tension between the need for security and the need to ensure the protection of our civil liberties. Terrorism exploits this tension. While terrorism may have different objectives, one of its main purposes is to provoke government overreaction. As the government indiscriminately targets communities and groups that may pose, or are perceived to pose a potential threat, the rights of innocent people are violated. Terrorists gain support. Violence escalates. The US Government is in a difficult position. If

16 Marshall, R. Supreme Court Rules Against L. A. Eight: Resident Aliens May Be Deported For Political Activity. *Washington Report on Middle East Affairs* [interactive], April/May 1999 [accessed 2009-04-23]. <<http://www.wrmea.com/backissues/0499/9904043.html>>.

17 Mahan, S.; Griset, P. L., p. 331.

18 Duncan, R.; Goddard, J., p. 265.

19 Campos, J. H. II. *The State and Terrorism: National Security and the Mobilization of Power*. Aldershot: Ashgate, 2007, p. 131.

20 *Global Responses to Terrorism: 9/11, Afghanistan and beyond*. London: Routledge: Taylor & Francis Group, 2003, p. 59.

21 Flynn, S. E. America the Vulnerable. *Annual Editions: Homeland Security, 2004/2005*. Guilford: McGraw-Hill: Dushkin, 2004, p. 8.

the Government fails to protect itself and the citizens from the terrorist attacks, it fails to fulfil one of its fundamental obligations and loses public support. If the Government, in order to prevent terrorism, violates the civil rights of citizens and threatens civil liberties – then it undermines the very principles upon which it was founded. There is little room to manoeuvre between the two.

The Patriot Act expanded the scope of FISA investigations, requiring only that foreign intelligence activities be a significant purpose of an investigation. This change removed a major distinction between foreign and domestic surveillance. The records that could be collected were no longer limited to specific narrow categories.²² The Patriot Act also prohibited subjects from disclosing that they had received a FISA order.

A lot of criticism was addressed to the Patriot Act. Law professor David Cole said that the Patriot Act was an overreaction based on fear, that it sacrificed the bedrock principles of political freedom and equal treatment, and that it traded the liberty of vulnerable immigrants for the safety of the rest of the society.²³

We need to recognize that at the same time this legislation positively affected law enforcement agencies and their roles in combating terrorism, and it covered a broad range of topics. The adoption of the Patriot Act greatly improved the tools available to the law enforcement agents. Beyond the immediate benefit of the Patriot Act, which is enhanced surveillance procedures, law enforcement agents at all levels will reap the greatest investigative rewards from the money laundering and financial tracking capabilities as well as from the increased information sharing among agencies.²⁴ The Patriot Act sets aside legal barriers and permits information sharing among federal and state agencies. Supporters of the new legislation argue that the Patriot Act has been instrumental in creating better cooperation and more affective information exchange between the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI). They argue that terrorists hide behind and seek to abuse the inherent protection offered by democratic societies in order to destroy it. The supporters believe that in order to weed out those who seek to abuse American security system, they need greater access to public records and personal information. They argue that in order to protect national security of the US and to prevent the occurrence of another 9/11, they must have greater flexibility in the treatment and interrogation of terrorist suspects. They see the creation of special categories of prisoners and the use of prison camps outside of the US as vital because they allow extraction of valuable information from the terrorist suspects without interference from the constraints of the American legal system. The right of people to be free from terror, they claim, is more important than a terrorist's right to due process and legal representation. They believe that the use of special military tribunals is essential, as it will allow the use of classified information by the prosecution while being able to limit the access of the accused.²⁵

22 *Annual Editions: Violence and Terrorism, 2004/2005*. Badey, T. J. ed. Guilford: McGraw-Hill: Dushkin, 2004, p. 116.

23 Mahan, S.; Grisct, P. L., p. 329.

24 Ronczkowski, M. R. *Terrorism and Organized Hate Crime*. Boca Raton: Taylor & Francis Group, 2007, p. 65.

25 Civil Liberties and Civil Rights. *Annual Editions: Homeland Security, 2004/2005*. Guilford: McGraw-Hill: Dushkin, 2004, p. 147.

Strong intelligence efforts can help prevent or resolve criminal activity but they can also be the source of significant abuse of civil rights by the government. Intelligence is an essential tool in combating terrorism. The US Administration has consistently justified its anti-terrorism measures as an intelligence operations designed to prevent further attacks, not to prosecute criminal violations.²⁶

The Patriot Act helped the intelligence agencies such as FBI, CIA, National Security Agency, to dramatically improve their information sharing with a host of other federal, state, local and international partners, their resources are used more effectively, and investigations are conducted more efficiently, and America is immeasurably safer as a result. It is unaffordable to go back to the days when agents and prosecutors were afraid to share information.²⁷

The government gave bigger powers to authorities as exceptional tool after 9/11, but this couldn't last forever. The “Sunset provisions” were set in the Act – the expanded powers of wiretaps for telephones and computers were set to expire in four years.

Despite the fact that the Patriot Act was scheduled to expire at the end of 2005, Congress twice temporarily extended the provisions of the bill. On 9 March 2006, President Bush signed the reauthorization bill. Most of the 2001 law was reauthorized, including the key components of the more controversial provisions, such as “roving wiretaps” and “sneak-and-peak” laws. But three changes were designed to answer civil libertarian complains. One altered the library clause exempting the libraries, functioning in their traditional capacity, from receiving national security letters. Second, the reauthorized legislation requires law enforcement officials to specifically describe the records they are seeking. Third, recipients of the letters were given the right to challenge the subpoenas in court.²⁸

Although most of the provisions of the reauthorization of the original Patriot Act were made permanent, the provisions allowing “roving wiretaps” and requiring the production of business records under the FISA are set to expire in four years. The 2001 law was passed as an emergency response to the terrorist attacks of 9/11. With the 2006 reauthorization, “*the exception becomes a rule ... the temporary becomes permanent*”.²⁹

Recently FBI Director Robert S. Mueller III urged lawmakers to renew intelligence-gathering measures in the US Patriot Act that are set to expire in December 2009, calling them “exceptional” tools to help protect national security.³⁰ He affirmed that the measures, which allow investigators probing terrorism to seek a suspect's records from third parties, such as financial services and travel and telephone companies without notifying the suspect, have been exceptionally helpful and effective in the US national security investigations. Another provision, permitting roving wiretaps of terrorism suspects, has

26 *Annual editions: Violence and Terrorism, 2004/2005*, p. 115.

27 *Congressional Testimony of Robert S. Mueller, III, Director, FBI, Before the United States Senate Committee on the Judiciary* [interactive]. 20 May, 2004 [accessed 2009-04-05]. <<http://www.fbi.gov/congress/congress04/mueller052004.htm>>.

28 Mahan, S.; Griset, P. L., p. 330.

29 *Ibid.*, p. 330.

30 Johnson, C., p. A08.

helped eliminate a lot of paperwork. In the past, authorities had to seek court approval for each electronic device carried by a suspect, from a phone to a home computer. But under the provision, one warrant can cover all of those machines.³¹

The American Civil Liberties Union (ACLU) has criticized the provisions of the Patriot Act and its amendments, calling them disastrous for Americans' rights. According to ACLU, in the panic following the events of 9/11, the US lawmakers hastily expanded the government's authority to a dangerous level and opened a "Pandora's box" of surveillance.³²

ACLU opposes the extension of Patriot Act provisions due to expire on December 31, 2009, and works with the Congress and the courts to introduce Patriot Act reform legislation.³³ In December 2008, as the result of an ACLU lawsuit, the gag order contained in the Patriot Act's National Security Letter (NSL) provision was struck down when a federal appeals court upheld the decision that these provisions were unconstitutional.³⁴

During his meeting with the FBI director, Senator Benjamin L. Cardin asserted that the Congress wants to make sure that law enforcement agents have the tools that they need and that they have appropriate oversight. The Patriot Act provisions may need to be modified to make sure they are effective and used as intended by Congress.³⁵

Patriot Act was passed in 2001 in response to a largely undefined threat from a poorly understood source. The sunset stipulation of a number of the Act's provisions in 2009 calls for a broad re-examination of what are and what are not the defensible practices in light of the experience of the intervening years.

The Patriot Act permitted much greater use of highly effective tool - National Security Letters (NSL) to collect information.³⁶ NSLs are signed by FBI agents with no judicial review, and require any recipient to disclose any documents, also compel the person to give testimony.³⁷ Used in national security investigations NSLs give a potential to obtain information in very short period of time and so they are a tool that enables the officials to avoid costly delays. NSLs are used in counterterrorism investigations when time is critical and even a brief delay in an investigation could be disastrous.³⁸

31 Johnson, C., p. A08.

32 ACLU Releases Comprehensive Report on Patriot Act Abuses. *American Civil Liberties Union, Immediate release* [interactive]. 11 March, 2009 [accessed 2009-04-19]. <<http://www.commondreams.org/news-wire/2009/03/11-1>>.

33 *Ibid.*

34 Court Rules Patriot Act's 'National Security Letter' Gag Provisions Unconstitutional. *New York Civil Liberties Union* [interactive]. 15 December, 2008 [accessed 2009-04-25]. <<http://www.nyclu.org/node/2119>>.

35 FBI Director Asks Lawmakers To Renew Patriot Act Provisions. *Free Internet Press* [interactive]. [accessed on 2009-04-20]. <<http://freeinternetpress.com/story.php?sid=20734>>.

36 Doyle, C. Administrative Subpoenas in Criminal Investigations: A Brief Legal Analysis. *CRS Report for Congress* [interactive]. 17 March, 2006 [accessed 2009-04-05]. <<http://www.fas.org/sgp/crs/intel/RL33321.pdf>>.

37 Administrative Subpoenas for the FBI: A Grab for Unchecked Executive Power. *Center for democracy and technology* [interactive]. 24 September, 2003 [accessed 2009-04-15]. <<http://www.cdt.org/security/usapatriot/030924cdt.shtml>>.

38 Doyle, C., *op. cit.*

Some authors are convincing that no investigative steps – from gathering information to following suspect physically to use of an informant – can be taken by law enforcement officers without compliance with Attorney General’s Guidelines for criminal or national security investigations. Uninhibited federal access to immense collections of private records of identified individuals without a reasonable indication of illegal or dangerous activity would vastly increase the amount of information that the federal government has about citizens whom there is no reason to suspect of terrorist involvement. The information could be misused to punish the administration’s enemies.³⁹

Already for a few years FBI is trying to acquire administrative subpoena authority for the criminal terrorism cases.⁴⁰ Administrative subpoenas, which are used in criminal investigations, in many respects resemble NSLs used in national security investigations, but, however, currently they are not available to the FBI for use in terrorism investigations. President Bush strongly advocated this idea, claiming that Congress should change the law and give law enforcement officials the same tools to fight terror as they have to fight other crime. Currently the administrative subpoenas, which enable law enforcement officials to obtain certain records quickly, are critical to many investigations. They are used in a wide range of criminal and civil matters, including health care fraud and child abuse cases. Regrettably, administrative subpoenas can’t be used in terrorism cases.⁴¹ American Civil Liberties Union considers that allowing law enforcement authorities to seize private records without the approval of a grand jury or judge would violate constitutional principles.⁴²

2. Military Commissions and the Rights of Non-Citizens

A “war on terrorism” was based on the premise that this form of attack on the US required a different, more aggressive response that had been used in dealing with most of America’s historic dangers.

Where the defence of the civil rights of citizens in democracies seems undisputed, the question of treatment of non-nationals remains. There is a new “martial law” for the 20 million non-US citizens living in the USA because President Bush was distinguishing between the constitutional rights enjoyed by citizens and the human rights, which do not have the same status. The detention center in Guantanamo Bay was the most graphic example and has given rise to great unease in liberal circles.⁴³

On September 14, in the aftermath of 9/11 terror acts, President Bush rapidly declared a state of national emergency and obtained congressional resolution authorizing the

39 Heymann, P. B.; Kayyem, J. N. *Protecting Liberty in an Age of Terror*. Cambridge: London: The MIT Press, 2005, p. 83.

40 Kerr, O. Should the FBI Have Administrative Subpoena Authority. *The Volokh Conspiracy* [interactive]. 20 May, 2005 [accessed 2009-04-22]. <<http://volokh.com/posts/1116609947.shtml>>.

41 Doyle, C.

42 Duggan, P. Subpoena Power Subject of Debate. *The Washington Post*. 7 February, 2009, p. B02.

43 *Global Responses to Terrorism: 9/11, Afghanistan and beyond*, p. 312.

use of all necessary measures to respond to the attacks. Further, in November 2001, he issued an executive order providing for alien terrorists to be tried in military tribunal courts with no criminal law or evidential rules of protection, detained outside of the United States.⁴⁴ The order applied to any individual who was not a citizen of the USA, and there was a reason to believe that such individual is or was a member of organization known as Al Qaeda, who was engaged in acts of international terrorism or who knowingly harbored such persons.⁴⁵ Department of Defense issued detailed instruction on when military commissions could be used, the procedures that would apply to such trials and the form of appellate review.⁴⁶

Much damage to all efforts of the USA to fight terrorism was inflicted after facts came to light that coercive interrogation techniques were used against suspected terrorists, and this raised a negative reaction in the whole world and inside the US community. Inadequately monitored and regulated coercion against prisoners is a setback for the US foreign and military policies and goals.⁴⁷ The general knowledge that a state tortures its opponents enhances indignation and disgust among country's citizens, who are thus less likely to help the government or approach the police to offer valuable information.

There are examples from the US history when the freedom of speech, assembly of movement and other fundamental rights in times of crisis or periods of perceived necessity were suspended. A case from the Second World War is such example, when after Japanese bombing of Pearl Harbour 110 000 Japanese Americans were forcibly interned, in order to protect "national interest".⁴⁸ In 1988 President Ronald Reagan signed legislation which amounted to a national apology, offering compensation to all surviving internees.⁴⁹

Military operations may be necessary under certain conditions. Such operations should be kept within the limits of international law. Military force should only be exercised against military objectives – such as the base camps of a terrorist organization, its support bases or deployment area.⁵⁰

Captured terrorists might qualify as protected civilians in the sense of Art. 4 para. 1 of the IV Geneva Convention, at least if they are captured in occupied territory, and should be treated according to the standards set out in detail in this Convention. In certain cases, when captured while being members of the armed forces of a belligerent power, terrorists might even qualify as the prisoners of war. The judicial guarantees provided for both call for a regular court procedure if one of them should be brought to trial. Such court procedure might be operated by military courts if these courts would be competent for analogous crimes of armed forces members of the detaining power. However, the proceedings conducted by ad hoc organs like the military commissions instituted by the

44 *Global Responses to Terrorism: 9/11, Afghanistan and beyond*, p. 312.

45 Viotti, P. R., p. 137.

46 Heymann, P.B.; Kayyem, J.N., p. 54.

47 *Ibid.*, p. 31.

48 *Global Responses to Terrorism: 9/11, Afghanistan and beyond*, p. 310.

49 *Ibid.*, p. 311.

50 Hamilton, D. S., p. 128.

Pentagon in the aftermath of 9/11 are excluded, in combination with the Guantanamo precedent, where non-citizens were detained indefinitely outside the jurisdiction of the US courts and without the clear status in either domestic or international law.⁵¹ Geneva Conventions are flexible enough to integrate considerations of practical utility and to cope with all legitimate concerns of an occupying power that has to deal with phenomena of wide-spread terrorism. The Guantanamo arrangement, with its reliance on the ad hoc category of “illegal combatants”, and the linked scheme of proceedings by military commissions, in comparison, grants only very small and marginal tactical short-term advantages in dealing with suspect terrorists, while these precedents threaten to erode the overall edifice of International Humanitarian Law. This neglects civilized progress embodied by Geneva Conventions.⁵²

However, we should admit that terrorism poses much bigger threat to human rights than law enforcement efforts to counter it. Former UN Secretary Kofi Annan in his remark cited that terrorism “must be perceived as a fundamental onslaught on basic values of humankind, as a frontal assault on human rights and the rule of law. Terrorist violence denies individuals their human dignity and physical integrity, since it sacrifices their lives to a greater political end.”⁵³

3. Recent Changes in Counter-Terrorism Strategy of the USA

The counter-terrorism strategy of President Barack Obama will be different from that followed by his predecessor. Initial emphasis will be on removing the distortions of the strategy such as treating the terrorist suspects as prisoners of war and keeping them in an army-controlled detention centre and subjecting them to trial by a military tribunal instead of normal courts.⁵⁴

President Obama started his term with signing three executive orders, banning coercive interrogation methods, ending the Central Intelligence Agency’s secret overseas prisons, and closing the Guantánamo Bay detention camp within a year.⁵⁵ Critics many years were accusing President Bush of permitting torture and damaging the country’s moral standing in the world, while former vice president Dick Cheney insisted that all their programs were lawful and had prevented a repeat of the 9/11 terrorist attacks.⁵⁶

New American president condemned coercive interrogation used against suspected terrorists, mentioning that due to this the USA has not become safer. However, even

51 Hamilton, D. S., p. 200.

52 *Ibid.*, p. 129.

53 *Ibid.*, p. 120.

54 Raman, B. Obama’s Counter-Terrorism Strategy. *South Asia Analysis Group* [interactive]. 2009 [accessed 2009-04-18]. <<http://www.southasiaanalysis.org/%5Cpapers31%5Cpaper3023.html>>.

55 Shane, S. Obama Orders Secret Prisons and Detention Camps Closed. *The New York Times* [interactive]. 2009 [accessed 2009-04-21]. <<http://www.nytimes.com/2009/01/23/us/politics/23GITMOCND.html?hp>>.

56 Underlining ‘moral high ground,’ Obama signs Gitmo shutdown. *Indian Express* [interactive]. 2009 [accessed 2009-04-21]. <<http://www.indianexpress.com/news/underlining-moral-high-ground-obama-signs-gitmo-shutdown/414302/>>.

as he reversed the most disputed counterterrorism policies of the Bush years, Obama postponed difficult decisions on the details for at least six months. He ordered a cabinet-level review of the most challenging questions his administration faces – what to do with dangerous prisoners, who cannot be tried in American courts; whether some interrogation methods should remain secret to keep Al Qaeda from training to resist them; and how the United States can make sure that prisoners transferred to other countries are not tortured.⁵⁷

The executive order on interrogations is certainly to be received with some scepticism at the Central Intelligence Agency, which for years has maintained that ordinary interrogation rules are insufficient to get information from such senior Al Qaeda figures like Khalid Sheikh Mohammed, confessed mastermind of 9/11. Used techniques helped to disrupt dangerous terror plots, including the alleged effort by Jose Padilla to detonate a “dirty bomb” spreading nuclear radiation.⁵⁸ In March 2009, Dick Cheney said that Obama’s decisions to revoke Bush-era terrorist detainee policies will “raise the risk to the American people of another attack.”⁵⁹

Although President Obama publicized the facts about coercive interrogations and condemned such methods, he absolved CIA officers from prosecution for such acts, because they were working according to the instructions. Civil right activists criticized him for such decision.⁶⁰

Based on the history, terrorism is not going away any time soon.⁶¹ The most important lesson from the World Trade Center and Pentagon attacks is that terrorism cannot be prevented entirely. There are too many potential targets to protect, so open society of United States affords opportunity for enemies to attack.⁶² We have to agree that the US practices at home and abroad had to, and have to change to reflect the threats of far more dangerous terrorism than previously seen.⁶³

We need to recognize that the political aspects of global counterterrorism operations need to be re-emphasized, and that more time and effort need to be spent on public diplomacy and on the promotion of democracy, than on narrow military, intelligence or law enforcement operations.⁶⁴

A number of measures introduced to combat terrorism raise serious civil liberties concerns. Abuses at Abu Ghraib and Guantanamo have undermined confidence in the US administration and international support for anti-terrorism campaign. If the campaign is not perceived to be legitimate, it is unlikely to be effective. If efforts to protect our

57 Shane, S.

58 *Ibid.*

59 Loven, J.; Barrett D. Obama: No charges for harsh CIA interrogation. *The Washington Times* [interactive]. 2009 [accessed 2009-04-21] <<http://www.washingtontimes.com/news/2009/apr/17/obama-no-charges-for-harsh-cia-interrogation-1/>>.

60 *Ibid.*

61 Ronczkowski, M. R., preface.

62 Waugh, W. L.; Sylves, R. T. Organizing the War on Terrorism. *Annual Editions: Homeland Security*. 2004/2005, p. 32.

63 Heymann, P. B.; Kayyem, J. N., p. 4.

64 Hamilton, D. S., p. 193.

societies from catastrophic disruption are not aligned with the freedoms of those societies, we endanger what we are trying to protect. The unique nature of terrorism means that maintaining the appearance of justice and democratic legitimacy will be much more important than in normal wars or struggles. We must not destroy what we are trying to protect.

In wartime, government calls for greater powers, and then the need for those powers recedes after the war ends. Therefore, while protecting the homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing between security measures and individual rights is crucial.

The power actually materially enhances security, meanwhile adequate supervision of the executive's use of the powers ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.⁶⁵

While agreeing that a rapid response to an urgent problem was required after 9/11, there is a need to recommend to policymakers the rules and procedures that should govern the US legal system's response to terrorism for decades to come. Congress and executive policy-makers should oversee some of the extraordinary measures required in response to the terror threat.

There are opinions that congressional oversight of new counterterrorism laws and practices would have significant effect on traditional rights of individuals. As ongoing extraordinary measures are retained by legislation, the congressional leadership should establish a five-year nonpartisan commission to make findings and recommendations regarding the continuing need for these measures for consideration by the Congress and the relevant committees.⁶⁶

The question should be discussed whether the security measures that counterterrorism legislation provides justify their effects on democratic liberties and other critical values, including a broad power by executive to detain, claiming for new executive powers to increase intrusion into private areas, investigating in ways that increase the risk of inhibiting free speech or association, taking certain investigative or security measures on the basis of ethnicity or religion.

It is not possible to have minimal risk from terrorism and absolutely maximally protected freedoms, but it is possible to preserve 90 percent of what concerns each camp. It is also possible for legislation to strike a detailed and thoughtful balance between these two absolutes that will endure over the decades ahead.⁶⁷

65 *Final Report of the National Commission on Terrorist Attacks upon the United States* [interactive]. The 9/11 Commission Report. 2004, p. 411 [accessed 2009-04-22]. <<http://www.9-11commission.gov/report/911Report.pdf>>.

66 Heymann, P. B.; Kayyem, J. N., p. 29.

67 *Ibid.*, p. 4.

Conclusions

Positive changes in the counter-terrorism system and in the politics of the US show that the country is on the right way. With the review of the counter-terrorism measures, the USA is taking necessary steps in order to correct past mistakes and to protect human rights. Efforts are raised to ensure that the fight against the terrorist threat should not undermine democratic norms. Getting homeland security right is not about constructing barricades to fend off terrorists. It is about identifying and taking the steps necessary to allow the USA to remain an open, prosperous, free, and globally engaged society while taking necessary measures to prevent possible terrorist attacks. Maintaining the appearance of justice and democratic legitimacy in the fight against terrorism will be much more important than in normal wars or struggles. We must not destroy what we are trying to protect.

The question should be discussed whether the security measures that counter-terrorism legislation provides justify their effects on democratic liberties and other critical values. There must be trade-offs among the goals of protecting national security and assuring democratic liberties. We must reject the views of those who think that civil liberties are immutable despite the great risks revealed by the 9/11 attacks, and of those who believe that everything that furthers our safety, no matter how little, is justified. Neither position is defensible. The sunset stipulation of a number of the Patriot Act's provisions in 2009 calls for a broad re-examination of what are and what are not defensible practices in light of the experience of the recent years.

In a democratic society that is adopting new and exceptional powers and taking unprecedented actions, there is a need to ensure that systems of oversight are robust. The power actually and materially enhances security, meanwhile adequate supervision of the executive's use of the powers ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use. Congress and executive policy-makers should oversee some of the extraordinary measures required in response to the terror threat. Congressional oversight of new counterterrorism laws and practices would have a significant effect on traditional rights of individuals.

There is a need to protect the natural rights of all human beings, regardless of their citizenship. Therefore, non-citizens should be afforded the basic legal protections of the US Constitution.

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ŽMOGAUS TEISĖS NAUDOJANT KOVOS SU TERORIZMU PRIEMONES: JAV PATIRTIS

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Santrauka. 2001 m. rugsėjo 11-osios teroro aktai parodė Jungtinių Amerikos Valstijų (JAV) kovos su terorizmu sistemos neefektyvumą. Didžiulis teisėsaugos įstaigų aparatas nesugebėjo užkirsti kelio teroristų išpuoliams. Tai buvo ženklas, kad būtina imtis žingsnių šiai sistemai keisti ir tobulinti. Netrukus po teroro atakų JAV imtasi kardinalių reformų – išleistas dešimtys naujų teisės aktų; reorganizuota teisėsaugos įstaigų bei vidaus saugumo sistema; institucijoms, atsakingoms už terorizmo prevenciją, buvo suteikti didesni įgaliojimai renkant informaciją bei taikant technines žvalgybos priemones; panaikinta riba, egzistavusi tarp vidaus saugumo bei užsienio žvalgybos institucijų; pradėtas karas Afganistane turint tikslą pašalinti teroristines organizacijas remiantį režimą; sustiprinta JAV valstybės sienos apsauga; sugriežtintos transporto sistemos saugumo priemonės. Ši JAV kovos su terorizmu sistemos reforma smarkiai paveikė žmogaus teisių padėtį šalyje ir sulaukė griežtos kritikos. Reforma buvo atliekama skubotai, kadangi tuometinė padėtis neleido delsti. Galbūt todėl nebuvo įvertintos visos minėtų pasikeitimų neigiamos pasekmės. Reformų kritikai reiškia susirūpinimą, kad teisėsaugos institucijoms siekiant užkirsti kelią naujiems teroristiniams išpuoliams, pažeidžiamos eilinių piliečių teisės. Reformų šalininkai tvirtina, kad norint užtikrinti šalies piliečių saugumą reikia susitaikyti su atsiradusiais suvaržymais. Šiame straipsnyje ir tirama susidariusi situacija, nagrinėjama JAV vykdomų kovos su terorizmu priemonių įtaka žmogaus teisėms. Pirmoje straipsnio dalyje aptariamas naujųjų JAV kovą su terorizmu reglamentuojančių teisės aktų poveikis žmogaus teisėms. Antroje dalyje nagrinėjamas karinių tribunolų statusas bei asmenų, neturinčių JAV pilietybės, teisėms. Trečioje dalyje rašoma apie paskutinių metų JAV kovos su terorizmu strategijos pasikeitimus. Apie kovos su terorizmu priemones žmogaus teisių aspektu yra rašę keletas JAV mokslininkų, tačiau straipsnio tema Lietuvos mokslininkų iki šiol nebuvo nagrinėta. Mokslinių tyrimų tikslas – ištirti kovos su terorizmu priemonių įtaką žmogaus teisėms JAV po 2001 m. rugsėjo 11-osios. Uždaviniai

– apžvelgti JAV teisės aktus, priimtus po Rugsėjo 11-osios teroristinių išpuolių; išanalizuoti atsiradusius JAV institucijų įgaliojimus kovos su terorizmu srityje; išanalizuoti naujų teisės aktų įtaką žmogaus teisėms. Tyrime taikyti sisteminės analizės, dokumentų analizės, lyginamasis ir apibendrinimo metodai.

Reikšminiai žodžiai: žmogaus teisės, terorizmas, kontrterorizmas, teisėsauga, žvalgyba, JAV teisės aktai.

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